IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 68 OF 2011

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

**NFC AFRICA MINING PLC** APPELLANT

AND

**JOHN MUBANGA AND 8 OTHERS** RESPONDENT

CORAM: **CHIRWA, AG. DCJ, CHIBOMBA AND WANKI, JJS**

 On 6th December, 2011 and 14th March, 2012

For the Appellants: Mr. A. Imonda, of Messrs A. Imonda and Company

For the Respondent: Mr. M. Simwanza of Messrs. Kitwe Chambers.

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:-

1. **Edith Tshabalala -Vs- The Attorney General, (1999) ZR 139.**
2. **Zambia Privatization Agency -Vs- James Matale, (1995-1997) ZR 157, 162.**

LEGISTLATION REFERRED TO:-

1. **Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, Section 71 (3) (c).**

The appellant, being dissatisfied with the judgment of the Industrial Relations Court delivered at Ndola on 18th April, 2011 appealed to the Supreme Court against the whole said judgment.

The facts leading to the appeal are that, the respondents filed a notice of complaint seeking:-

1. Damages for loss of salary for the remainder of a fixed term of employment.
2. An order that the respondents be deemed to have completed their contracts and be paid salaries and all allowances for the remaining period of their respective contracts.
3. Damages for breach of contract.

The notice of complaint was supported by an affidavit which showed that: the respondents executed contracts with the appellant with varying periods; in or about February, 2009 the appellant unilaterally terminated the said contracts for no reason at all; the appellant’s acts were illegal and a blatant breach of contract; it was wrong for the appellant to prematurely determine the contract before the expiry of the period for which the contract was to endure; the respondents were still willing and ready to work up to the end of their respective contracts; and the payment of one month’s salary in lieu of notice without damages for breach of contract was wrongful at law.

The appellant filed an answer in which it submitted that: notwithstanding that the contract of employment of the respondents provided for termination on expiry, the contracts were also subject to the other conditions as contained in company rules and regulations relating to employment; the said conditions provided in Clause 1.8 thereof when an employee is over retirement age the employment may be terminated by one month’s notice or payment in lieu and payment of all terminal benefits, the required payment in lieu of notice was made together with the terminal benefits of each of the respondents; paragraph 4 of the notice of complaint was completely blank and no grounds of complaint are stated therein, the notice is therefore defective and void; the notice of complaint has been made under **Section 108(2)** of the **Industrial and labour Relations Act** (3) which deals with discrimination, no allegation of discrimination has been pleaded; the complaint should have been made under the provisions of **Section 85(2)**, the complaint was lodged out of time and an application should have been made for leave to extend time but that was not done; the complaint should be dismissed.

The appellant’s answer was verified by an affidavit.

The evidence on behalf of the respondents was that the respondents were not paid their terminal benefits in accordance with their age when they were terminated. They were employed on contracts on 2nd December, 2008. The contracts were to end on 1st December, 2009. They did not complete the one year contracts.

The letters of termination they received did not tell them the reasons. Termination was provided in the contracts of employment, it provided that the employment would be terminated at the end of the contract. Following the termination of their contracts they saw the union representatives who tried to intervene. However, after failing the union representatives advised them to take up the matter themselves.

The terminal benefits they were paid were not according to how they should have been paid. They should have been paid as if they had completed the contracts. There was no repatriation money and Christmas bonus.

The evidence given on behalf of the appellant by RW1 was that, the respondents were paid on fixed term contracts under the General Payroll Conditions of Service. The respondents’ employment was terminated on 1st February, 2009. They were paid their dues, of one month’s pay in lieu of notice.

The termination was under Clause 1.8 of the General Payroll Conditions of Service, which provides for either party to terminate the contract by paying one month salary in lieu of notice. Christmas bonus was not paid because the termination was in February, 2009. Repatriation was also not paid because the respondents were recruited within Chambishi where they were residing.

The Court below after analyzing the evidence held that, Clause 6 of the individual letters of employment could only be altered by similar clear provisions made in the General Payroll Conditions of Service.

The Court then concluded that, the appellants as much as the respondents were bound by the Conditions of Service in the individual employment contracts signed between the parties. They found that the purported terminations by one month’s salary in lieu of notice, was in breach of the individual contracts of employment which remained unaffected by the General Payroll Conditions of Service. Judgment was, accordingly, entered for the respondents.

The appellants advanced one ground of appeal:-

**“The Court below erred in law in interpreting/construing Clause 6 of the respondent’s contracts of employment as superseding or excluding Clause 1.8 of the Conditions of Service for NUMAW (union) represented employees for year 2008.”**

The parties filed respective heads of arguments which were augmented by submissions by Counsel at the hearing.

In support of the sole ground of appeal, it was pointed out that, the evidence adduced before the Court revealed that, the fixed term employment contracts were governed by and subject to the collective agreement - General Payroll Conditions of Service.

It was contended that, the respondents’ employment was terminated under Clause 1.8 of the collective agreement (General Payroll Conditions of Service) which provides that:-

**“1.8: The employment may be terminated by either party giving to the other at least one month’s notice in writing or paying to the other party one month’s salary in lieu of notice. The company may terminate the contract without notice or payment in lieu for lawful cause including any breach by the employee of these regulations or conditions.”**

It was submitted that Clause 6.1 of the employment contract does not bar either party from giving notice of termination or payment in lieu of notice envisaged under Clause 1.8 of the General Payroll Conditions of Service.

It was argued that the natural and ordinary meaning of the word ‘notice’ in Clause 6 of the employment Contract is simply a reminder. It was pointed out that, neither party under the contract was mandated or required to remind the other of the termination by expiration.

It was contended that the word “notice” as used in the clause is not of similar effect as the notice or payment in lieu of notice in Clause 1.8 of the General Payroll Conditions of Service. That is merely a reminder of the impending termination by expiry and hence the choice of the word such separation in the clause. Such separation refers to termination by expiration of contract and not termination by payment in lieu of notice.

To show that the notice in the clause should be understood merely as a reminder, the clause contains and states; **however, an employee who wishes to continue working shall be required to apply two months before the expiry of the contract**. This sentence in effect, clarifies the natural and ordinary meaning of the word ‘notice’ in the clause.

It was pointed out that, there is nothing in the clause to indicate or to suggest that the language should be understood in any other special sense that “it bars either party from giving notice of termination.”

It was submitted that, the primary rule of interpretation is that the meaning is to be found in the natural and ordinary meaning of the words used. The literal and grammatical meaning will prevail where there is nothing to indicate or suggest that the language should be understood in any other special sense. The Court was referred to the case of ***EDITH TSHABALALA -VS- THE ATTORNEY GENEAL.*** (1)

It was further submitted that, if there is any conflict between Clause 1.8 of the Conditions of Service negotiated by the union and Clause 6.1 of the employment contracts, the provisions of conditions of service ought to prevail because the wages and conditions of employment for the appellant were regulated through the process of collective bargaining conducted under the ***Industrial and*** ***Labour Relations Act***. (3) Since a collective agreement is binding on the parties to it under **Section 71(3) (c)** (3), any provision in the respondent’s employment contracts which is conflict with the collective agreement (whether beneficial or detrimental) is invalid. The superiority of the Conditions of Service over the employment contracts is very clear on page 96 Clause 1.1 and 1.2 in the record of appeal; the fixed term contracts were governed by and subject to the Collective Agreements.

The Court was finally urged to uphold the appeal and set aside the Lower Court’s Judgment.

In augmenting the heads of argument, Mr. IMONDA asked the Court to look at pages 34 and 35 of the record of appeal which is a contract of one of the respondents.

He contended that, the appellant had express power to terminate the contract by notice. The conditions from page 96 of the record applied to the contract by virtue of the acceptance at page 30. The conditions were not negotiated individually but through the union.

In response it was contended that, the Lower Court did not err in law in interpreting/construing Clause 6 of the respondents’ Contracts of Employment as superseding or excluding Clause 1.8 of the Conditions of Service for NUMAW (union) represented employees for the year 2008.

It was further contended that the employment contracts had express provision in the manner of termination and since the employment contracts had express provision in the manner of termination and since the employment contract is founded on contract, the terms therein ought to be strictly construed.

It was argued that, there was no guideline suggesting the extent that the contract of employment signed by the employee and employer should be construed as against the NUMAW agreement.

While conceding that individual contract of employment would ordinarily be modeled on a prevailing agreement binding members of a particular union to the agreement, it was submitted that, a modeled individual contract of employment falls out of this scope generally.

It was further submitted that, the variation in the termination clause became operative and governed the mode of termination between appellants and respondents.

It was contended that, the termination by notice was in breach of the terms of employment contract which had express provision on the matter of termination.

In aid, the appellants relied on the case of ***ZAMBIA*** ***PRIVATION AGENCY -VS- JAMES MATALE*** (2) in which the Court agreed and cited the principles as laid out in the Modern Law of Employment at page 463 that:

**“Where the contract expressly or impliedly provides that the relationship of employer and employee is to endure for a certain time, the contract will be determined at the conclusion of such period. Termination before the agreed date may take place either lawfully or wrongfully by one of the events or acts to be discussed below. If such termination is lawful, then the parties will be discharged from the obligation of the contract without any liability there under. If it is wrongful on the other hand, the party guilty of premature determination will be in breach of the contract and will be liable accordingly.”**

The Court then held that:

**“Payment in lieu of notice was a proper and lawful way of terminating the respondent’s on the basis that in the absence of express stipulation every contract is determinable by reasonable notice.”**

It was submitted that, the respondent cannot now rely on the NUMAW Agreement. The Court below was therefore on firm ground when it held that the appellant was barred from relying on the termination clause in the NUMAW agreement.

It was pointed out that, since the contract of employment provided for the manner the respondents’ employment was to be terminated, then it follows that the termination of the respondents’ employment was wrongful and the respondents are entitled to damages as awarded by the Court below.

The case of ***ZAMBIA PRIVATION AGENCY -VS- JAMES*** ***MATALE*** (2) was cited in which we stated that:

**“Damages measured by loss of salary for remainder of a fixed term employment are only payable where the employer wrongfully repudiates the contract and not where termination is lawful as in the present case.”**

It was contended that, there being an express term on termination which term remodeled the NUMAW agreement and because the individual contract signified the start of the employment relation between appellant and respondent, the Court below did not wrongly interpret and thereby did not err.

In augmenting, the respondents’ heads of argument, Mr. SIMWANZA submitted that, he supported the findings of the Court below on the basis that the individual contracts spelt out the modes of termination. Any other modes, has to attract penalty.

He further submitted that, the conditions at page 97 of the record of appeal changed the contracts.

We have considered the sole ground of the appeal; the heads of argument by both parties and the submissions on behalf of the parties. We have also examined the judgment of the Court below.

The issue that we have been invited to consider is whether the respondents’ contracts of employment were wrongly terminated.

From the evidence that was adduced before the Court below, we have found that the respondents were NUMAW represented employees. As such the conditions under which they were employed were negotiated between the appellants and NUMAW in accordance with Part VIII of the ***INDUSTRIAL AND*** ***LABOUR RELATIONS ACT***. (3)

Following such negotiations, the parties formulated a collective agreement which once approved by the Minister responsible for labour and registered pursuant to **Section 71 of** **the Act** became part of the law and binding on the parties.The end product contained Conditions of Service for NUMAW represented employees for 2008. Any contract of employment entered into thereafter between the appellants and the employees represented by NUMAW had to conform to the terms of the said conditions.

The general clause of the Conditions of Service for NUMAW represented employees for 2008 at pages 96 to 101 of the record of appeal provides that:-

**“Conditions of Service for NUMAW represented employees are conditions for employees who signed an individual contract with the company whether his job is full time or part time but does not include casual labour.”**

Further, Clause 1.1 of the conditions provides that:

**“Every employee engaged on contract shall sign an individual contract with the company.”**

and Clause 1.2 provides that:-

**“The employment contract shall be governed by these regulations and other company regulations including but not restricted to the disciplinary code.”**

Finally, Clause 1.8 of the said conditions provides that:-

**“The employment may be terminated by either party giving to the other at least one month’s notice in writing or paying to the other party one month’s salary in lieu of notice. The company may terminate the contract without notice or payment in lieu for lawful cause including any breach by the employee of these regulations or the conditions.”**

 From the foregoing, it would be noted that, the contracts of employment under which the respondents were employed had their origins from the Conditions of Service for NUMAW represented employees. The provisions of those conditions including the termination clause, Clause 1.8, applies to the contracts of employment under which the respondents were serving.

Clause 6 of the individual contracts is therefore in conflict with Clause 1.8 of the Conditions of Service of NUMAW represented employees. That being the case, the provisions of Clause 1.8 supersede Clause 6 of the individual contracts. It is not allowed to contract out of the collective agreement which has a force of law.

In the light of the foregoing, we find that the Court below erred in law in interpreting/construing Clause 6 of the individual contracts as superseding or excluding Clause 1.8 of the Conditions of Service for NUMAW (union) represented employees for the year 2008.

The sole ground of appeal has succeeded.

In the circumstances, we find that the appeal has merit and is allowed. The order by the Court below is set aside.

The respondents to bear the costs, both before the Court below and this Court, to be taxed in default of agreement.

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D. K. Chirwa,

**ACTING DEPUTY CHIEF JUSTICE**

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 H. Chibomba, M. E. Wanki,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**