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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 07/2012
SCZ/8/260/2011

BETWEEN:

BARCLAYS BANK ZAMBIA PLC — APPELLANT

AND

WESTON LUWI — 1ST RESPONDENT

SUZGO NGULUBE — 2ND RESPONDENT

CORAM: Mwanamwambwa Ag/DCJ, Muyovwe and Malila, J.J.S

On 03rd March, 2015 and 26th May, 2015

For the Appellant: *Mr. S. Lukangaba of Messrs. Mweemba Chashi & Partners*
For the Respondents: *Mr. M. Mando – Messrs M. L. Mukande & Company*

JUDGMENT

Mwanamwambwa, Ag/DCJ, delivered the Judgment of the Court

CASES REFERRED TO:

(1) **ZAMBIA CONSOLIDATED COPPER MINES V JAMES MATALE (1995-1997) Z.R. 144**
(2) **SACHIKA SITWALA V NATIONAL PROVIDENT FUND BOARD APPEAL NO. 20 OF 1996**
(3) **TOLANI ZULU AND MUSA HAMWELA V BARCLAYS BANK ZAMBIA LIMITED AND ANDREW KANYANTA SCZ JUDGMENT NO. 76 OF 2004.**
(4) **RADRIZA LIMITED V ABIUD NKAZI AND FOUR OTHERS APPEAL NO. 101 OF 2009**
(5) **ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIUME (1998) Z.R. 1**
(6) **AUGUSTINE KAPEMBWA V DANNY MAIMBOLWA AND ATTORNEY GENERAL (1981) Z.R. 127**

(7) **JOSEPH CHITOMFWA V NDOLA LIME COMPANY LIMITED (1999) Z.R. 172**

(8) **SWARP SPINNING MILLS PLC V SEBASTIAN CHILESHE AND OTHERS (2002) Z.R. 23**

(9) **CHILANGA CEMENT PLC V KASOTE SINGOGO (2009) Z.R. 122**

(10) **FARLEY V SKINNER [2001] 4 ALL E.R. 801**

LEGISLATION REFERRED TO:

(1) **SECTION 85 OF THE INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA**

WORK REFERRED TO:

(1) **PARAGRAPH 959 OF HALSBURY'S LAWS OF ENGLAND, 4TH EDITION REISSUE, VOLUME 12 (1), AT PAGE**

This is an appeal from the Judgment of the Industrial Relations Court, which awarded damages to the Respondents, who were Complainants in the Court below, for wrongful and unfair termination of their employment contracts.

The brief facts of the case are these: the 1st and 2nd Respondents were employed as Human Resource Operations Manager and Human Resource Governance and Compliance Manager, respectively, in the Appellant Bank. Sometime in May 2009, the Appellant commissioned an internal investigation into staff records, following the recruitment of 200 Direct Sales Agents. A report compiled after the investigation concluded that the recruitment, which was supervised by the Respondents, was fraught with

irregularities. Subsequently, the Respondents were suspended and charged with gross negligence and misconduct. The Disciplinary Committee dropped the charge of gross misconduct due to lack of evidence, but found the Respondents culpable of gross negligence. The Respondents were served with written reprimands.

Dissatisfied with the outcome of the disciplinary hearing, the Respondents appealed to the Managing Director. In the process of the appeal, the Respondents were transferred to non-human resource departments. But the Appeals Committee reversed the purported transfers and reinstated the Respondents to their substantive positions. The Committee also quashed the charge of gross negligence due to insufficient evidence and replaced it with an offence of poor supervision. The Committee, however, did not interfere with the written reprimand as the offence of poor supervision carried the same penalty.

Despite their successful appeal, the Respondents were unable to resume duties because the Appellant had recruited new people to their positions. Next, the Respondents were sent on "forced leave". What followed on 9th April, 2010, was that the Appellant invoked the notice clause and terminated the Respondents' contracts of employment. The Respondents sued the Appellant seeking the following reliefs:

1. **Damages for wrongful and unfair termination of contracts**

2. **An Order or declaration that the disciplinary process to which the Complainants were subjected was irregular and the written reprimand be quashed.**

3. **An Order or declaration that during the process of appeal the Complainants are entitled to maintenance of the status quo including all benefits and entitlements which were withdrawn from them.**

4. **Damages for mental anguish and distress as a result of the harassment and embarrassment arising from the unfair disciplinary process**

5. **Refund of money paid towards purchase of motor vehicles purchased for the Complainants**

6. **Any other relief the Court may deem fit**

7. **Interest**

8. **Costs**

The Respondents contended that they had been unfairly treated as the termination of their employment contract had nothing to do with the notice clause. The Respondents submitted that the Appellant was using the termination clause as a camouflage because there were other reasons for terminating their employment.

The Appellant, in defence, argued that the termination was lawful and fair as it was done in accordance with Clause 6 of the Articles of Agreement, which entitled either party to determine the agreement and employment by giving one

month's notice in writing. It was the Appellant's contention that the disciplinary process and the termination of the contract were not in any way related.

After considering all the evidence before it, the trial Court found that although, the Appellant was entitled to terminate with notice in accordance with its Articles of Agreement, the whole disciplinary process and termination were actuated by malice. Relying on the case of **Zambia Consolidated Copper Mines v James Matale**[1], the trial Court invoked provisions in **Section 85** of **the Industrial and Labour Relations Act,** to delve into the real reasons for terminating the Respondents' employment. Upon lifting the veil, the trial Court came to the conclusion that the Respondents' employment was unfairly terminated through the notice clause. The lower Court, however, dismissed the claim for refund of money paid towards the purchase of motor vehicles because the Respondents were not entitled to a refund. The Respondents were, thus, awarded 24 months' pay inclusive of fringe benefits as damages based on the grim prospects of future employment. The damages covered both unfair termination of contract and, inconvenience and distress. In addition, interest at an average short term bank deposit rate from date of issuance of the writ to date of Judgment and thereafter at current lending rate up to final settlement, and costs.

Aggrieved by the Judgment, the Appellant has appealed to this Court, on two grounds.

Ground one alleges that the trial Court misdirected itself in law and fact when it held that the Respondents' employment was unfairly terminated through the Notice Clause.

The gist of the Appellant's submissions on ground one was that the trial Court fell into grave error when it held that termination by invoking the notice clause in the contract of employment was unfair. Counsel for the Appellant, Mr. Lukangaba, submitted that it was trite law that an employer can terminate employment for any reason or no reason at all. He submitted that it was, therefore, a misdirection for the trial Court to delve in the real reasons for the notice and to relate the termination to the disciplinary proceedings. He relied on the cases of **Sachika Sitwala v National Provident Fund Board**[2], and **Tolani Zulu and Musa Hamwela v Barclays Bank Zambia Limited and Andrew Kanyanta**[3], for this proposition.

Mr. Lukangaba submitted that the cases, the trial Court relied on to justify the piercing of the veil, were distinguishable from the present case. That in all the cases, cited by the lower Court, termination was used to avoid disciplinary proceedings

and the employee was denied the opportunity to be heard. That disciplinary proceedings in the instant case, on the other hand, were held in accordance with stipulated procedure. Counsel reminded us that this Court had held that while the Industrial Relations Court has power to pierce the veil, this power must be exercised judiciously and in specific cases where it is apparent that the employer is invoking the termination clause out of malice. He cited the case of **Radriza Limited v Abiud Nkazi and four others**[4], for this proposition. Mr. Lukangaba submitted that there was no malice, in this case, as the Respondents were afforded an opportunity to be heard, and were not disadvantaged or denied their emoluments during the disciplinary proceedings.

But Mr. Mando argued, on behalf of the Respondents, that the trial Court adequately addressed the requirements and its jurisdiction before piercing the veil. He submitted that the lower Court correctly concluded, that there was malice based on the evidence on record. He, further, submitted that termination of the Respondents' contracts was not an exercise of a contractual right but a smoke screen for a failed and flawed disciplinary process. Mr. Mando drew our attention to the case of **Attorney General v Marcus Kampamba Achiume**[5], which, he said, was instructive as to when this Court can interfere with findings of fact. That, in this case, the Appellant had failed to demonstrate any of the circumstances

highlighted in **the Achiume case**[5] to warrant this Court's interference.

We have examined the record and the submissions of both Counsel on this ground. The question is whether the lower Court was right to exercise its discretion to delve into the real reasons behind termination of the Respondents' employment contract. From the outset, the trial Court rightly pointed out that, the law regarding an employer's right to terminate a contract on notice with or no reason is well-settled. In that respect, there is no argument as to the Appellant's right to terminate on notice.

However, this Court has in a plethora of cases pronounced itself on the jurisdiction of the Industrial Relations Court, whose main object is to do substantial justice between the parties before it. To this effect, we have held that the general jurisdiction of the Industrial Relations Court does not prevent it from delving behind or into reasons given for termination in order to redress any real injustices discovered. More so, to expose and address injustices committed under the guise of termination on notice or payment in lieu of notice.

The case of **Zambia Consolidated Copper Mines Limited v James Matale**[1], on which the lower Court relied, lays down this principle.

In the case before us, the trial Court found as a fact that, while the Respondents were accorded a hearing, the disciplinary process, itself, was fraught with malice. The lower Court held, and we agree with it entirely, that just from the two incidences the trial Court singled out, the Appellant, clearly, acted *mala fide.* Firstly, when the Respondents were being reinstated to their substantive positions, the positions had already been taken up by other people. In fact, the lower Court found that this fact had not been vigorously challenged by the Appellant at trial. Secondly, the Respondents were sent back home on *"forced leave"*. And when they were finally asked to return to work, they were handed letters of termination. We take note that the Appellant took these measures, notwithstanding the fact that the Respondents had been cleared of the earlier charge by the Appeals Committee. They were only found guilty of a lesser offence which attracted a reprimand, a penalty that had already been served. We cannot, under these circumstances, fault the trial Court for drawing the inference that the reinstatement was an academic exercise. Also, that the Appellant, having failed to get rid of the Respondents through the disciplinary process opted for another avenue of the termination clause.

In any event, the arguments raised by the Appellant in this ground of appeal, are against findings of fact which this Court cannot lightly overturn. For the Appellate Court to set

aside any findings of fact, it must unmistakably appear from the evidence itself or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses. Or that the findings are perverse or made in the absence of any relevant evidence or upon a misapprehension of the fact or they are findings, which, on a proper view of the evidence no trial Court acting correctly can reasonably make: See the cases of **Augustine Kapembwa v Danny Maimbolwa and Attorney General**[6], and **Attorney General v Marcus Achiume**[5]. As Mr. Mando, rightly submitted, none of these circumstances have been demonstrated by the Appellant.

In our view, the trial Court was rather modest in its findings because the record is replete with instances demonstrating the Appellant's determination to frustrate the Respondents. These incidences occurred before, during and even after the appeal hearing which cleared them. The Respondents were repeatedly asked to stay home *"on leave"* against their wish; their performance ratings were downgraded during the disciplinary process; a recruitment manager, who faced similar disciplinary proceedings, but did not commence court action, was not terminated again a fact which was not challenged by the Appellant at trial.

In the face of what we have highlighted above, Mr. Lukangaba's submission, that there was no nexus between the disciplinary proceedings and the termination, does not hold. As the trial Judge properly concluded, the termination was directly as a result of botched disciplinary proceedings. The intention was clear. The Appellant desired to get rid of the Respondents.

Therefore, we are satisfied that there was no impropriety in the manner in which the trial Court invoked provisions in Section 85 of the Industrial and Labour Relations Act and delved into the real reason for termination. We are equally satisfied that the trial Court exercised this discretion judicially. The Court asked itself pertinent questions before piercing the veil i.e. whether there was evidence adduced by the Complainant which was sufficient or compelling enough to warrant the Court or persuade the Court to use its discretion to go behind the notice. Secondly, whether there was any ulterior motive or evidence of malice shown on the part of the Respondents. From the evidence, there is no doubt in our minds that the Appellant was actuated by malice to terminate the Respondents' employment. In sum, our view is that there is no plausible reason to interfere with the lower Court's findings of fact. Ground one of the appeal fails.

We now move to ground two. Ground two is that the trial Court misdirected itself in law and fact when it awarded the Respondents 24 months' pay, inclusive of fringe benefits, as damages.

Mr. Lukangaba submitted that it was wrong, in awarding damages, for the trial Court to apply the period of notice used in the case of **Joseph Chitomfwa v Ndola Lime Company Limited**[7], without taking into consideration the particular circumstances of the case. Counsel referred us to the case of **Swarp Spinning Mills Plc v Sebastian Chileshe and Others**[8], and implied that the only departure to the normal measure of damages – that is the reasonable length of notice- was where the termination is inflicted in a traumatic fashion causing distress and mental suffering. He submitted that in the present case, there was no evidence of mental anguish or dim prospects of the Respondents finding new job opportunities.

In response, Mr. Mando submitted that the trial Court, rightly, relied on **Joseph Chitomfwa v Ndola Lime Company Limited**[7], in view of the limited prospects of the Respondents finding employment elsewhere. He submitted that unless the Appellant was able to demonstrate that the employment situation had changed, this appeal must be dismissed for lack

of merit. He submitted that in some cases the Supreme Court had even awarded up to 36 months' salary as damages.

We have considered the submissions on both sides and have looked at the authorities cited. At common law, the measure of damages for wrongful termination of the contract of employment, is determined by the period of notice. The award is equivalent to the salary for the period of notice. However, there are exceptions. The case of **Swarp Spinning Mills Limited v Sebastian Chileshe and Others**[8], which Mr. Lukangaba cited, clearly sets out what some of the exceptions to the normal measure of damages are. At this stage, we take the liberty to correct Mr. Lukangaba's assertion that mental anguish is the only exception. What we said in that case is that the normal of measure of damages is departed from where "*the circumstances and the justice of the case so demand*". Therefore, termination inflicted in a traumatic fashion causing undue distress or mental suffering is, but one example. Loss of employment opportunities is another. In **Joseph Chitomfwa v Ndola Lime Company Limited**[7], 24 months' salary was awarded to compensate for loss of employment opportunities. We went further to hold in **Chilanga Cement Plc v Kasote Singogo**[9], that enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of employment. In **Farley v Skinner**[10], the House of Lords held that a trial Court can on

the evidence before it award damages for inconvenience and discomfort or distress and that such award must be a modest sum. The learned authors of Halsbury's Laws of England state at paragraph 959 that:

> **"Where mental suffering is directly related to some physical discomfort or inconvenience caused to the innocent party by the breach, the damages awarded can include a sum to reflect the suffering."**

Similarly, we hold that the trial Court was entitled, based on the evidence before it, to award damages, for cover distress and inconvenience. An award of 24 months' salary as damages, therefore, does not come to us with a sense of shock, as being excessive, to warrant being set aside. Ground two also fails.

For the foregoing reasons, this appeal is dismissed for want of merit. Costs in this Court are for the Respondents, to be taxed in default of agreement. Interest and costs awarded in the lower Court remain unchanged.

M. S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

E.C. MUYOVWE
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE