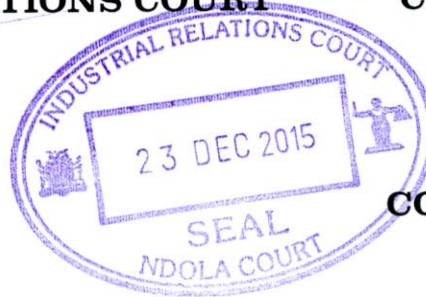
IN THE INDUSTRIAL RELATIONS COURT | COMP/120/2014
HOLDEN AT NDOLA



BETWEEN:

PUMULO LISWANISO | COMPLAINANT

AND

BUILDCOM INVESTMENTS LTD | RESPONDENT

BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

1. Hon. J. Hasson
2. Hon. W.M. Siame

For the Complainant : Mr. Caristo Mukonka of Messrs Caristo Mukonka Legal Practitioners

For the Respondent : Mr. C. Magubbwi of Messrs Magubbwi and Associates

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JUDGMENT

Date : 23rd December, 2015

CASES REFERRED TO:

1. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR.
2. Galaunia Farms Ltd v National Milling Corporation Ltd (2004) ZR.
3. Chilanga Cement Plc v Kasote Singogo (SCZ) Judgment Number 13 of 2009.

4. **Gerald Musonda Mumba v Maamba Collieries Ltd (1988 - 1989) ZR.**
5. **Barclays Bank v Mando Chole and Ignatius Mubanga (1997) ZR.**
6. **Southern Water and Sewerage Company v Sandford Mweene (2006) SCZ.**
7. **Josephine Mwaka Mwambazi v Food Reserve Agency, Appeal No. 128 of 2001.**
8. **Kitwe City Council v William Ng'uni (2005) ZR.**

This Complaint was filed by M/Pumulo Liswaniso. It was filed against Buildcom Investments Ltd. We shall, therefore, refer to M/Pumulo Liswaniso as the Complainant and to Buildcom Ltd as the Respondent which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

1. Damages for wrongful/unlawful termination of employment.
2. Compensatory damages.
3. Payment of outstanding salaries.
4. Payment for allowances.
5. Payment for accrued leave days.
6. Interest.
7. Costs.
8. Any other relief the court may grant.

The duty for this court is to ascertain whether or not the Complainant has proved his claims.

This case is not without history. The history of this case is that hearing commenced on 18th May, 2015. At the close of the Complainant's case the Respondents sought an adjournment because according to them their witness had travelled to Lusaka for a bereavement. The adjournment was granted. That was the first adjournment at the instance of the Respondents.

The matter was adjourned to 2nd June, 2015 for defence in the presence of both parties.

When the court sat for defence on 2nd June, 2015 counsel for the Respondent was not present.

Realizing that it was the Respondent who sought an adjournment, and realizing further that the date was agreed to by both parties, and there being no communication as to why counsel for the Respondent was not present and the Complainant having closed his case, we adjourned for judgment.

What followed was an Application to arrest judgment. We granted the application and the matter was set for defence.

When the court sat for defence on 24th September, 2015 both parties were not present.

There was a Notice of Intention to vary hearing date filed by the Complainant. That did not excuse and indeed it should not excuse

parties from coming to court. That is not an adjournment. It is not an application for an adjournment either. That is a mere notification that on the date set for hearing, the party filing that notification shall apply to court to seek variation of date of hearing. It is, therefore, not a basis upon which parties should neglect coming to court. Parties should come to court and make the application. This can be done by the same counsel who filed the notification or any other counsel. In one lawyer law firms, it can be done even by a subcontracted counsel. It is mandatory for a party that files an application to attend court to make the application and for the other to respond to the application. Adjournments are in the discretion of the court, and the court may grant the application or not. If the court does not grant the application the matter should proceed notwithstanding the notification for an intention to adjourn or to vary the date of hearing.

A party seeking variation of hearing date or an adjournment must have valid reasons particularly where the date was earlier agreed to by the parties as was the case in this matter.

On the basis of the above facts the matter was struck off from the active cause list with liberty to restore.

What followed was an application for restoration. We granted the application and the matter was restored to the active cause list and set to 2nd December, 2015 for defence.

When the matter came up for defence on 2nd December, 2015 counsel for the Complainant was present. Counsel for Respondent was not present. Mr. Anthony Chongo a representative for the Respondent Company informed the court that he was certain that counsel for the Respondent was coming. It was then 14.10 hrs for a matter which was scheduled for 14.00 hrs. The case had already suffered sufficient delay before. On those basis the case was adjourned to 23rd December, 2015 for judgment.

The fact that the Respondents did not give evidence in their defence does not mean that the case became simpler for the Complainant in any way. This is so because the Complainant still had a duty to prove his claims. The standard of proof to which the Complainant should prove his claims in the Industrial Relations Court is not the balance of probability but the degree of substantial justice. That degree is clear. It is the extent to which justice must be seen to have prevailed between the parties unencumbered by the rules of evidence prevalent in other courts.

In the case of **Wilson Masauso Zulu v Avondale Housing Project (1)** the Supreme Court ruled that a Plaintiff who does not prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Also in the case of **Galaunia Farms Ltd v National Milling Corporation Ltd (Z) Ltd (2)** the Supreme Court held that a Plaintiff must prove his case. Indeed we have been well guided.

We shall now consider the Complainant's evidence in this case including the Respondent's Answer and all Affidavits filed by the Respondents in this case.

The Complainant's evidence was that he was employed by the Respondent on 4th July, 2014. At the time he had other offers but opted to accept the offer from the Respondent because the Respondent offered better conditions of service.

The Complainant was stationed at Monze where they were rehabilitating the Monze - Namwala Road. He was not allowed to go to Monze with his family. He was camped at a place 30 km from Monze on the Monze – Namwala Road.

On 26th October, 2014 the Complainant fell sick. He was given permission by the Respondent to go to Monze Hospital where he underwent scanning and x-ray of the heart (cardiamopathy). He was given 5 days bed rest. According to the Complainant himself, during this period he was unable to do normal chores such as cooking for himself.

On 29th October, 2014 the Complainant was told that in order to be on off duty he must apply for leave. The Complainant complied and applied for leave. His application for leave was to be approved by the Contracts Manager. The Complainant left Monze and came to Ndola to join his family for nursing during his illness before his application for leave was approved by the Contracts Manager because the Complainant was assured by the Site Manager that his

application for leave would be approved by the Contracts Manager. According to the Complainant, on 3rd November, 2014 he visited the Respondent Headquarters here in Ndola to inquire when he should return to Monze but found a letter of termination of employment. We have seen the letter of termination. It was produced and exhibited in the Complainant's Affidavit in Support of Notice of Complaint. We have not been availed with the Contract of Employment. We have seen the letter of offer of employment which was exhibited to the Respondent's Affidavit in Opposition to Notice of Complaint. That letter has a termination clause by either party. When the Complainant's employment in this case was terminated the Complainant was paid in lieu of notice. We have looked at the case of **Chilanga Cement Plc v Kasote Singogo (3)** where the Supreme Court stated that:

> "Payment in lieu of notice is a proper and lawful way of terminating employment since every contract of service is terminable by reasonable notice."

We have also looked at the case of **Gerald Musonda Mumba v Maamba Collieries Ltd (4)** where the Supreme Court stated that :

> "In an ordinary master and servant relationship the master can terminate the contract with his servant at any time and for any reason or for none whatsoever."

We have been well guided. While termination of contract is lawful, we are alive to realities in the labour markets. The realities are that sometimes termination of employment is done wrongfully or

even unlawfully. We have looked at the circumstances under which the employment of the Complainant was terminated. The circumstances are that the Complainant travelled from his work station in Monze to join his family in Ndola because he had fallen ill. He applied for leave but travelled from Monze to Ndola before the leave was approved. That leave was subsequently not approved. That perhaps was the genesis of the problem.

While the Complainant was in Ndola he received a letter of termination of employment.

In the circumstances, the pertinent question to ask is whether or not the termination of employment was in any way linked to his absence from his duty station having left before the leave was approved, and which was subsequently disapproved.

The Supreme Court in the case of **Barclays Bank v Mando Chole and Ignatius Mubanga (5)** held that the court is entitled to look behind the prima facie valid termination of employment to discover the real reasons for termination.

Again, in the case of **Southern Water and Sewerage Company Ltd and Sandford Mweene (6)** the Supreme Court stated that:

> "The fact that there is a notice clause for terminating a contract without giving reasons does not bar the Industrial Relations Court from looking behind the termination to ascertain if some

injustice was done by the employer when invoking the termination clause."

Also, in the case of **Josephine Mwaka Mwambazi v Food Reserve Agency (7)** the Supreme Court held that:

"Where evidence is led that brings to the fore, ulterior motives behind the termination of employment, the court can go behind the notice to ascertain the real reasons behind the termination."

We have analyzed the evidence in this case. We have found that there is evidence in this case which brings to the fore ulterior motives behind the termination of employment. The ulterior motive was to dismiss the Complainant for having left his duty station without an approved leave. It is this ulterior motive which made the termination of employment wrongful. The best the Respondent should have done was to charge the Complainant and take him through the whole process of disciplinary proceedings. Unfortunately, the employer chose to use the termination clause which perhaps was a shorter route. We have found that this shorter route has short circuited.

The termination of the Complainant's employment was wrongful.

We shall now turn to consider the relief sought.

1. Damages for wrongful/unlawful termination of employment

We have already held that the termination of employment was wrongful. As to damages we have been guided by the Supreme Court decision in the case of **Chilanga Cement Plc v Kasote Singogo** (above) where the court awarded six (6) months salary for wrongful dismissal. We have looked at the circumstances of this case, inter alia that he Complainant left his duty station without an approved leave. We, therefore, award the Complainant three (3) months' salary for wrongful termination of employment.

This claim succeeds.

2. Compensatory damages

We have seen no basis for this claim.

This claim fails.

3. Payment of outstanding salaries

We order that if there are any months which the Complainant worked for but is not yet paid be paid accordingly. The Complainant cannot be paid for the period which he did not work. In the case of **Kitwe City Council v William Ng'uni (8)** the Supreme Court held that it is unlawful to award a salary or pension benefit for a period not worked.

4. Payment for allowances

   We order that all allowances which the Complainant worked for and earned before he was separated from employment be paid to him if not already paid. We cannot allow payment of allowances which the Complainant did not work for in order to earn them.

5. Payment of accrued leave days

   All leave days accrued only up to date of separation from employment shall be paid if not already paid.

6. Interest

   All the moneys payable in this case shall be paid with interest at the current Bank of Zambia rate from 26th November, 2014 when the Complaint was filed into court until full payment.

7. Costs

   We order cost of these proceedings in favour of the Complainant (no interest on costs).

8. Any other relief the court may grant

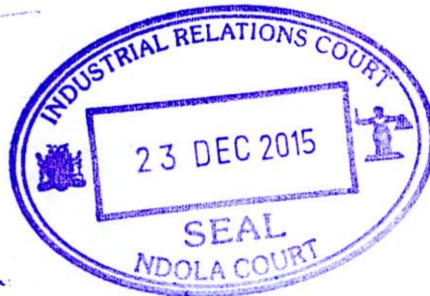
   We have seen no other relief to grant.

In default of agreement on any of the within awards, same shall be referred to the Deputy Registrar at Industrial Relations Court for assessment or taxation as the case may be.

Delivered and signed at Ndola and parties to uplift the judgment on 23rd December, 2015.

Hon. E.L. Musona
JUDGE

Hon. J. Hasson
MEMBER



Hon. W.M. Siame
MEMBER