

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 50 OF 2011
HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

TALLFELLOW HURTON WISHIMANGA

APPELLANT

AND

NIEC

RESPONDENT

CORAM:

PHIRI, WANKI, AND MUYOVWE, JJS

On 4th November, 2014 and 4th February, 2015

For the Appellant:

Mr. J. Mataliro - Messrs. James
Mumba Malila and Partners

For the Respondent:

Mr. I.M. Mabbolobolo - Messrs.
Makala and Company

J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Nsansa School Education Trust -Vs- Musamba (2010) Vol. 1 ZR 458.**
2. **Chilanga Cement -Vs- Kasote Singongo (2009) ZR 122.**
3. **Zambia Privatisation Agency -Vs- Matale (1995-97) ZR 157 (SC).**
4. **National Airports Corporation Limited -Vs- Zimba and Another (2000) ZR 154.**

The appellant appealed against the trial Court's judgment delivered over twenty years ago on the 10th day of March, 1994.

The background of this case is that the appellant was a General Manager of the respondent. The respondent terminated the appellant's employment in 1991. Consequently the appellant sued the respondent in the High Court. The matter was heard and judgment delivered in 1994. Being dissatisfied with the aforesaid judgment the appellant filed an application for leave to appeal out of time. The application was not heard on account of the case record being misplaced and the death of the advocate who represented the appellant. The appellant was only able to bring this appeal sometime in 2011.

The undisputed facts before the lower Court are that the appellant was employed by the respondent. The appellant worked for the respondent for twenty one years in various capacities. Until 1988 the appellant was a permanent and pensionable employee enjoying ZIMCO terms and Conditions of Service. The appellant opted for renewable contracts and signed a three year contract in 1988 which was renewed in 1991 for two years. The respondent terminated the said contract on 25th November, 1991

paying the appellant three months' salary in lieu of notice. As a result the appellant commenced this matter against the respondent. The trial Judge found that the three months' salary paid to the appellant in lieu of notice was sufficient and held that the appellant was entitled to gratuity calculated at 25% of his annual basic earnings during the tenure of employment ordering no interest on the sum awarded. The appellant was dissatisfied with the said judgment and now appeals to this Court.

The Appellant has advanced the following grounds:-

1. **The learned trial Judge erred when she found that the termination of contract of service for the appellant by payment of three months' salary in lieu of notice was in line with the terms of the contract, when in fact Clause 2 of the same contract, provided that termination of contract by either party should be by not less than three months previous notice in writing to that effect.**
2. **It was a travesty of justice for the Judge to find that the appellant was not paid the allowances that he enjoyed in lieu of notice and yet did not make an order for the same to be paid.**
3. **That learned trial Judge erred when she ordered the respondent to pay the appellant 25% of the total basic earnings for 21 years but did not make an order as to interest on the same amount.**

Counsel on both sides submitted in writing and we are highly indebted to Counsel for the industrious arguments.

However, we propose not to reproduce the said submissions here save to conveniently refer to them in this judgment.

In ground one, the appellant invited us to consider whether the trial Judge's holding that the termination was lawful was justified. The thrust of this ground appear to be that the respondent breached the contract when it terminated the appellant's employment in the manner it did. In **NSANSA SCHOOL EDUCATION TRUST -VS- MUSAMBA** ⁽¹⁾, we observed at page 466 that damages for breach of contract committed by the defendants are compensation to the Plaintiff for the damage, loss or injury he has suffered through the breach.

Failure to comply with the terms of a contract written or oral amounts to breach of contract. A party failing to give notice of termination in accordance with the terms of the contract is in breach. This breach is usually remedied by damages. Damages for failing to give notice are calculated on the basis of what the employee would have received had the necessary notice been given. If the employer terminates the contract without notice or gives less notice than the contract provides, or the statutory provisions require, then damages will be initially limited to the

period of notice that should have been given. Where the contract for a fixed term gives the employer the right to terminate before the end of that term, then damages will be limited to the notice period.

In this case, the contract of employment was for a fixed term which gave either party the right to terminate before the end of that term in clause 2 of the contract. The said clause provides that:-

“That the employee shall hold his said office subject as hereinafter provided until his appointment shall be determined by not less than three months’ previous notice in writing to that effect given by either of the parties or until the 31st August 1991.”

In light of the said clause it was contended by the appellant that the only mode of termination was by three months written notice and there was no term allowing for payment of salary in lieu of notice. The effect of the appellant’s argument is that the termination was unlawful. The response was that the trial Judge was on terra firma when she held that the termination of employment was lawful having paid the appellant three months’ salary in lieu of notice.

We are not persuaded by the appellant's arguments in respect of ground one. In light of what we have said above the breach committed by the respondent namely termination without the required notice could be adequately remedied by damages calculated on the basis of what the appellant would have received had the requisite notice period been given. The appellant was paid three months' salary in lieu of notice an equivalent of what he would have received had the notice been given. We find that the trial Judge was justified in holding that the termination was lawful. We reaffirm by our decisions in **CHILANGA CEMENT -VS- KASOTE SINGONGO** ⁽²⁾ **AND ZAMBIA PRIVATISATION AGENCY - VS- MATALE**. ⁽³⁾ There is no merit in this ground of appeal.

Regarding ground two, it was argued on behalf of the appellant that the trial Judge, having found that the appellant was not paid anything else apart from three months' salary in lieu of notice, should have ordered that the appellant be paid his allowances. We examined the evidence of the appellant in the Court below and the trial Judge's judgment in light of this ground of appeal. We find no basis upon which the trial Judge should

have proceeded to order payment of other allowances as envisaged by the appellant.

In **NATIONAL AIRPORTS CORPORATION LIMITED -VS- ZIMBA AND ANOTHER** ⁽⁴⁾, the first respondent was offered a two year contract but he only worked for four months and a few days when his contract was terminated. The contract provided for termination by three months' notice on either side, and also provided that: "If the employer terminates the contract prematurely for the reasons other than incompetence or willful neglect of duty all the benefits under the contract shall be paid as if the contract had ran full term."

In the judgment delivered by the erstwhile Chief Justice Ngulube, this Court noted (at page 157 of) that the action was for damages for wrongful termination which were ordered by the Court below to be computed "as if the contract had ran the full term." This Court went on to observe that it was aware that damages on such footing can be defended if the sum thereby stipulated can be held to be liquidated damages; a genuine pre-estimate of damages the parties themselves intended should govern the contract in the case of termination in breach.

In the instant case there was no provision in the contract which envisaged payment of other allowances in case of breach in the contract of employment. Further we find no evidence which established other allowances so claimed on the balance of probabilities. This notwithstanding the trial Judge ordered payment of gratuity to the appellant for 21 years served at 25% of total basic annual earnings on the basis of a provision in the appellant's contract of employment. Placed in the position of the trial Judge, we would have reached the same position. We find no merit in ground two of this appeal.

We now turn to ground three. The law on awarding interest by the Courts in Zambia is provided in the **High Court Act (Chapter 27 of the Laws of Zambia)**, the **Judgments Act (Chapter 81 of the Laws of Zambia)**, the **Law Reform (Miscellaneous Provisions) Act (Chapter 74 of the Laws of Zambia)** and decided cases.

Order 36 Rule 8 of the High Court Rules provides that 'Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as

the Court or Judge may direct to the date of judgment'. **Section 2 of the Judgments Act** provides that "Every judgment, order, or decree of the High Court or of a Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the Court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree." **Section 4 of the Law Reform (Miscellaneous Provisions) Act Chapter 74** on the award of interest provides that "In any proceedings tried in any Court of record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment...."

Our deduction from the above stated provisions governing the award of interest is that the above said provisions empower

all Courts of record to make awards of interest. It was mandatory for the trial Court to order payment of interest on the sum awarded in accordance with the law highlighted above. The trial Judge erred in not doing so. We order that interest be paid by the respondent at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ to the date of judgment and thereafter at the current lending rate as determined by the Bank of Zambia from the date of the judgment, until the same shall be satisfied.

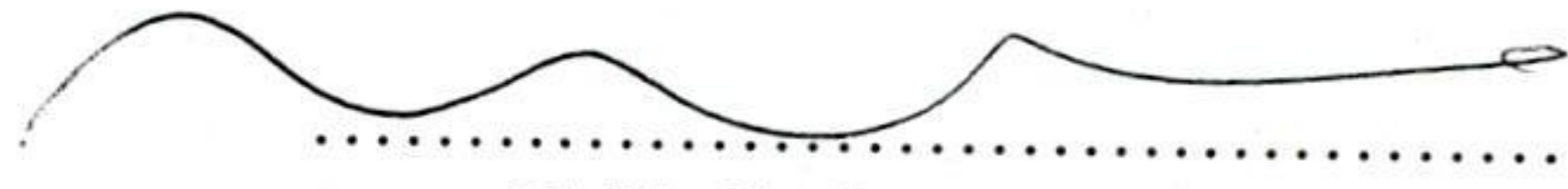
The net result is that grounds one and two fail and the same are dismissed. Ground three succeeds and the appeal is allowed. Each party to bear its costs.



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G. S. Phiri,
SUPREME COURT JUDGE.



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M. E. Wanki,
SUPREME COURT JUDGE.



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E.N.C. Muyovwe,
SUPREME COURT JUDGE.