IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 42/2010
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

AMIRAN LIMITED **APPELLANT**

AND

ROBERT BONES **RESPONDENT**

CORAM : Mwanamwambwa, DCJ, Hamaundu, JS and Lengalenga, AJS

On the12th August, 2014 and the 19th August, 2014

For the appellant: Mr K. Chenda, Messrs Simeza, Sangwa & Associates

For the respondent: Messrs Musa Mwenye Advocates

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Contract Haulage Limited v Mumbuwa Kamayoyo [1982] ZR 13**
2. **Gerald Musonda Lumpa v Maamba Collieries Limited [1988/1989] ZR 217**
3. **Zambia Privatisation Agency v Matale [1995/1997] ZR 157**
4. **Zambia Consolidated Copper Mines v Matale [1995/1997] ZR 144**

Legislation Referred to:

1. **The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, Sections 85A and 97**
2. **The Minimum Wages and Conditions of Employment Act, Chapter 276 of the Laws of Zambia**

Rules

The Industrial Relations Court Rules, Cap 269, Rule 44

When we heard this appeal, we sat with Madam Justice Lengalenga. The Honourable Justice Lengalenga is no longer in the Supreme Court. Therefore, this judgment is by majority

This is an appeal against the Judgment of the Industrial Relations Court dated the 3rd July 2008, which found that the respondent had been unfairly dismissed and awarded him compensation for loss of employment.

The facts giving rise to this appeal are these:

The respondent was offered employment by the appellant as a Financial Controller, to start work on the 1st October, 1995. On the 30th November, 2005, the respondent received a letter from the appellant terminating his employment on the basis that his services were no longer required. In the said letter, the appellant indicated that the respondent would be paid one month's salary in lieu of notice together with his dues, in accordance with his contract, including leave days. The total of the benefits came to US$6,293.

Reacting to the termination, the respondent told the appellant that, as no reason was given for the termination of his employment, he should be deemed to have been placed on early

retirement; and that his terminal benefits be paid to him on that basis.

Upon encountering an impasse, the respondent proceeded to lodge a complaint against the appellant, claiming damages or compensation for loss of employment. The respondent also sought an order to be deemed to either have been declared redundant or separated on early retirement.

The appellant, in answer to the complaint maintained that it had lawfully terminated the respondent's employment in accordance with his contract and that all his dues had been paid to him in accordance with the said contract.

At the hearing, the respondent's evidence was that the basis for his employment with the appellant was a letter dated 30th August 1995, which he produced. According to the said contract he was to commence work on the 1st October 1995. His emoluments included; a salary of K780,000.00, a car, airfare to the United Kingdom every two (2) years and six hundred pounds (£600) paid into a bank account of his choice, which amount was later revised. A number of his conditions were revised during the period of employment to include entitlement to a cell phone, home land telephone, payment of water and electricity bills and

payment of his children's school fees. At the time of termination of his employment, the respondent's basic salary was USD800.

On the 30th November 2005, the respondent was summoned to the office of the appellants Managing Director, Eric Almog. Present in the office were the Chief Executive Officer of a Company called Bolton CP Limited, the holding or parent company of the appellant, and Mr Robinson, also of the appellant company. It was in this meeting that the respondent was informed that the appellant was terminating his services and that all his benefits would be given to him. A letter terminating his employment was handed over to him but no reasons were given for the termination of his employment. Upon perusal of the letter, the respondent disagreed with the calculation of his terminal benefits but the appellant, after consulting their lawyers, maintained that the calculations were correct.

The respondent further stated in his evidence that he was also accountable to Bolton CP Limited and, as proof thereof, he exhibited a payroll dated October 2002 from Bolton CP Limited that showed that he was also receiving a monthly payment of £1,200. This amount was paid to him by the appellant according to his letter dated 30th August 1995 and deposited in his bank

account in the United Kingdom. To avoid exchange control regulations and for the appellant's internal audit purposes, the respondent at the instance of the appellant signed another letter of employment dated 5th September 1995 from the appellant. The said letter did not include the foreign payments from Bolton Company Limited.

The appellants evidence at the hearing was that the basis for the respondents employment was a letter dated 5th September 1995 which letter did not include the foreign payment from Bolton CP Limited. The appellant maintained that there was no arrangement for the appellant to be paying the respondent an external salary and benefits from Bolton CP Limited and that neither was it agreed that he be deemed to have been placed on early retirement.

The court below found the following facts as undisputed:

(i) That the respondent was a bonafide employee of the appellant, employed as a Financial Controller;

(ii) That the respondent's contract was not for a fixed period; and

(iii) That the respondent was aggrieved with the manner in which his employment was terminated as he had not yet attained 55 years, the retirement age.

The Court below set out the following issues as being the ones for determination;

(i) Whether it was within the appellants' right to terminate the respondents' employment.

(ii) Whether the terminal dues paid to the respondent were correct.

(iii) Whether the appellant's termination of the respondent's employment amounted to redundancy or early retirement.

(iv) Whether any arrangement, agreement or contract existed that entitled the respondent to claim and external salary.

(v) Whether the respondent's contract was governed by the *Employment Act.*

(vi) Whether the respondent was within his legal rights to calculate his benefits based on the provisions of the *Minimum Wages and Conditions of Employment Act.*

The court held that an employer may, as of right, terminate a contract of service of an employee provided that the termination is carried out lawfully. The court then examined the language used in the letter of termination to the respondent and decided that the phrase *'your services are no longer required'* did not amount to the respondent being made redundant as the employer was still a viable business and there was no evidence suggesting a re-organisation or closure of the business. The Court also held that there was no evidence to support the respondents claim for early retirement as this was not provided for in his contract. With regard to the absence of a clause providing for the duration of the contract, the court said that, this was a flaw that should have been rectified during the respondent's employment period by either indicating that he was on permanent and pensionable conditions of service or setting out the duration of the contract.

The Court further found that the respondent was employed on two parallel contracts of service by virtue of the letters dated 30th August 1995 and 5th September 1995, none of which were withdrawn and that from the evidence adduced he was receiving an external salary. The Court found also that the respondent was

employed under some conditions peculiar, lucrative and special to him with the full knowledge of the appellant and Bolton CP, more so as the respondent's evidence pertaining to the reason why he signed the letter dated 5th September, 1995 at the instance of the appellant was never challenged by the appellant.

The Court also held that while the respondent's contract was governed by the *Employment Act*, he could not claim under the *Minimum Wages and Conditions of Employment Act* because he was in management, a category which was excluded from claiming under the *Act*.

The Court however found that the appellant did not give any reason for terminating the contract. According to the court, such conduct was unreasonable. For that reason, the court held that the respondent was unfairly dismissed. The Court awarded the respondent twelve month's salary, inclusive of allowances and entitlements, as compensation for loss of employment.

Hence this appeal.

Before us the appellant has filed four grounds of appeal:

The first ground is that the Court below erred in law and fact when it held that the respondent was employed on two

parallel contracts of service, one dated 30th August 1995 and the other dated 5th September 1995.

The second ground is that the Court below erred in law and fact when it held that the respondent appeared to have been employed under some conditions peculiar, lucrative and special to him, with the full knowledge of the appellant and Balton CP.

The third ground is that the Court below erred in law and fact when it held that the respondent was unfairly dismissed.

The fourth ground is that the Court below erred in law and fact when it awarded the respondent twelve month's salary, inclusive of his allowances and entitlements, as compensation for loss of employment.

At the hearing of the appeal, counsel for the appellant argued in the first ground that contrary to the respondent's contention that there were two parallel contracts of service dated 30th August 1995 and 5th September 1995 respectively, there was, in effect, only one contract of service dated 5th September 1995, as the one dated 30th August 1995 was varied by mutual agreement of the appellant and the respondent. As such, in accordance with principles of contract law, it was the contract dated 5th September 1995 that expressed the final intentions

relating to the employment relationship between the appellant and the respondent.

In the second ground of appeal, counsel's argument was three-fold: first, that there was no evidence before the court below to support the finding that the appellant and Bolton CP had full knowledge of the lucrative, special and peculiar conditions of service for the respondent; secondly, that Bolton CP was a separate legal entity that was not a party to the proceedings; and, thirdly, that the respondent conceded in his evidence that the contract governing his employment was the one dated 5th September 1995.

Learned Counsel, in rebutting the position by the court below that the respondent was unfairly dismissed, argued in the first limb of the third ground of appeal that, as the relationship between the appellant and the respondent was that of master and servant, the appellant could terminate the respondents' contract by merely giving notice or payment in lieu of notice. Counsel referred us to the cases of **Contract Haulage Limited v Mumbuwa Kamayoyo**[1],**Gerald Musonda Lumpa v Maamba Collieries Limited**[2]and **Zambia Privatization Agency v Matale**[3] to buttress the argument. Counsel argued further that it was

clear from the letter of contract dated 5th September that the intention of both the appellant and respondent was to give either party thirty days' notice to terminate the contract and, in default, thirty days' pay in lieu of notice.

In the second limb of the third ground of appeal, learned Counsel argued that the only reason why the lower Court concluded that the respondent had been unfairly dismissed was because the respondent's services were terminated without the appellant giving any valid reason for its action. It was Counsel's argument that the lower court's position meant that an employer could not invoke the termination clause under a contract of employment unless the employer gave a valid reason for such termination. That position, according to counsel, has no basis at law. Learned Counsel went on to argue that an employer, just like an employee, in a pure master and servant relationship can terminate the contract of employment by invoking the termination clause for any reason or for none.

In the fourth ground of appeal, Counsel emphasized that as the appellant lawfully terminated the appellant's contract of service in accordance with the termination clause in his contract, to hold that the respondent be paid twelve months salary

together with all his allowances and entitlements as compensation for loss of employment would be contrary to the terms of the written contract between the appellant and the respondent.

With those arguments, counsel for the appellant urged us to allow the appeal.

In response to the appellant's first ground of appeal, counsel for the respondent supported the lower court's finding that the respondent was employed on two parallel contracts of service; one dated 30th August 1995 and the other dated 5th September, 1995. To expand his contention, counsel argued that there was no evidence that the appointment letter dated the 30th August, 1995 was withdrawn by the appellant; instead, the respondent enjoyed the terms stated therein and, infact, the appellant arranged the external payment without any input from the respondent except to give the appellant the details of the account where the money was to be deposited. Counsel argued that, from those circumstances, the only conclusion to be drawn was that the appellant wrote the letter of the 5th September, 1995 for internal audit purposes.

Responding to the appellant's second ground of appeal, counsel for the respondent, again, supported the lower court's finding of fact that the respondent appeared to have been employed under some conditions peculiar, lucrative and special to him with the full knowledge of the appellant and Bolton CP. Counsel argued that there was no evidence to suggest that the respondent had direct personal contact with Bolton CP with regard to the external payment; to the contrary, the arrangement to pay the respondent abroad was made by the appellant and Bolton CP. Counsel argued further that the appellant's contention that Bolton CP is a separate legal entity from the appellant cannot hold water because when the respondent's services were being terminated, Mr David Reynolds, the Chief Executive Officer of Bolton CP was Present in the appellant's Managing Director's office. It was counsel's argument that that meeting could not have been coincidental but a meeting to discuss the respondent's situation.

Responding to the appellant's third ground, challenging the lower court's holding that the respondent was unfairly dismissed, counsel argued that the court below gave a valid reason as to why it felt that the respondent was unfairly treated.

In response to the appellant's fourth ground of appeal which raises issue with the lower court's award of twelve months salary and allowances as compensation for the respondent's loss of employment, counsel argued that, the respondent having served the appellant for more than ten years, it was unfair for the appellant to offer only one month local pay without taking into account the respondent's external pay and the other allowances of which he was in receipt every month.

With the above arguments, counsel for the respondents urged us to dismiss this appeal and uphold the lower court's judgment.

We have considered the argument's advanced by both sides. We wish to point out at the outset that the first and second grounds of appeal are based entirely on points of fact. Under **Section 97** of the **Industrial** and **Labour Relations Act**, **Chapter 269** of the **Laws of Zambia** an appeal shall not lie to the Supreme Court if it is on points of fact only. Therefore, to the extent that the two grounds of appeal are based on points of fact only, they are incompetent. We accordingly dismiss them.

Coming to the third ground, the reason which the lower court gave for its holding that the respondent was unfairly

dismissed was that he was not given any reason for the termination of his employment. According to the court below, the finding of unfair dismissal was based on **Section 85A(d)** of the **Industrial** and **Labour Relations Act.**

We must hasten to say that we do not see how that section empowers the Industrial Relations Court to make a finding of unfair dismissal. To drive the point home, we hereby set out the whole of **Section 85A**:

"85A. Where the court finds that the complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may—

(a)award the complainant damages or compensation for loss of employment;

(b)make an order for re-instatement, re-employment or re-engagement;

(c)deem the complainant or applicant as retired, retrenched or redundant;

(d)make any order or award as the court may consider fit in the circumstances of the case"

It is clear from the foregoing provisions that **Section 85A** does not set out the findings that the Industrial Relations Court may make but provides the remedies that the court may award

after having made a finding. A determination that a dismissal is unfair is a finding and not a remedy. Therefore, **Section 85A(d),** in particular only gives the court power to make an order or award that it may consider fit for the circumstances of each particular case after it has made a finding that a dismissal is unfair.

We now come to the finding that the dismissal was unfair. Where the Industrial Relations Court is concerned, we held in the case of **Zambia Consolidated Copper Mines v Matale**[4] that there is nothing to stop the Industrial Relations Court from delving into or behind the reasons given for termination in order to redress any real injustices discovered. To expand that holding, what we meant is that even where a termination of employment is purportedly based on the termination clause in the contract, the Industrial Relations Court, being a court of substantial justice, has power to examine critically all the circumstances surrounding that termination; and where it finds that the application of the termination clause was made in bad faith, it may make a finding under **Section 85A** that the complaint is justified and reasonable, whereupon it shall select, and grant, any of the remedies available under that section.

In this case, the court below found fault with the termination of the respondent's employment merely because no reason was given for that termination. The court did not critically examine the circumstances of the termination in order to find whether the use of the termination clause by the appellant was activated by malice or bad faith. It was not in dispute by the parties that the contract of employment provided for termination by either party upon providing thirty days notice. It is common cause that, in the instant case, it is the appellant which exercised its liberty under that clause. The clause, itself, did not require either party to give any reason for terminating the contract. Therefore, in the absence of a finding by the court below that the appellant used the termination clause in bad faith, there was nothing that could taint the termination. It is our view, therefore, that the finding by the court below that the termination amounted to unfair dismissal was wrong at law. We find merit in the third ground of appeal and, since the entire appeal hinges on that ground of appeal, we find merit in the appeal.

With the success of the third ground of appeal, the fourth ground falls away.

This appeal is allowed. We set aside the judgment of the court below for unfair dismissal and hold that the termination of the respondent's employment was lawful and valid. We should state, however, that in view of the finding by the court below that the respondent was in receipt of an external salary, any terminal benefit due to the respondent as a result of the termination and whose calculation is based on the salary should include the external salary.

With regard to costs, **Rule 44** of the **Industrial Relations Rules Chapter 269** of the **Laws of Zambia** provides that, in matters before the Industrial Relations Court, costs can only be awarded against a party if such party is guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. With appeals that come from the Industrial Relations Court we adopt the principle in that Rule. In this case, the appeal was filed by the appellant and it has succeeded. The respondent had no choice but to come and defend the appeal. In the course of the appeal, the respondent has not been guilty of any conduct that would

warrant costs being ordered against him. Therefore, we shall order the parties to bear their own costs.

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M. S. MWANAMWAMBWA

DEPUTY CHIEF JUSTICE

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E. M. HAMAUNDU

SUPREME COURT JUDGE