

CAZ/08/09/2019

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT NDOLA

COMP/IRD/ND/107/2017

BETWEEN:

CHARLES MWILA

AND

SHIF CONTRACTORS & GENERAL
DEALERS



COMPLAINANT

RESPONDENT

BEFORE HON. MR. JUSTICE E.L. MUSONA

For the Complainant: Mr. E. Sichone- Legal Aid Board

For the Respondent: Mr. E. Chibeluka- Douglas & Partners ✓

JUDGMENT

Cases referred to

1. *Albert Mwanauomo and Others Vs. NFC Africa Mining Plc, Que Nelson Jilowa* (2011) 1 ZR 30
2. *Bank of Zambia v Kasonde* 1995.1997 ZR
3. *First Quantum Mining and Operations Limited v Obby Yendamoh* SCZ APP No. 206/2015
4. *Khalid Mohamed Vs. The Attorney General* (1982) ZR 49
5. *Redrilza Limited v Abuid Nkazi and Others* S.C.Z. Judgment No. 7 of 2011

Other works referred to:

- 1. Peter Chandler (2003) Waud's Employment Law: A Practical Guide for Personnel Managers, Trade Union Officials, Employers, Employees and Lawyers (14th Ed)**
- 2. Winnie Mwenda (2011 Revised Edition) Employment Law in Zambia**

This matter was commenced by Mr. Charles Mwila (Complainant) against Shif Contractors and General Dealers (Respondent) by way of Notice of Complaint and accompanying Affidavit in Support of Notice of Complaint dated 27th September, 2017.

In the Notice of Complaint, the Complainant is seeking for the following reliefs against the Respondent;

- i. Terminal benefits
- ii. Damages for unlawful termination of employment
- iii. 16 days' unpaid salary
- iv. Leave days
- v. Any relief the Court may deem fit.

In his Affidavit in Support of Notice of Complaint, the Complainant has deposed that he was employed by the Respondent as a Stores Manager from 25th February, 2013 until August 2017 when he was served with the letter of termination of employment in which the Respondent was claiming that the Company had lost colossal sums of money due to his negligence

The Complainant further deposed that the Respondent had breached the terms of the contract of employment.

The Respondent on the other hand has filed an Answer to the Notice of Complaint and an Accompanying Affidavit in Support of Answer dated 18th October, 2017. The Respondent's Affidavit in Opposition to Notice of Complaint was deposed to by Francis Sichimba, the Managing Director in the Respondent's Company. According to the said Affidavit, the deponent has stated that the Complainant's contract of employment was terminated on 16th August, 2017 and that the Respondent lost goods worth K242, 140 which were stolen whilst under the control and custody of the Complainant.

The Respondent has further stated that the Complainant was given a chance to exculpate himself on how the goods which were in his custody were stolen but he expressed ignorance.

At the hearing of the matter, the Complainant(CW) gave evidence on oath and he did not call any witnesses. CW's evidence in brief was to the effect that he was given a letter of dismissal without being charged and that he was not paid anything after working from 25th February, 2013 to 16th August, 2017.

It was CW's further testimony that he was claiming for terminal benefits for a period of 4 years and 7 months. He also testified that he wanted the Court to order damages for unlawful dismissal because he was not charged and was not given a chance to exculpate himself. To this extent, CW testified that the Disciplinary Code of the Company was not followed.

In further examination in chief, CW testified that prior to his dismissal on 16th August, 2017 he had worked from 1st August, 2017 to 16th August, 2017 and was not paid for 16 days which he worked for.

With regard to leave days, CW testified that he wanted the Court to award him leave pay for the period worked from 25th February, 2013 to 16th August, 2017 and that he was entitled to 4 leave days per month.

In cross examination, CW stated that he does not know how the leave days are to be calculated and that he had not informed Court how much his salary was per month. He maintained that he was claiming damages for unlawful dismissal because the Respondent did not follow the disciplinary procedure code. He denied that the goods were stolen whilst in his custody.

In re-examination, CW testified that his monthly salary was K2, 260 per month and that he had not been paid for 16 days. He further testified that he went on leave for only 5 days during the time that he was in employment.

The Respondent called only one witness by the name of Mubanga Chisanga (RW) in support of its case. RW testified that he is the Accounts Assistant at the Respondent's Company and his testimony was that the Complainant is not entitled to any terminal benefits because the Respondent lost colossal sums of money through the theft of goods in the warehouse which happened under the custody of the Complainant.

It was RW's further testimony that boots, banning jackets and pairs of gloves with the total value of K241, 240 went missing and the Complainant was to blame because he was the one who was tasked with the responsibility of keeping the stock and when he was asked about the lost items he pleaded ignorance.

RW testified that the Complainant was asked to exculpate himself but after expressing ignorance the Respondent wrote a letter to him terminating his contract of employment.

On the Complainant's claim for 16 days salary, RW testified that the Respondent has refused to pay the Complainant despite the fact that he has worked because the money that the Respondent has lost is more than the money that the Complainant is claiming. RW also stated that the Complainant cannot be paid leave pay because of the same reasons.

In cross examination by the Complainant's Counsel, RW testified that employees are supposed to be paid terminal benefits upon exiting employment and that they are also entitled to be paid salaries for the period worked. He maintained that the Respondent has refused to pay the Complainant because of the loss suffered by the Respondent due to the negligence of the Complainant.

RW further testified that there is no document to show that the Complainant was given a chance to exculpate himself and that the Complainant has never been arrested for the offence of theft. RW confirmed that the Complainant was supposed to be notified of the

offence that he had committed but that this was not done. He further admitted that the Complainant was entitled to 79 leave days.

In re-examination, RW testified that he was not sure whether there was a conclusion reached relating to the police investigations into the alleged theft.

At the end of the hearing, both parties expressed intention to file written submissions. The Complainant has submitted that section 26 of the Employment Act Chapter 268 of the Laws of Zambia states that when an employee is summarily dismissed he shall be paid on dismissal, wages and other working allowances due to him up to the date of such dismissal.

The Complainant has further submitted that since the dismissal was based on the performance and conduct, the law requires that he be given an opportunity to be heard on charges laid against him but that the Respondent breached this law by not according him a hearing.

The Respondent on the other hand has submitted that the Complainant is not entitled to the reliefs he is seeking on the ground that he was summarily dismissed following loss of the goods at the Respondent's warehouse where the Complainant was a Stores Manager.

The Respondent has relied on the case of *Albert Mwanaumo and Others Vs. NFC Africa Mining Plc, Que Nelson Jilowa (2011) 1 ZR 30* where Kaoma J (as she then was) held inter- alia that;

“Where a master “dismisses” a Servant, he terminates the Contract summarily without any notice, on the grounds of misconduct, negligence or incompetence, and that if such grounds are justified the servants forfeits the right to any notice whatsoever, and several other benefits.”

The Respondent has also submitted that the Complainant has failed to prove that his dismissal from employment was unlawful and reference has been made to the case of ***Khalid Mohamed Vs. The Attorney General (1982) ZR 49*** where the Supreme Court held inter alia that;

“The Plaintiff cannot automatically succeed whenever a Defence has failed; he must prove his case.”

Finally, the Respondent submitted that it complied with the requirement of section 36 (1) (c) of the Employment Act Amendment Act Number 15 of 2015.

I have considered the evidence on record and the submissions by the parties. The question for the determination of this Court is whether or not the termination of the Complainant’s employment by the Respondent was unlawful and whether the Complainant is entitled to terminal benefits and all the reliefs that are set out in his Notice of Complaint.

I once again feel the need to explain the difference between termination and dismissal, unlawful, wrongful, unfair and illegal termination as it appears that there is a misconception among litigants as to the meaning of these terms and the parties often use

some of these terms interchangeably without necessarily taking into account that they have distinct elements which must be proved separately.

i. Termination and Dismissal

It is very common for litigants to use the term termination and dismissal interchangeably both in pleadings and in giving evidence before Court as was the case in casu. The Supreme Court of Zambia put the difference between termination and dismissal in clear perspective in the case of *Redrilza Limited v Abuid Nkazi and Others S.C.Z. Judgment No. 7 of 2011*, where it was held that; “..., there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the employer to terminate the contract of employment without invoking disciplinary action. In fact, we note that in its judgment, the lower Court concluded that it found the respondents' dismissals to have been unfair. It is apparent, that the Court, in its judgment used the term 'dismissal' and 'termination' interchangeably. This should not have been so, especially that the respondents were not dismissed from employment, but their services were terminated by way of notice. “

ii. Unfair Dismissal

A dismissal is unfair if the disciplinary procedure leading to dismissal was not followed. The procedure is that the accused employee must be charged. After the employee has been charged the employee must be caused to appear before a tribunal or Disciplinary Committee for hearing and the outcome of the hearing must be communicated to the employee.

iii. Wrongful dismissal

A dismissal is wrongful if the employer has breached a term of the contract when dismissing the employee including the disciplinary code. The learned author of *Employment Law in Zambia (2011 Revised Edition)* has observed that;

“..., wrongful dismissal is one at the instance of the employer that is contrary to the terms of the employment and when considering whether the dismissal is wrongful or not, the form rather than the means of the dismissal must be examined. The question is not the why but how the dismissal was effected...”

It is also wrongful dismissal if the allegations upon which the employee is dismissed are not proved against the employee. The Supreme Court of Zambia in the case of **Bank of Zambia v Kasonde 1995.1997 ZR** held that if the dismissal is not on proved grounds then it amounts to wrongful dismissal.

iv. Unlawful Dismissal

A dismissal is unlawful if the employer has breached a statutory provision such as a provision in the Employment Act when dismissing the employee.

v. Illegal dismissal

Illegal dismissal is synonymous with unlawful dismissal therefore; the same ingredients of unlawful dismissal are applicable.

Coming to the case at hand, the Complainant is claiming for terminal benefits, damages for unlawful termination of employment, 16 days' unpaid salary, leave days and any relief the Court may deem fit. I now proceed to examine these claims in order to determine whether the Complainant has proved the said claims on the balance of probabilities in line with the case of *Khalid Mohamed V. The Attorney-General (1982) Z.R. 49 (S.C.)*.

a. Damages for Unlawful termination

Having explained the difference between termination and dismissal, the facts of this case clearly show that what transpired was a summary dismissal. I say so because exhibit '**CM1**' in the Complainant's Affidavit in Support of Notice of Complaint clearly says so. This is a letter signed by Mr. Francis Sichimbi, the Director in the Respondent's Company addressed to the Complainant informing him of the decision by management to terminate his contract of

employment with immediate effect and with no pay due to the poor performance at the warehouse where the Complainant was in charge.

The learned author of ***Waud's Employment Law (14th Edition)*** has observed the following at page 38;

“an employee guilty of conduct which is tantamount to a repudiation of a contract of employment, thereby forfeits his or her right to a notice maybe dismissed summarily (that is to say, on the spot). In practice, an employer should not dismiss summarily without first investigating the circumstances and giving an employee an opportunity to present his side of the story”

Exhibit marked '**CM1**' in the Complainant's Affidavit in Support of Notice of Complaint shows that the Complainant was dismissed on the spot. ***Section 25 of the Employment Act Chapter 268 of the Laws of Zambia*** deals with summary dismissal and it states that;

“(1) Wherever an employer shall dismiss an employee summarily and without due notice or payment of wages in lieu of notice, such employer shall, within four days of such dismissal, deliver to a labour officer in the District in which the employee was working, a written report of the circumstances leading to, and the reasons for, such dismissal:”

Further section ***26A of the Employment Act*** provides that;

“An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee

without affording the employee an opportunity to be heard on the charges laid against him.”

Clearly the grounds on which the Complainant was dismissed on relate to his conduct or performance at the warehouse where he was assigned to. The question therefore is this, ‘was the Complainant given an opportunity to be heard on the charges laid against him?’

In cross examination, RW1 testified that the dismissal of the Complainant was with immediate effect, no notice was given and the complainant was not notified of the charges against him. In the case of ***First Quantum Mining and Operations Limited v Obby Yendamoh SCZ APP No. 206/2015***, the Supreme Court of Zambia had this to say at page 31 of the Judgement observed that;

“..., the findings by the Court below was that the evidence on record reviewed that the letter of dismissal blocked the adherence by the Appellant to the rules of Natural Justice. We agree with this finding because the evidence reviews that the Respondent was not charged prior to his dismissal and neither was he invited to exculpate himself to appear before the disciplinary committee. These are the basic tenets of natural justice which the Appellant failed to comply with.... an employee is entitled to be heard prior to his dismissal based on conduct pursuant to section 26A of the Employment Act as amended in 1997”

Having analysed the facts of this case and the law to which I have referred to, I have come to the conclusion that the Complaint’s

dismissal was indeed unlawful as it breached the provisions of section 26A of the Employment Act.

Considering the manner in which the Complainant's contract was terminated, that is, on the spot and without giving him any chance to exculpate himself, I am guided by the decision of the Supreme Court in the case of *Dennis Chansa v Barclays Bank Zambia Plc Appeal No. 111/2011*, in which it was held that:

"We now come the second issue. The court in Zambia Airways Corporation Limited V Gershom Mubanga supra awarded 12 months' salaries as damages in lieu of reinstatement in 1992. Seven years later in Chitomfwa V Ndola Lime supra, we awarded 24 months. The lower court seven years later in the appeal before us awarded 36 months' salaries as damages. The rationale is as the global economies, detoriate, the chances of finding employment even by graduates are dimmer. There should be a progressive upward increase in damages, as it is bound to take longer to find a job in the current domestic and global economic environment.

For what we have said, we cannot fault the lower court for awarding 36 months' salaries as damages. The award was not wrong in principle. We do not agree with the appellant's sole ground of appeal nor do we agree that we should disturb the award."

I order that the Complainant be paid 36 months' salary as damages for unlawful dismissal.

b. 16 Days unpaid salary

The Complainant testified that prior to his dismissal on 16th August, 2017, he had worked from 1st August to 16th August, 2017 and was not paid for these days. RW confirmed this position and stated that the only reason why the Respondent refused to pay the Complainant his salary for the 16 days worked is because the Respondent lost a lot of money as a result of the theft that happened at the warehouse.

Section 45 (1)(b) of the Employment Act states that;

“45. (1) Notwithstanding any other provisions of this Act, an employer may make deductions from the wages payable to an employee in respect of-

(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of any employer occasioned by the willful default of the employee, if such amount and its deduction are duly accepted in writing by such employee;”

The above provision makes it clear that an employer can only deduct from the wages of the employee in relation to any loss of property if the amount and its deduction are duly accepted in writing by the employee. The Complainant did not accept the deduction and neither did he admit to the loss of the properties belonging to the Respondent. The deduction or withholding of the Complainant's 16 days' pay by the Respondent is therefore unlawful and this claim succeeds.

c. Leave days

The Complainant testified that he was not sure of how many leave days he had accumulate. However, I have noted that the Respondent does not dispute that the Complainant accumulated leave days and as a matter of fact, according to the Respondent's record from exhibit marked "**FS1**" titled; "**Mwila Charles; Leave days' computation against lost company inventory**", in the Respondent's Affidavit in Opposition to Notice of Complaint, shows that the total accumulated leave days is 79 days which translates to K8,126.95.

The position of the Respondent is that it cannot pay the Complainant because it lost goods whose value is more than the money that is owed to the Complainant in leave days.

I agree with the Complainant that section 26 of the Employment Act which has also been referred to by the Respondent is clear and states that:

"Where an employee is summarily dismissed, he shall be paid on dismissal the wages and other working or other allowances due to him up to the date of such dismissal"

The Respondent was duty bound by this provision to pay the Complainant his leave pay and I therefore order that the Complainant is entitled to be paid his leave pay of K8,126.95 as calculated by the Respondent. The claim for unpaid leave days has therefore succeeded.

d. Terminal benefits

I agree with the Complainant's submissions that terminal benefits are final entitlements of an employee upon termination of an employment contract. The phrase encompasses various dues such as leave pay, gratuity and different types of allowances depending on the contract of employment. In the present case, the Complainant has not specifically stated what type of terminal benefits he is seeking save for leave days which I have already ordered. I therefore find that the Complainant has failed to prove that he is entitled to any other relief save for leave days. This claim is accordingly dismissed.


I award interest on the sums due to the Complainant at the average short term deposit rate per annum as determined by the Bank of Zambia from the date of commencement of this action to the date of Judgment and thereafter, at the current Commercial Bank lending rate as determined by the Bank of Zambia until full satisfaction of the Judgment debt.

I make no order as to costs

Leave to appeal to the Court of Appeal within 30 days is granted.

DATED AT NDOLA THIS 19TH DAY OF DECEMBER, 2018

.....
Hon. E. L. Musonda
JUDGE



REPUBLIC OF ZAMBIA
JUDICIARY
HIGH COURT FOR ZAMBIA
19 DEC 2018
INDUSTRIAL / LABOUR DIVISION
JUDGE
P.O. BOX 70160 - NDOLA