IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 23/2018

BETWEEN:

KAWANGU KAYOMBO	**1ST APPELLANT**
KAMWANGA MANSON	**2ND APPELLANT**
CHILUMBU JOSHUA	**3RD APPELLANT**
MAONA EZEKIYA	**4TH APPELLANT**
CHIMBOTU WARD	**5TH APPELLANT**
SOMBE JOHN	**6TH APPELLANT**
JOHN MUMBA	**7TH APPELLANT**
RACHEL CHIYESU	**8TH APPELLANT**

AND

QUATTRO COMPANY LIMITED **RESPONDENT**

CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

On 24th April 2018 and 13th July 2018

FOR THE APPELLANTS: MR. J. MATALIRO OF MESSRS MUMBA MALILA & PARTNERS

FOR THE RESPONDENT: MS. K. N. KAUNDA OF MESSRS K. N. KAUNDA ADVOCATES

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Chilanga Cement v. Kasote Singogo (S.C.Z. Judgment No. 13 of 2009)*

2. *Mugford v. Midland Bank PLC (1997) I.R. L.R. 208, Eat*
3. *ZCCM Investment Holding v. Cordwell Sichimwi, SCZ Appeal No. 172 of 2014*
4. *Walls Meat Co Ltd v Selby (1989) ICR 611*
5. *Duffy v Yeomans and Partners Ltd (1995) ICR 1*

Authorities

1. *Employment Law in Zambia; cases and materials (2011) revised edition*

This is an appeal against the Judgment of the court below as it determined that, the Appellants were not wrongfully and unfairly dismissed. The brief facts of the case are that, the Appellants were engaged as security guards in 2016 on two year fixed term contracts.

In 2017, they were invited to a meeting addressed by the Respondent's management, at which they were informed of the decision to declare them redundant.

Thereafter, management engaged union representatives and the Labour Office concerning the redundancies and ultimately, the Appellants were paid their redundancy packages and gratuity in accordance with their conditions of service.

The Appellants have advanced three grounds of appeal as follows;

1. *The court below erred both in law and in fact when it held that the Respondent did not in any way violate the law in the*

manner it carried out the redundancy process against the Appellants in disregard of the fact that the said redundancy was effected without notice, consultation, clear and transparent selection procedure and since the redundancy came as an ambush to the Appellants.

2. *The court below erred both in law and in fact when it found that the complainants under complaint No. IRD/SL/12/2017 were unionized workers in disregard of agreed evidence by the parties that the said complainants were non-unionized.*

3. *The court below erred both in law and in fact when it found that the Appellants herein attended a meeting called by the union in the absence of credible evidence regarding the existence of any such meeting or attendance by the Appellants at any such meeting.*

In the court below, the Appellants, who were the complainants asked the court to grant them the following reliefs;

(a) *A declaration that the termination of the complainants' employment was wrongful and/or unlawful.*

(b) *36 months' salary or such higher amount as the court may deem fit as damages for loss of employment.*

(c) *Damages for mental torture, distress, pain, suffering and anguish inflicted on the complainants by the Respondent.*

(d) Interest on all sums found due.

(e) Costs.

As reflected in the grounds of appeal and the heads of argument, the main thrust of the complainants' arguments in the court below, who are the Appellants in this Court is that the Respondent failed to engage in consultations with the Appellants, to prepare them for the redundancies, contrary to the Supreme Court's guidance in the case of *Chilanga Cement v. Kasote Singogo*[1] on how redundancies should be handled.

It is argued that the case establishes the law governing redundancies where the employment is governed by a written contract. They also argued that, where the contract does not set out the procedure for redundancy, then the procedure at common law is implied and ought to be followed. They relied on the learned authors of Employment Law in Zambia; cases and materials (2011) revised edition UNZA Press[1] where it is stated that:

> ***"Any contract whether written or oral will consist of at least three separate elements;***
>
> ***(b) Terms which are implied by common law..."***

After citing the above quotation, the Appellants went on to refer the Court to the enunciations in the *Chilanga Cement* case (supra) by the Supreme Court of Zambia in which it pronounced itself on the way a redundancy ought to be handled.

The Appellants further referred us to the case of *Mugford v. Midland Bank PLC*[2] which also discussed extensively the place of consultations in a redundancy. Other cases referred to are *ZCCM Investment Holding v. Cordwell Sichimwi*[3] and *Walls Meat Co Ltd v Selby*[4].

What is common with all these cases is that, they deal with the need to follow procedure in redundancy cases and that failure to do so would render the dismissal unfair.

For the Appellants in this case, their main argument is that there was no consultation between them and the Respondent prior to the dismissal rendering the same unfair.

Since the Appellants have placed so much reliance on the *Chilanga Cement PLC* case, we have taken time to read the case and it is clear to us that in that case, just like in this case, the Supreme Court was dealing with an employee, whose contract of employment contained a redundancy clause. In addressing the issues before it on appeal, the Supreme Court looked at the terms under which the Respondent served as couched in Clause 22 of his conditions of service as follows;

"The company will comply with any necessary statutory requirements and take reasonable measures to minimize the impact of such redundancies as are deemed appropriate by the company..."

In interpreting the above provision, the Supreme Court stated thus;

> ***"Our understanding of these conditions is that we do not divorce statutory requirements, but instead incorporate them...."***

The Court however, went on to find that our Employment Act did not have a provision that relates to written contracts of employment having already found in its earlier Judgment *(Barclays Bank (Z) PLC v Zambia Union of Financial and Allied Workers)* that Section 26 B of the Act only applied to oral contracts of employment.

The law therefore, as it stands in this jurisdiction is that in written contracts of employment for non-unionized employees, only redundancy clauses apply to the governance of the redundancy of such employees.

It is therefore, clear to us that the decision of the Supreme Court in the *Chilanga Cement* case was based on its interpretation of Clause 22 of the Respondent's conditions of Employment under the contract. Nowhere, in that Judgment does the Court rely on common law principles as seems to be, the Appellants arguments. It is for that reason that at page 140 line 17 of the Judgment, the Court put the matter thus;

> ***"It is our view that the appellant certainly did not honour its duty to minimize the impact of the redundancy on the respondent***

contrary to the undertaking in the conditions of service. This, in our view, was a breach of its duty."

Further at page 140 line 32, the Court stated as follows;

"The conditions of service in this case do not make provision for a redundancy to be effected through payment in lieu of notice when there has been no consultation".

The point the Supreme Court made in that case is that an employer is under obligation to adhere to the spirit of the redundancy clause in a written contract of employment. Where there is a statutory provision governing redundancy, the same shall be incorporated into the redundancy clause and if not expressly, then it shall be implied.

An employer cannot read into a redundancy clause other provisions of the contract such as a termination clause.

As regards the case of *Mugford v Midland Bank PLC*, the circumstances were different in that, it seems from the facts that Mugford was a member of a trade union with which the Bank had entered into a Security of Employment Agreement (SEA). The agreement provided for procedures to be followed in the event of compulsory redundancies becoming necessary.

The Agreement also provided for consultation with the union over redundancies but was devoid of a provision for consultation with individual employees identified for redundancy.

Upon receiving his letter of dismissal, Mr. Mugford appealed to the United Kingdom Employment Appeals Tribunal and lost, after the tribunal found that his dismissal was on account of redundancy.

The Tribunal then considered the question whether the redundancy was reasonable, pursuant to Section 57 (3) of the Employment Protection (Consolidation) Act 1978 which became Section 98 (4) of the Employment Rights Act 1996.

The provision, provided among others, for consultation with the employee before the dismissal.

After considering a number of earlier decisions on the question of consultation as provided for by statute, the Court made the following conclusions;

> ***(1) Where no consultation about redundancy has taken place with either the trade union or the employee, the dismissal will normally be unfair, unless the Industrial Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.***
>
> ***(2) Consultation with the Trade Union over selection criteria does not of itself release the employer from considering with***

the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the Industrial Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

From the above conclusions, we would hold that the position as regards consultations is a matter best left to the discretion of the trial court to decide whether lack of it was an act of unreasonableness on the part of the employer where statute so provides.

One of the decisions reviewed in the case of Mugford is that of *Duffy v Yeomans and Partners*[5] in which the so called *'Polkey'* exception was considered by the Court of Appeal and assigned to it the meaning that;

"It is not necessary for the employer to have thought at the time of dismissal that consultation would be futile; it is enough that a reasonable employer would have reached that conclusion".

The Court of Appeal then also found that consultation may take a number of forms such as engaging a union to agree on how the

redundancy should be carried out, but that usually unions would only come after the employees to be placed on redundancy have been selected. Thus the basis of the statement that has been quoted by the Appellants at page 4 of their heads of argument that;

> ***"It is in these circumstances that consultations between the employer and individuals identified for redundancy becomes important. It should normally take place before a final decision to dismiss is reached. It gives the employee an opportunity to put his case to the manager carrying out the selection so that the latter may reach a fully informed decision".***

The above statement was made in the context of both contractual and statutory provision that governed the redundancy process in that case, and the point being emphasized was that once an employee has been selected for redundancy, it becomes necessary to engage him before the final decision is made.

The Mugford case had similar provisions, hence the conclusions of the Court as cited at page 8 of this Judgment. In the case before us, the redundancy was solely governed by a contractual provision as Section 26 B of The Employment Act, does not apply to written contracts of employment.

The contractual provision on redundancy is very brief and without procedure for the process. The provision which appears on the 2nd page of each contract under the sub-title:

Death in Service through natural causes/redundancy provides as follows;

The company will give;

1. *Two months basic salary for the current contract served*
2. *Leave days accrued*
3. *Repatriation where applicable*
4. *Gratuity pro-rata*

Under the above clause, an employee who dies from natural causes and one declared redundant are treated the same and their benefits are limited to what is stated therein. The Respondent was therefore, not obliged to look elsewhere for procedure, as neither the contract nor statute provides any.

In terms of the doctrine of freedom of contract, each party is bound by the terms of the contract they have entered into voluntarily, to the extent that the same does not offend against statute and not tainted with illegality.

In his Judgment, the learned trial Judge found that, for the non-unionized employees, the redundancy was carried out in accordance with the contractual provisions and based on what we have said in this Judgment about the import of the decisions in *Chilanga Cement* and *Mugford* cases, the learned trial Judge was on firm ground. We further take the view that in the contracts of employment for the Appellants, redundancy is one way employment could be terminated and the Appellants went in fully aware of that.

It is very clear to us that all the authorities cited are in unison on the point that all redundancies should be carried in accordance with the conditions of employment and any applicable statutory provisions. Consultation is not a stand-alone criterion but will be considered in context of the conditions of employment and applicable statutory provision.

In this case, we are satisfied that the Appellants were dismissed on account of redundancy in accordance with their conditions of employment and as such their dismissals were not tainted with any unlawfulness, wrongfulness or indeed unfairness. We would accordingly dismiss ground one of appeal.

In ground two, the bone of contention is that none of the Appellants were unionized contrary to the finding by the learned trial Judge.

At page 21 line 4 of the Record of Appeal, the learned trial Judge states as follows in his Judgment;

> ***"Clearly, there are two groups of complainants who are party to the proceedings herein. There is a group of employees under Complaint No. IRD/SL/10/ 2017 who were non-unionized employees and those under Complaint No. IRD/SL/12/2017 who were unionized".***

Our perusal of the record of proceedings in the court below does not support the above finding of fact by the learned trial Judge. In fact,

quite to the contrary, RW1, the Respondent's Human Resource Manager, was very firm in cross-examination as recorded at pages 218 lines 6 to 11 and 219 lines 4 to 12 of the Record of Appeal that none of the eight Appellants was unionized. Clearly the finding of fact by the learned trial Judge is not supported by evidence on the record and we are bound to interfere with it and allow the second ground of appeal.

The third ground also attacks the Judge's finding of fact that the Appellants in fact attended a meeting called by management when there is no evidence that such a meeting was ever called. The learned trial Judge accepted RW1's evidence that the Appellants used to attend meetings between management and unionized employees despite him saying that he did not attend the meetings and as such he did not know if the Appellants were in attendance. We do not think that we can interfere with the trial Judge's finding in that regard because he believed the story given to him by the Respondent's witness.

This ground of appeal must equally fail and we dismiss it accordingly.

On the totality of what we have said, the appeal is dismissed in totality because ground two has no bearing on the outcome of the appeal as the basis of the lower court's Judgment is that the

Respondent did not violate the provisions of the conditions of employment when it dismissed the Appellants.

Each party shall bear their own costs in this Court as in the court below.

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J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE