IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 29 OF 2019

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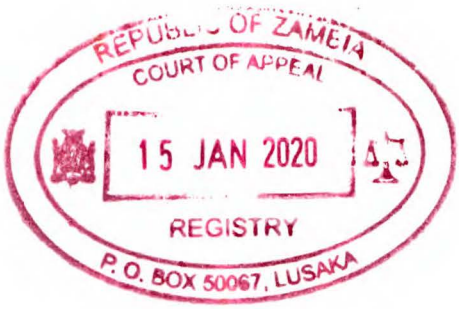

(Civil Jurisdiction)

BETWEEN:

ZAMBEZI PORTLAND CEMENT LIMITED **APPELLANT**

AND

KEVIN JIVO KALIDAS **RESPONDENT**

CORAM: Chashi, Makungu and Lengalenga, JJA

ON : 19th November, 2019 and 15th January, 2020

For the Appellant: K. Khanda, Messrs Central Chambers

For the Respondent: H. Chinene, Messrs Lumangwe Chambers

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. Malloch v Aberdeen Corporation (1971) 2 All ER, 1278
2. Contract Haulage Limited v Mumbuwa Kamayoyo (1995 - 1997) ZR, 218
3. Jacob Nyoni v The Attorney General (2001) ZR, 65
4. Swarp Spinning Mills Plc v Sebastian Chileshe and Others (2002) ZR, 23
5. Tom Chilambuka v Mercy Touch Mission International – SCZ Appeal No. 171 of 2012
6. The Minister of Home Affairs, The Attorney General v Lee Habasonda, Suing on his own Behalf And on Behalf of the Southern African Centre for The Constructive Resolution Of Disputes - SCZ Judgment No. 23 of 2007
7. William Harrington v Dora Siliya and Attorney General (2011) ZR, 253
8. Sililo v Mend-a-bath and Another - SCZ – Appeal No. 168 of 2014
9. Spectra Oil Zambia Limited v Oliver Chinyama – CAZ Appeal No. 18 of 2018

10. Barclays Bank Zambia Plc v Weston Luwi and Suzyo Ngulube – SCZ Appeal No. 7 of 2012
11. Duncan Sichula & Muzi Freight Transport and Forwarding v Catherine Mulenga Chewe – SCZ Judgment No. 8 of 2000
12. Kitwe City Council v William Ng'uni (2005) ZR, 57
13. Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Zambia PLC – SCZ Appeal No. 209 of 2004
14. Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba - SCZ Appeal No. 117 of 2016
15. Zambia Telecommunications Company Limited v Mirriam Shabwanga & 5 Others – SCZ Appeal No. 78 of 2016 and Appeal No. 81 of 2016

Legislation Referred to:

1. The Employment Act, Chapter 268 of the Laws of Zambia (as amended by Act No. 15 of 2015)
2. The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, Industrial Relations Division, delivered by Hon. Mr. Justice E.L. Musona on 19th December, 2018.

1.2 In the said Judgment, the learned Judge ruled in favour of the Respondent and awarded six (6) months basic salary as damages for unlawful termination of employment.

2.0 BACKGROUND

2.1 The brief facts giving rise to this appeal are that, on 18th August, 2017, the Appellant employed the Respondent as a Crane and Hydraulic Mechanic on a two-year fixed term contract. However, on 9th February, 2018, the contract was prematurely terminated by the Appellant pursuant to clause 10 of the contract of employment vide a letter dated 9th

February, 2018, terminating his employment with effect from 28th February, 2018.

2.2 The termination clause upon which the Appellant relied, allowed for either party to terminate the contract by giving the other, one month written notice or payment of one month full salary in lieu of such notice.

2.3 In the letter of termination, the Appellant indicated that the one months' notice would be a partial working notice and that he would be paid for the remainder of the days. The letter went on to state that the Respondent would be paid his accrued benefits.

2.4 The Respondent reacted by writing a letter to the Appellant, dated 26th February, 2018, challenging his termination on account that no reasons were furnished for his termination and that he did not receive a verbal or written warning.

2.5 In its reply, the Appellant asserted that the termination was in accordance with clause 10 of the contract of employment which provided that either party could terminate the contract by giving the other party one months' notice. Further that, the termination was not based on disciplinary grounds.

2.6 Dissatisfied with the Appellant's response and convinced that his termination was an infraction of the law, the Respondent instituted proceedings against the Appellant in the court below.

3.0 CASE BEFORE THE COURT BELOW

3.1 The claim by the Respondent was by way of a notice of complaint against the Appellant and sought the following reliefs:

(a) Damages for unlawful and unfair termination of employment.

(b) Interest on the sum due

(c) Costs

(d) Any other award the court may deem fit.

3.2 The Respondent's claim, as distilled from the evidence we have momentarily alluded to above, was that his termination was unlawful and unfair.

3.3 The Appellant filed an answer to the complaint and denied that the termination was unlawful and unfair. The Appellant maintained that the termination was lawful, as it merely exercised its contractual and legal right to terminate the Respondent's contract in line with clause 10 of the contract of employment, which gave either party the right to terminate by giving one months' notice or pay in lieu of notice.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the evidence and submissions of the parties, the learned Judge found that, section 36(1)(c) of **The Employment Act[1] (as amended by Act No. 15 of 2015)** placed an obligation on an employer to furnish an employee with valid reasons for the termination of the

employee's contract of employment and that the said provision is couched in mandatory terms.

4.2 He opined that, reliance on a termination clause in the contract of employment is not a reason but an option available to both the employee and the employer as one of the methods through which an employment relationship may come to an end. He went on to state that even where an employer is relying on a termination clause in a contract, the law requires the employer to go further and give a reason for terminating the employee's contract of employment.

4.3 The learned Judge was of the view that, in the instant case, the Appellants relied on the termination clause but did not give a reason for terminating the Respondent's employment. He found that the failure to give a reason for the termination, amounted to an unlawful termination and violated section 36(1)(c) and (3) of **The Employment Act**[1]. Based on the foregoing, the trial

Judge awarded six (6) months basic salary as damages for unlawful termination of employment.

5.0 GROUNDS OF APPEAL

5.1 It is against this decision that the Appellant launched this appeal anchored on two grounds of appeal couched as follows:

1. **That the learned Judge misapprehended the law when he awarded damages of six months with interest which are beyond the notice period as provided by the parties' contract.**
2. **The learned trial Judge misdirected himself by omitting to consider and review the Appellant's submissions and authorities cited and applying the law and authorities to the facts and distinguishing the law and authorities to those cited in the Respondent's submissions.**

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Mr. Khanda, learned Counsel for the Appellant, relied on his filed heads of argument, which he augmented with

brief oral submissions. In support of ground one, the Appellant's position was that the lower court erred when it awarded six months' salary as damages for unlawful termination. It was argued that a contract of employment is the primary source of law that governs the parties and any disputes arising out of that employment relationship. Where there is any breach of the terms of that contract as to termination, such breach can give rise only to a remedy in damages. In support of this argument, reliance was placed on the case of **Malloch v Aberdeen Corporation.**[1] Counsel further relied on the case of **Contract Haulage Limited v Mumbuwa Kamayoyo,**[2] and submitted that, payment in lieu of notice is a proper and lawful way to terminate a contract of employment.

6.2 It was further submitted that in computing damages, the Court rarely takes the remaining period of service as a basis for calculations. The case of **Jacob Nyoni v The Attorney General**[3] was called in aid for this argument.

6.3 Citing the cases of **Swarp Spinning Mills Plc v Sebastian Chileshe and Others**[4] and **Tom Chilambuka v Mercy Touch Mission International**[5], Counsel argued that, the normal measure of damages, where a contract is wrongfully terminated is the basic salary for the period for which notice should be given.

6.4 It was contended that in the instant case, the contract provided for one month salary in lieu of notice, which adequately atoned for the Respondent in damages. It was argued that, notwithstanding that reasons for the termination were not advanced, the termination was perfected by payment of salary in lieu of notice and there can be no further payments beyond that, as it would amount to unjust enrichment of the Respondent. It was contended that, the Respondent did not adduce any evidence that his employment was terminated in a traumatic fashion and as such, he was not entitled to any of the reliefs being sought.

6.5 In support of ground two, the Appellant faulted the learned trial Judge for not considering the Appellant's submissions in the court below. It was argued that had the learned Judge addressed his mind to the said submissions, he would not have arrived at the decision he did. Citing the case of **The Minister of Home Affairs, The Attorney General v Lee Habasonda Suing On His Own Behalf And On Behalf Of The Southern African Centre For The Constructive Resolution Of Disputes**,[6] Counsel argued that a trial court's Judgment must contain a review of the evidence, findings of fact, reasoning of the court and the application of the law and authorities.

Further reliance was placed on the **Tom Chilambuka case,**[5] which in Counsel's opinion is on all fours with the present case. He submitted that as long as payment in lieu of notice was paid, notwithstanding that the reason for separation from employment was not given, the

termination was perfected. The Appellant accordingly prayed that the appeal be allowed.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 The Respondent's counter argument on ground one was that, the lower court was on firm ground when it awarded six months' basic salary as damages for unlawful termination. The gravamen of the Respondent's argument under this ground is that the Appellant in effecting the termination, breached the provisions of Section 36(1)(c) and (3) of **The Employment Act**[1] as amended, which places an obligation on the employer to furnish the employee with valid reasons for the termination and it is the absence of that reason, that formed the basis of the award.

7.2 Counsel's contention was that the aforecited provisions are couched in mandatory terms by the use of the word "shall", that even where an employer has complied with the terms of the contract giving notice or payment in lieu

of notice, the absence of a valid reason negates the validity of that termination.

7.3 Counsel, further drew a distinction between the **Tom Chilambuka case**[5] relied upon by the Appellant and the current case and submitted that, the **Tom Chilambuka case**[5] occurred in 2012 before the amendment to **The Employment Act**[1] which now requires an employer to furnish the employee with valid reasons for termination of employment.

7.4 It was further submitted that, in arriving at an amount to award in damages, the court will take into account various factors, depending on the circumstances of each case. The Respondent called into aid the case of **Jacob Nyoni v The Attorney General**[3].

7.5 In reacting to the argument advanced in regard to ground two, the Respondent defended the position taken by the trial Judge and submitted that the Appellant's arguments in the court below were misdirected and as such the lower court found it unnecessary to consider them. We

were referred to the case of **William Harrington v Dora Siliya and Attorney General**[7] where the Supreme Court held as follows

> *"(1) A trial or appellate Court is at liberty not to rule on the issue raised before it, if it is of the view that ruling on such an issue is unnecessary, or would go beyond what needs to be adjudicated."*

7.6 It was submitted that, what fell for determination before the lower court was the unlawful termination in light of the amendment to the provisions of section 36 of **The Employment Act**[1] and not to determine the case law prior to the amendment.

We were urged to dismiss the appeal and uphold the award of six months' salary as damages.

8.0 ARGUMENTS IN REPLY

8.1 The Appellant in reply, essentially repeated the arguments contained in the Appellant's heads of argument and added that the issues raised in this appeal were necessary and relevant as they were premised on

the Appellant's submissions in the lower court, which submissions were disregarded by the lower court. Counsel relied on the case of **Sililo v Mend-a-bath and Another**[8] for the argument that a trial court has the prerogative to determine which submissions are relevant and useful.

9.0 DECISION OF THIS COURT

9.1 We have considered the record, the impugned Judgment and the arguments of the parties and the authorities cited therein.

9.2 It is common cause that the employment of the Respondent was governed by the contract of employment executed by the parties. The said contract provided for termination by one months' notice or payment of one month full salary in lieu of such notice. It is also clear that in the termination letter, the Appellant relied on the termination clause and did not furnish the Respondent with any reason for such termination. It is for this reason

that the lower court found that the termination was in contravention of section 36(1)(c) and (3) of **The Employment Act**[1]as amended. As a result, the lower court held the opinion that the Respondent's service was unlawfully terminated and he was entitled to damages.

9.3 In processing the damages, the lower court had regard to the fact that the employer violated the law, it therefore considered it fit in the circumstances, to award the Respondent six (6) months' basic salary with interest.

9.4 The question for determination in this appeal, as we see it, is quite simple; we say this because there is no dispute that the Respondent's contract of employment was unlawfully terminated by the Appellant. The Appellant is merely contesting the quantum of the award and whether the learned trial Judge was justified in departing from the normal measure of damages.

9.5 The kernel of the Appellant's argument is that, in cases of unlawful termination, the payment in lieu of notice

perfects the termination and that in the instant case, the Respondent is not entitled to any damages, as he was paid in lieu of notice and that perfected the termination. On the other hand, the Respondent maintains that his termination was unlawful as he was not furnished with valid reasons for his termination which is an infraction of the law and as such the award of six months' basic salary was appropriate.

9.6 In order for us to determine whether the award by the lower court was appropriate, there is need to consider the law on the measure of damages in cases of unlawful termination.

9.7 The general rule is that the normal measure of damages is usually calculated based on the contractual notice period provided in the contract of employment. However, this general rule has some exceptions. The Supreme Court has in a number of its decisions, awarded damages above and beyond the contractual notice period where there is loss of employment opportunities or where the

employee has suffered inconvenience and distress as a result of the loss of employment. In the case of **Swarp Spinning Mills Limited v Sebastian Chileshe and Others**[4] the Supreme Court held as follows:

> *"In assessing damages, to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering..."*

9.8 The question we ask ourselves is whether the circumstances of this case justified the departure from the normal measure of damages. Our answer is in the affirmative. As we have stated above, the Appellant was

employed in 2017, way after the amendment to **The Employment Act**[1] was effected. In our view, Section 36(1)(c) and (3) of **The Employment Act**[1] is very clear and unequivocal that it is a legal requirement that every employer who terminates the employment of an employee, must furnish the employee with valid reasons. The aforecited provisions are clear as day and it is therefore, not enough for the Appellant to merely give notice.

9.9 It appears to us that, the Appellant was well aware of the amendment to the law and flagrantly disregarded the provisions of **The Employment Act**[1] and proceeded to effect termination without furnishing the Respondent with valid reasons, even after the Respondent inquired on the reason for his termination and as a result, the Respondent's employment came to an abrupt end, after serving just five months of the two year fixed contract.

9.10 We were faced with a similar situation in our recent decision in the case of **Spectra Oil Zambia Limited v**

Oliver Chinyama[9], in which the employer terminated the contract of employment without furnishing the employee with a valid reason as stipulated by section 36(1)(c) of **The Employment Act.**[1] In that case, this Court considered the case of **Barclays Bank Zambia Plc v Weston Luwi and Suzyo Ngulube**[10] and the case of **Duncan Sichula & Muzi freight Transport and Forwarding v Catherine Mulenga Chewe**[11] on the measure of damages. In the latter case, the Supreme Court held as follows:

> *"An Appellate court should not interfere with the award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled"*

Based on the foregoing cases, we upheld the lower court's decision to award 12 months' salary as damages and took the view that it was not inordinately high.

9.11 In the present case, we are of the view that the trial court did not misapprehend the facts or apply a wrong principle. We do not think that the award of six months' basic salary as damages for unlawful termination of employment, was inordinately high or so low as to be utterly unreasonable or to be entirely a wrong estimate of the damages to which the Respondent is entitled. The circumstances and the justice of this particular case demand a departure from the normal measure of damages. We find no merit in ground one of the appeal and it accordingly fails.

9.12 Coming to the second ground of appeal, which is that the learned trial Judge misdirected itself by omitting to consider and review the Appellant's submissions and the authorities cited and applying them to the facts of the case. It is a well established principle of the law that a

court is not bound by the submissions of the parties. In the case of **Kitwe City Council v William Ng'uni**[12], the Supreme Court held as follows:

> *"The court is not bound to consider counsel's submissions because submissions are only meant to assist the court in arriving at a Judgment."*

It is clear at page J6 of the Judgment that the learned trial Judge considered both the Appellant and the Respondent's submissions. However, as stated in the above case, the court is not bound by Counsel's submissions, as they are merely to assist the court in arriving at its decision. The Appellant's argument that the lower court erred by not reviewing the Appellant's submissions and applying them to the facts is flawed. The lower Judge was on firm ground in the manner he decided the case. Ground two fails.

9.13 The other issue, though, not raised by the Appellant, is the award of costs to the Respondent. We also note that

both parties have asked for costs in the appeal. Rule 44(1) of **The Industrial and Labour Relations Act**[2] dealing with costs provides as follows:

> *"44. (1) Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexations or unnecessary steps in any proceedings, or of other unreasonable conduct, the Court may make an order for costs or expenses against him."*

9.14 Further, the Supreme Court has in its recent decisions such as **Zambia Union of Financial Institute and Allied Workers v Barclays Bank Zambia PLC**[13] and **Engen Petroleum Zambia Limited v Willis Muhanga and Jeromy Lumba**[14] discussed the issue of costs and Rule 44(1) of **The Industrial and Labour Relations Act**[2]. In the latter case, the Supreme Court had this to say:

> *"The general rule is that costs are awarded in the discretion of the Court. In matters decided in the*

Industrial Relations Division, however, Rule 44(1) of the Industrial and Labour Relations Act, provides the circumstances in which the IRC may make an order for costs against a litigant...The effect of this rule is that the IRC can only make an order for costs against a litigant if he/she has been guilty of unreasonable delay, or has taken improper, vexatious or unnecessary steps in the proceedings or is guilty of other unreasonable conduct..."

The Supreme Court then went on to state that in the case of **Zambia Telecommunications Company Limited v Mirriam Shabwanga & 5 Others**[15], it explained the rationale behind Rule 44(1) of **The Industrial and Labour Relations Act**[2] as follows:

"The rule restricts the discretion of the IRC in the award of costs to instances specified in the rule. The IRC was established as an Employment Tribunal and the Rules were intended to guard against the abuse of court process through unreasonable delays,

unnecessary or vexatious application while ensuring that genuine litigants are not discouraged from asserting rights on account of cumbersome rules of evidence and litigation costs to which they could be condemned."

9.15 In light of the holding in the above case and taking into account the facts of this case, there is nothing to suggest that the Appellant is guilty of unreasonable delay, or has taken improper, vexatious or unnecessary steps in the proceedings or is guilty of other unreasonable conduct that would warrant costs being ordered against it. Neither did the learned Judge in the court below proffer any explanation for awarding costs to the Respondent.

Therefore, the award of costs to the Respondent is set aside and we order that each party bears its own costs.

10.0 CONCLUSION

10.1 For the reasons stated above, this appeal is devoid of merit and it is accordingly dismissed. Parties shall bear

their respective costs in this Court and in the court below.

J. CHASHI
COURT OF APPEAL JUDGE

C.K. MAKUNGU
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE