IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 021/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

LINOS MABVUTO NCHENA **APPELLANT**

AND

RUSANGU UNIVERSITY **RESPONDENT**

Coram: Mchenga, DJP, Chishimba and Majula, JJA

On 27th June 2018, 6th July 2018 and 12th April 2019

For the Appellant: No Appearance

For the Respondent: Fitzgerald Muchindu, Public Relations Officer

---

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. **Moses Choonga v ZESCO Recreation Club, Itezhi-Tezhi SCZ Appeal No. 168/2013**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited 1982 ZR 17**
3. **London Transport Executive v Clarke [1981] LRLR 166,**

Legislation referred to:

1. **The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia**
2. **The Employment Act, Chapter 268 of the Laws of Zambia**

Works referred to:

1. **Halsbury's Laws of England, Volume 9(1), Eth Edition**
2. **Selwyn's Law of Employment, 14th Edition, Oxford University Press**

This appeal is against the decision of the Industrial Relations Division of the High Court, dismissing the appellant's complaint that he was unlawfully dismissed from employment and is entitled to the payment of specified terminal benefits.

The facts of the matter are that on 1st October 2011, the appellant was employed as a lecturer by the respondent. On 10th July 2014, he wrote to the respondent asking for study leave from 26th August 2014, indicating that he intended to pursue studies in Sweden. He left for Sweden before his employer's response to the request.

Over a year later, on 1st September 2015, the appellant turned up and requested that the respondent "re-install" him as a lecturer, having returned from Sweden. On 22nd September 2015, the respondent informed the appellant that he could only be appointed as a part-time lecturer. Through two contracts, he worked from September 2015 and November 2015. Following complaints by students that he was not attending lectures, his employment was terminated.

The appellant lodged a complaint in court seeking a declaration that the termination of his employment was unlawful because it was in breach of the law and the respondent's disciplinary code. He also sought the payment of holiday allowance, redundancy pay, notice time, repatriation, leave pay and interest.

According to the appellant, his employment by the respondent from 1st October 2011 to 27th January 2016, was governed by the respondent's SID Working Policy. Following the termination of his employment, he was entitled to repatriation allowance, severance pay and payment for leave days he had accumulated, as outlined

in the SID Working Policy. He said he was entitled to K63,560 as service severance allowance, K3,972.50 as repatriation pay and K63,543.63 as notice time allowance. He was only paid K9,000.00.

The trial judge held that the appellant ceased to be a full-time lecturer in 2014, when he left for Sweden before he was granted leave. On his return, he was not reinstated or re-employed as a full-time lecturer, but employed as a part-time lecturer. He was given two separate fixed term contracts, one for a month, in August and the other for three months, from September to November.

He held that the SID Working Policy, on which the appellant premised his claims, was not applicable to him because he was a part-time employee. The working policy was for full-time employees. As a result, other than the K9,000.00 paid to him under the fulltime contract terminated in 2014, he was not entitled to a severance allowance as the part-time contract under which he was employed did not provide for it. For the same reasons,

he was not entitled to holidays, repatriation and redundancy payment.

The trial judge also held that the appellant was not entitled to be paid any leave days. He accepted the respondent's evidence that the leave days he accumulated in 2012, 2013 and 2014, when he was in full time employment, were paid to him.

Coming to his claim for interest, the trial judge held that he was not entitled to interest on the K9,000.00, because the delay in paying him was as a result of his failure to comply with clearing formalities. Finally, he held that he was not entitled to damages for short notice because he was a part-time lecturer.

The appellant has advanced 6 grounds in support of the appeal. From what we can discern from the arguments in their support, they raise the following issues:

1. the erroneous holding that his fulltime employment contract was terminated when he left for Sweden;

2. the failure to deal with his claim that the termination of his contract of employment was unlawful;
3. the erroneous holding that he was not entitled to repatriation pay, severance allowance, leave pay and notice pay; and
4. the erroneous holding that he was not entitled to payment of interest on the delayed payment of his terminal benefits.

The appellant did not appear at the hearing, having filed a notice of non-appearance in which he indicated that he would entirely rely on the heads of arguments he had filed.

In support of the argument that the holding that his fulltime contract was terminated when he left for Sweden, the appellant pointed out that the only termination letter he received was that written to him by the Vice-Chancellor dated 27th January 2016. The letter indicates that his employment was only terminated in 2016 and not in 2014, as held by the trial judge.

The appellant referred to the case of **Moses Choonga v ZESCO Recreation Club, Itezhi-Tezhi**[1], and **Halsbury's Laws of England, Volume 9(1), 4th Edition**, paragraph 701, and submitted that the respondent's having taken no action when he allegedly left for Sweden without permission, must be taken to have granted him leave. They cannot, now claim that he absconded. He also referred to the case of **Masauso Zulu v Avondale Housing Project Limited**[2] and urged us to set aside the holding because it is not supported by evidence.

In response to this argument, the respondents submitted that the appellant ceased to be a full-time employee when he left without leave in 2014. That is why on his return, he was granted part-time employment.

In the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2], it was held, inter alia, that:

> **"The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts."**

In support of his claim that he remained in full time employment up to 2016, the appellant referred to the Vice-Chancellor's memo dated 26th January 2017. That letter makes it clear that it was written following a recommendation from the Labour Office that he be given a redundancy letter. In any case, one cannot determine the status of the appellant's employment by only considering the contents of this letter. It must be considered in light of all the circumstances of the case and the other evidence that was before the trial judge.

There is evidence that following the appellant's return from Sweden, the appellant, on 1st September 2015, applied for "re-installation" as a lecturer. On 22nd September 2015, he was offered employment, not as a full-time lecturer, but on a part time basis. It is inconceivable that the appellant would have been required to reapply and end up with a part time appointment, if his 2011 appointment was still running on his return. Further, there is no plausible explanation for why he could have signed up to a part-time job with the same employer, if his 2011 contract was still running.

In the face of this evidence, it cannot be said that the trial judge's holding that the appellant's full-time employment terminated when he left for Sweden was not supported by evidence or was perverse. We find that the finding was in fact, supported by the evidence.

Coming to the argument that the trial judge failed to adjudicate on the legality of the termination of his employment, the appellant first pointed out that the claim was premised on two separate contracts of service. The part-time contract of employment terminated on 5th November 2015, and the full-time contract of service terminated on 20th January 2016.

According to the appellant, the illegality associated with the termination of the part-time contract was that he was not being paid his monthly dues on time. As a result, he did not have the means to travel to deliver his lectures as he was not staying on campus. He referred to **section 48(2) of the Employment Act**, which he said required the respondent to pay him within 5 days of the end of each month.

As regards the full-time contract, the appellant argued that following the respondent's failure to pay him on time, he lodged a complaint with the Labour Office in Choma. In response to that complaint, the respondent decided to terminate his employment.

He then referred to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] and submitted that there was misdirection when the trial judge failed to examine the circumstances in which his contracts were terminated and find that it was unlawful.

In response to this ground of appeal, it was argued that that adjunct contract was lawfully terminated because he was absenting himself and there where complaints. As for the full-time contract it was terminated because he left without obtaining leave.

We will start with the full-time contract. We have already indicated that the trial judge rightly held that it was terminated when he left for Sweden without permission. In the case of **London Transport Executive v**

Clarke[3], an employee wanted to go on leave but the employer declined to allow him. The employee still proceeded even after being informed that he would be removed from the register. He stayed away for a period of seven weeks. While away, the employer wrote him and informed him that he would be assumed to have given up his job, if he did not respond within a specified period, he did not and his name was removed from the register.

On his return, the employee applied for his job and when it was not given to him, he sued for unfair dismissal. His employers argued that he had resigned, but this was rejected. The Court of Appeal found that he had not resigned but was dismissed. The dismissal was also found to have been fair.

Commenting on the rational for the finding that the dismissal had been fair, the authors of **Selwyn's Law of Employment, 14th Edition**, at paragraph 17.53, observed as follows:

> **"Thus if an employee walks out of his job, or commits any other breach of contract, but nonetheless claims**

> **that he is entitled to resume his work, the employer must expressly or impliedly accept the repudiation, and this will constitute a dismissal. He must then satisfy the employment tribunal that in the circumstances, having regard to the equity and substantial merits of the case, he acted reasonably in treating the repudiatory conduct as sufficient reason for dismissing the employee.**

In this case, the appellant applied for leave and despite it not being granted, he went away for a period of over a year. On his return he was offered a lesser job, which in our view, is indicative that as of September 2015, his 2011 contract had been terminated. In other words, he had been dismissed from employment. The question that follows is, was the dismissal justified?

Despite holding that the appellant's contract came to an end following his departure, the trial judge made no pronouncement on the lawfulness of its termination. This was a misdirection because it was one of the appellant's claims. Notwithstanding, we find that on the evidence that was before him, had he addressed the issue, he would have come to the conclusion that the appellant's absconding, for a period of over one year, was sufficient

reason for the respondent dismissing him. We find that there is no evidence supporting the claim that his employment was unlawfully terminated.

Coming to the part-time contract, his argument is that the SID Working Policy was not complied with when it was terminated. As the trial judge rightly held, there was nothing unlawful with the termination of the second part-time contract because it was a 3 months fixed term contract. Being a part-time contract, the legality of its termination can not be determined using the SID Working Policy.

Consequently, we find no merit in the argument that the trial judge erred when he failed to find that his employment was unlawfully terminated.

As regards the argument that it was erroneous for the trial judge to find that he was not entitled to repatriation pay, severance allowance, leave pay and notice pay, the appellant referred to **section 48(4) of the Employment Act** and argued that the law required that

he be paid wages and allowances on the termination of the contract. Severance allowance, repatriation allowance and leave wages were not paid as is required by **section 15 of the Employment Act.**

He also referred to his termination letter dated 27th January 2016, which indicated that he would be paid terminal benefits in accordance with the SID Policy. He submitted that going by the SID Policy, severance allowance, repatriation allowance and leave wages, were payable on termination. He then referred to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** and submitted that the holding that he was not entitled to these allowances be set aside because it was perverse

He urged us to set aside the trial judge's holdings and hold that he is entitled to K63,560 as service severance allowance, K3,972.50 as repatriation pay and K63,543.63 as notice time allowance.

In response to this argument, the respondent submitted that the appellant ceased to be a full-time employee when

he left without leave in 2014. Being a part-time employee, the SID Policy he now seeks to rely on was not applicable to him. In any case, all that was due to him was paid.

We have already indicated that the trial judge rightly held that the appellant was serving under a three months fixed term contract the last time he worked for the respondent. That being the case, the trial judge rightly held that he was not entitled to repatriation pay, severance allowance, leave pay and notice pay, as those claims where only available to a person in full time employment.

The last argument related to the payment of interest on the delayed terminal benefits. The appellant pointed out that the claim was limited to the period 201th January 2016 to 22nd March 2016. He referred to **section 48(2) of the Employment Act** and submitted that the law was breached because he was not paid within 5 days as was required by the law.

In response to this argument it was submitted that termination allowance must undergo the clearance process before such payment. The appellant left without clearance, not withstanding, they paid him even if he did not clear.

We yet again find that the trial judge was correct when he held that the appellant was not entitled to the claim because it was on account of his default. Despite not triggering the clearing process, which was a requirement for the payment to be processed, the appellant went ahead and still paid him.

Having dismissed all the appellant's arguments in support of the appeal, this appeal fails and it is dismissed.

Costs to the respondent.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
F.M. Chishimba
COURT OF APPEAL JUDGE

.....
B.M. Majula
COURT OF APPEAL JUDGE