

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

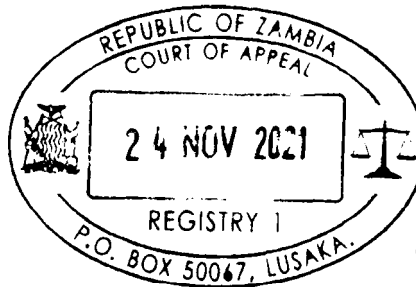
APPEAL No. 37/2020

B E T W E E N:

ZESCO LIMITED

AND

EDWARD ANGEL KAHALE



APPELLANT

RESPONDENT

Chishimba, Majula and Siavwapa, JJA
On 21st October 2021 and 24th November, 2021

For the Appellant: Mr. K. Mweemba – Legal Officer & Mrs. Jane Kunda – Principal Legal Officer.

For the Respondent: In Person

JUDGMENT

MAJULA JA, Delivered the Judgment of the Court

Cases referred to:

- 1. David Chiyengele, Charles Chingumbo & 4 others vs SCAN Limited (SCZ No.2 of 2017).*
- 2. Josephat Lupemba vs First Quantum Appeal 120/2017.*
- 3. Chilanga Cement Plc vs Kasote Singogo (SCZ Judgment No.13 of 2009).*
- 4. Swarp Spinning Plc vs Sebastian Chileshe & Others (2002) ZR 23.*
- 5. ZESCO vs Salim Banda SCZ No.211 of 2013.*

6. *Malconi Morgan Walubita vs Permanent Secretary Ministry of Finance*
Selected judgment No.37/2018.
7. *Dennis Chansa vs Barclays Bank (SC Appeal No. 111/2011).*
8. *Chintomfwa vs Ndola Lime Company Limited (1999) ZR 172*
9. *Kawimbe vs The Attorney-General (1974) ZR.244.*
- 10 *ZESCO Limited vs Richard Phiri & Others Appeal No.87 of 2009.*
- 11 *Rosemary Ngorima & 10 Others vs Zambia Consolidated Copper Mines*
Appeal No.97 of 2000.
- 12 *Colgate Palmolive (Z) Inc vs Shemu & Others Appeal No.11 of 2005.*
- 13 *Nkhata & Others vs the Attorney General (1966) ZR 124.*

1.0. INTRODUCTION

- 1.1 This appeal stems from a decision rendered in the High Court against the appellant. The matter revolves around a contract of employment wherein the court below found that the appellant had wrongfully dismissed the respondent and proceeded to award him 24 months damages beyond the normal measure. The appellant, aggrieved with this turn of events, has approached us by way of appeal.

2.0 BACKGROUND

- 2.1 The brief background is that the respondent was employed on 18th November, 2007 and declared redundant on 18th July, 2016 pursuant to clause 18 of the Power Generation and Allied Workers Unions of Zambia, (POWAGUZ) Conditions of Service for the represented staff.

2.2 During the course of his employment, he pursued a number of courses and rose through the ranks from electrician to Faults Coordinator. Amongst his achievements was being awarded the most customer focused employee on 15th April, 2016. He went on annual leave on 18th July, 2016. Upon his return, he was shocked to receive a letter of separation by way of redundancy from the appellant.

2.3 This is what triggered a complaint being filed in the Industrial Relations Division of the High Court. The following were the reliefs claimed:

- (a) An order that the purported separation by way of redundancy amounted to dismissal.
- (b) An order of reinstatement and in the alternative.
- (c) Damages for wrongful, unfair and unlawful termination,
- (d) Damages for breach of contract.
- (e) Punitive Damages.
- (f) Damages of mental stress.
- (g) An order that the Respondent reimburses the 'tax' deducted from the terminal benefits,
- (h) Reimbursement of compassionate and scheme 'Stanchart' loan deducted contrary to note no.2 under clause 18 of conditions of service,
- (i) Any other relief the court may deem fit,
- (j) Interest and
- (k) Costs.

3.0. DECISION OF THE COURT BELOW

- 3.1 After interrogating the evidence on record the court formulated the issue for resolution as being whether the respondent's employment with the appellant was a redundancy and whether the said redundancy was effected in accordance with the law and laid down conditions of service. The court examined the POWAGUZ - Collective Agreement and concluded that the respondent was declared redundant regard being had to clause 18.
- 3.2 The Court further found that *"..... the respondent paid the complainant three (3) months' salary in lieu of notice. It is the considered position of this court that failure to give notice of redundancy by the respondent, cannot be cured by payment in lieu of notice."*
- 3.3 In addition, the court found that the respondent's employment was unlawfully terminated by the appellant and ordered that the latter pay the former twenty four (24) months' salaries as damages.
- 3.4 The other claims were unsuccessful and consequently dismissed.

4.0. GROUNDS OF APPEAL

- (i) The court below erred in law and fact when it awarded the respondent herein damages of 24 months' salaries way above and beyond the normal measure for awarding

damages as stated in decided cases without giving reasons for such an excessive award.

- (ii) The court below erred in law and fact when it found that payment in lieu of notice of the respondent herein did not have the same effect as giving him a notice of a pending redundancy.

5.0 APPELLANT'S ARGUMENTS

5.1 On the first ground of appeal, Counsel submitted that the award of 24 months' salaries as damages was beyond the normal measure for awarding damages as stated in decided cases.

5.2 That the award was made despite the fact that the respondent was paid his terminal benefits and other dues. It was argued that there was therefore, no damage proved to the lower court. Our attention was drawn to the case of **David Chiyengele, Charles Ching'ambo & 4 others vs SCAN Limited¹** where it was held:

"In cases of this nature, a Claimant needs to prove that they were entitled to damages or compensation for loss of employment beyond what they received in the redundancy package."

5.3 It was further submitted that the award of 24 months' salaries was arbitrary and against established principles of law in awarding damages. To buttress his argument Counsel referred the Court to the holding of the Supreme Court in

Chilanga Cement Plc vs Kasote Singogo³ where it was stated that the measure of damages for loss of employment is normally the period of notice although the court can go beyond in deserving cases.

- 5.4 Further recourse was made to the case of **Swarp Spinning Plc vs Sebastian Chileshe and Others**⁴ where it was held that the normal measure of damages may be departed from where the termination was inflicted in a traumatic fashion which causes undue distress or mental suffering.
- 5.5 Counsel contended that in this case there was no evidence that the termination was inflicted in a traumatic fashion which caused undue stress and mental suffering to the respondent.
- 5.6 Turning to ground two, Counsel observed that it was brought to the attention of the court below that the appellant and the respondent had conditions of service that governed their employment relationship. Clause 18 in particular provided for three months' notice or payment of three months' salaries in lieu of notice to an employee to be declared redundant.
- 5.7 Counsel contended that it was therefore an error on the part of the lower court to hold that payment in lieu of notice to the respondent did not have the same effect as giving him notice of a pending redundancy.
- 5.8 We were called upon to allow the appeal.

6.0. RESPONDENTS ARGUMENT

- 6.1 In the Respondents heads of arguments he outlined seven grounds in response to the Appellant's grounds of appeal. We must hasten to point out that in our view, they were not couched in the manner and format expected by the court as they contained narratives and some amounted to a cross appeal. We have considered them in so far as is relevant to the appeal.
- 6.2 In a nutshell the respondent is emphatically asserting that the trial Judge was on firm ground in finding in his favour and awarding him 24 months' salaries as damages.
- 6.3 He called in aid several cases including ***Joseph Chintomfwa vs Ndola Lime Company Ltd, Chilanga Cement PLC vs Kasote Singogo, Swarp Spinning Mills Ltd vs Sebastian Chileshe and Others.***
- 6.4 These cases are an illustration of when a court can depart from the normal measures of damages.
- 6.5 All in all it was the respondent's view that the appeal was bereft of merit and should be dismissed with costs.

7.0 HEARING OF APPEAL

- 7.1 At the hearing of the appeal on 21st March, 2021, Counsel for the appellant, Mr. Mweemba, placed reliance on the heads of

argument filed on 23rd March, 2020. He however abandoned the 1st limb of the argument that was raised in ground one.

- 7.2 He went on to draw the court's attention to the case of **Josephat Lupemba vs First Quantum²** where we had stressed the need for a trial court to state the reasons or facts taken into account when departing from the common law measure of damages. The case of **Chilanga Cement vs Singogo³** was called in aid which earlier articulated the same principle.
- 7.3 The contention by Counsel was that in this particular case the court below departed from this principle when it awarded 24 months salaries without stating the reasons for doing so.
- 7.4 Further that no evidence was led that the respondent had encountered difficulties or was struggling to find another job. He pointed out that in the case of **Swarp Spinning Mills vs Chileshe & Others⁴** the Supreme Court awarded six months salaries on account of the fact that the respondents had suffered mental anguish. On account of the foregoing arguments he was of the view that the award of 2 years was unreasonable and totally erroneous and should be reversed.
- 7.5 Turning to the second ground, Mrs. Kunda insisted that notice was given to the respondent and that a contractual relationship subsisted between the parties. To strengthen her argument on payment in lieu of notice, she referred us to the

cases of **ZESCO vs Salim Banda⁵** and **Malcon Morgan Walubita vs Permanent Secretary Ministry of Finance.⁶**

- 7.6 She concluded by stating that the case of **Salim Banda⁵** was on all fours with arguments advanced. In addition the respondent did not provide any evidence of people being engaged in his position.
- 7.7 In response the respondent, Mr. Kahale equally placed reliance on his heads of arguments and authorities filed.
- 7.8 In augmentation he stated that notwithstanding the fact that the court below did not categorically outline the reasons for the departure from the normal measure of damages, pages 14 – 15 clearly disclose the reasons why the Judge condemned the manner in which his job was terminated.
- 7.9 From his viewpoint, he suffered damages and the trial Judge was on firm ground in finding in his favour. He pinned his faith on the case of **Josephat Lupemba vs First Quantum²**. On the circumstances when a court can depart from the normal measure of damages, he spiritedly argued that we should substitute the award of 24 months with 36 months. It was urged upon us to dismiss the appeal with costs for being devoid of merit.

8.0 OUR DECISION

- 8.1 We have carefully scrutinized the evidence on record, the arguments by the parties as well as the cases relied upon.

8.2 In the first ground of appeal, the grievance by the appellant emanates from the award of damages which was 24 months' salaries. According to the appellant, this was way above and beyond the normal measure and there were no reasons assigned for such a hefty amount.

8.3 There are multitude of cases on the award of damages. It is settled that in contracts of employment the common law remedy for wrongful termination is the notice period. However, each case must be decided on its own merit. There are a number of instances where the court have gone beyond the normal measure of damages based on the circumstances of the case. In the celebrated case of **Chilanga Cement vs Kasote Singongo**³ for instance, the respondent was awarded 36 months' salaries as compensation for abrupt loss of a job. The Supreme Court examined the manner in which his job terminated and were greatly displeased with the harsh and inhumane manner in which he had been treated. Their displeasure was communicated in the following terms:

“Hopeless and weak employees like the respondent need to be protected from the whims and caprices of powerful elements in the large conglomerates such as the appellant, who might be tempted to use their positions to antagonize employees.”

8.4 Another insightful decision is that **Dennis Chansa vs Barclays Bank**⁷ where the award of 36 months was upheld on account of dim job prospects. The apex court observed that:

“The rationale is that as the global economies deteriorate, 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.”

- 8.5 In an earlier case of ***Chintomfwa vs Ndola Lime***⁸ where two years was awarded as damages the rationale was also based on grim job prospects.
- 8.6 It is clear from the foregoing that the courts are inclined to depart from the normal measure of damages if they are of the view that exceptional circumstances exist, such as the manner in which the termination was effected and in addition consideration may be had to the scarcity of jobs.
- 8.7 It is significant to note that award of damages are at the discretion of the court and we are not at liberty to interfere with the findings of the trial court in this regard unless the discretion was not exercised judiciously.
- 8.8 In this case the court did not reveal its mind as to why it departed from the normal measure of damages. In arriving at our decision we recall the case of ***Kawimbe vs The Attorney-General***⁹ where it was held that:

“An appellate court should not interfere with the finding of a trial court as to the amount of damages ‘merely because they think that if they had tried the case in first instance they would have given a lesser sum’ (Greer, L.J in Flint Lovell (3). Before this court will interfere it must be shown that the trial court has

applied a wrong principal or has misapprehended the facts or that the award was so high as to be utterly unreasonable.”

8.9 The question that begs an answer is, is this such a case which requires our interference? Did the trial court apply a wrong principle or misapprehend the facts or is the award too high as to be utterly unreasonable?

8.10 It is our standpoint that the court below did go against the established principle of law in awarding damages. We stand by what we said in **Josephat Lupemba vs First Quantum Mining and Operations Limited²**:

“It is a requirement that the trial Judge gives reasons for awarding a measure of damages, either as the period of notice, when the award is within the common law measure or justification for award if it exceeds the common law measure as was the case in this case.”

8.11 In the **Chilanga vs Singogo³** case there was evidence led to show how badly treated the employee was and it was those circumstances which were traumatic that the court was compelled to go beyond the normal measure.

8.12 Equally in the case of **Swarp Spinning Plc vs Sebastian Chileshe & Others⁴** the court took a dim view of the manner in which the employees were treated, and they opined that:

“The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which cause undue distress or mental suffering.”

8.13 In the absence of evidence of exceptional circumstances to warrant departure from the normal measure and the award of 24 months, in our view, is therefore unjustifiable. On the basis of the foregoing we are compelled to interfere with the award. We therefore, find merit in the 1st ground of appeal and uphold it.

8.14 The unhappiness in the second ground of appeal stems from the lower court's judging that a payment in lieu of notice did not have the same effect as giving him notice of pending redundancy.

8.15 It is not in dispute that the employment relationship between the parties was governed by the POWAGUZ conditions of service. Therefore it is imperative that we address our minds to what terms and conditions were obtaining. In this regard clause 18 of the said agreement is instructive, and provides as follows:

"6. Notice of Redundancy

The company shall give three (3) months' notice or payment of three (3) months' basic salary in lieu of notice to an employee to be declared redundant"

8.16 Our understanding of the above provision is that it is either the giving or the payment of the three month's that serves as the notice. This is what the parties signed up for and agreed that reasonable notice of three months or payment could lawfully terminate the contract of employment.

8.17 Concerning contracts of employment the general principle is that parties are bound by whatever terms and conditions they set out for themselves – see **ZESCO Limited vs Richard Phiri & Others**¹⁰, **Rosemary Ngorima & 10 Others vs Zambia Consolidated Copper Mines**.¹¹ As courts we are bound to enforce contracts which have been freely and voluntarily entered into by contracting parties as articulated in **Colgate Palmolive (Z) Inc vs Shemu & Others**.¹²

8.18 In this case the parties, having agreed to the giving of notice, are bound by the agreement and we are obliged to enforce the agreement. The court below fell into error by finding that a payment in lieu of notice to the respondent did not have the same effect as giving him a notice of a pending redundancy.

8.19 We are fortified in setting aside this finding on the basis of the case of **Nkhata & Others vs the Attorney General**¹³ which stipulates when an appellate court can interfere. It was held in **Nkhata** (*supra*) as follows:

“A trial Judge sitting alone without a Jury can only be reversed on question of fact if (1) the Judge erred in accepting evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the Judge did not take proper advantage of having seen and heard the witness (4) external evidence demonstrates that the Judge erred in assessing the manner and demeanour of the witness.”

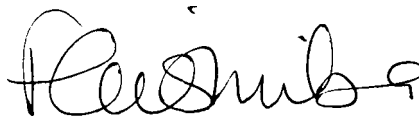
8.20 There is clearly a misapprehension of the law in this instance.
We accordingly find merit in ground two and uphold it.

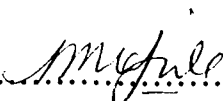
9.0. CONCLUSION


9.1 Having found merit in both grounds of appeal we order as follows:

1. That the award of 24 months be set aside and in its place we award 3 months.
2. That payment in lieu of notice has the same effect as giving notice of pending redundancy, as provided for under clause 18 of POWAGUZ agreement.

9.2 Each party to bear their own costs.


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


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


.....
M.J. Siavwapa
COURT OF APPEAL JUDGE