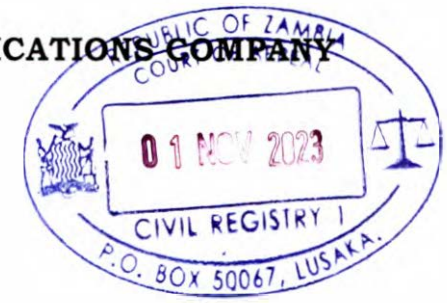
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO./131/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED **APPELLANT**



AND

JOSHUA MUKWAILA **RESPONDENT**

Coram: Siavwapa, JP, Chishimba and Banda-Bobo, JJA
On 13th June, 2023 and 1st November, 2023.

For the Appellant: Ms. C. Chibabwe – In-house Counsel

For the Respondent: Mr. K. Kaunda of Messrs Kaunda and Kaunda Legal Practitioners

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JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. *Zambia Telecommunications Company Limited v Eve Banda- (Appeal No.2 of 2017 (CAZ)*
2. *The Attorney General v D.G. Mpundu (1984) ZR 6*
3. *Chilanga Cement Plc v Kasote Singogo (SCZ/ 13/2009)*
4. *Savenda Management Services v Stanbic Bank Zambia Limited-(Selected Judgment No.10 of 2018)*
5. *Swarp Spinning Miles PLC v Chileshe and Others (2002) ZR 1*
6. *Bank of Zambia v Kasonde, (1995-1997) ZR (SC)*
7. *The Hannah Blumenthal (1983)1 AC 854*
8. *Smith V. Hughes (1871) LR 6 QB 597*
9. *Printing and Numerical Registered Company v Simpson*

Other works referred to:

1. *G H Treitel, the Law of Contract, 7th Edition, Steven and Sons*

1.0. INTRODUCTION

1.1 This is an appeal against the Judgment of the Honourable Mr. Justice E. Mwansa, given in the Industrial Relations Division of the High Court at Lusaka on 22nd March, 2021.

2.0. BACKGROUND

2.1 The brief background to this matter is that the Respondent lodged a complaint by way of a Notice of Complaint wherein he complained that his contract of employment was wrongfully terminated because it was in breach of clause 10 of his contract of employment of 2011 which was renewed in 2013. He sought various reliefs as set out in his Notice of Complaint dated 26th May, 2015.

2.2 The history of this case is that the Respondent was offered a letter of employment on 6th February, 2013 by way of renewal, as an Internal Audit Manager which contract was effected on 14th February, 2013. However, it is purported that the actual contract for 2013-2016 was not executed despite both parties relying on some clauses of the contract. The contract of employment was

said to have been terminated by the employer invoking the termination clause as provided in the 2013 contract. However, the same provision under the 2011 contract was materially different.

3.0. DECISION OF THE LOWER COURT

3.1 The Judge in the Court below found that the parties did not execute the contract for the period 2013 to 2016. That the letter renewing the contract for 2011-2013 only mentioned the salary as the only condition that changed. From this, the Judge concluded that the parties intended to keep all other conditions as in the previous contract save for the salary that was expressly mentioned. He found that the employer opted to invoke the termination clause and was therefore, obligated to pay as per clause 10.1(b) of the contract. He ordered that the Appellant, having not terminated the contract on misconduct or performance, was obliged to pay the Respondent a sum equivalent to his total gross salary for the remainder of the contract period as per clause 10 of the contract.

3.2 With regard to housing, car/vehicle, talk time (with spouse) and fuel allowances from February 2015 to February, 2016, the Judge

found that those allowances were provided as tools to perform his duties. Therefore, since the Respondent did not work from February, 2015 to February, 2016, he was not legally entitled to fuel, talk time, housing or indeed the duty vehicle. The Court found that the Respondent was essentially on leave and could not ask for leave pay when he was already on leave and thus this relief failed.

3.3 As for the award for damages for unfair or wrongful termination, the court found that the same could not be awarded on the basis that the termination clause was properly invoked.

3.4 In terms of the relief for damages for mental shock the court awarded three months salary as damages because of the manner in which the termination was handled.

3.5 For the relief of damages for defamation or injury to reputation arising from comments by people on account that the Respondent misconducted himself leading to the termination, the court found that the tort of defamation could not be proved under the circumstances the Respondent found himself in and therefore the claim failed.

3.6 As for the relief for special damages, the Judge found that there was no evidence before Court to prove special damages and that there were neither special nor extenuating circumstances to call for punitive or exemplary damages.

3.7 For the claim that sim card number 0950044700 be switched on with credit of K540.00 and a 24 gigabit data bundle, the Judge found that there was not enough evidence to help resolve this claim in favour of the Respondent.

3.8 The Judge adjudged that the amounts due would attract interest at the Bank of Zambia short term deposit rate from date of Notice of Complaint to Judgment and thereafter at 6% to complete settlement. He made no Order as to costs on the basis that most of the claims had not been successful.

4.0. **THE APPEAL**

4.1 The Appellant, dissatisfied with the Judgment, has now appealed to this Court on the following four grounds:

1. *The learned Judge misdirected himself in law when he invoked clause 10.1(b) of the contract of employment when he said the clause was penal in nature, unconscionable and unenforceable;*

2. *The learned Judge erred in law and in fact when he ordered the Appellant to pay gross salaries amounting to K244,880.00 as gratuity when the contract had a specific provision dealing with gratuity and how and when it should be paid;*
3. *The learned Judge erred in law and in fact when he used the clause for payment of gross salaries to compute gratuity; and*
4. *The learned Judge erred in law and in fact when he awarded three months salary as damages for mental shock despite the Appellant complying with the terms of the contract of employment on termination.*

5.0. **ARGUMENTS IN SUPPORT**

5.1 Counsel for the Appellant filed heads of argument on 11th June 2021, and argued in ground one that the Judge fell into grave error when he directed that the sum of K244,880.00 be paid to the Respondent as gratuity being gross salaries which was what he would have been paid had he completed the contract. Counsel submitted that clause 10.1 (b) had nothing to do with gratuity or its payment. Counsel submitted that clause 10.1 (b) invoked by the High Court Judge has been considered before the Court of Appeal in the case of **Zambia Telecommunications Company**

Limited v Eve Banda[1] and that the finding therein was that such a clause was unconscionable and unenforceable by any Court action.

5.2 Counsel submitted that it was clear that the Judge below misdirected himself at law when he invoked a clause which was penal in nature and unenforceable. It was Counsel's contention that the Respondent in his reliefs did not ask for the enforcement of clause 10.1(b) in his contract of employment. Instead the trial Judge went on his own and in total disregard of the position of the law on the matter, to award gross salaries for a period not worked for and that the same should be deemed as gratuity. This, according to Counsel was a grave misdirection on the part of the trial Judge. It is for these reasons that counsel believes that ground one has merit and should be upheld.

5.3 Counsel argued grounds two and three together and submitted that the trial Judge misdirected himself by awarding K244,880.00 as gross salaries for the period not worked, from termination of contract up to when it should have expired by effluxion of time. He argues that clause 7 of the Respondent's contract of employment dealt with gratuity. Further, that clause 7 clearly

stipulated that gratuity would be paid at the end of employment period. More importantly, Counsel argued that in *casu,* the Respondent's contract was terminated in February, 2015 and therefore, he could not claim gratuity up to February, 2016 when he was no longer an employee of the Appellant. Counsel submitted that parties never agreed to payment of gross salaries up to the end of the contract in the event of premature termination and deemed to be gratuity. He prayed that grounds two and three had merit and should be upheld.

5.4 In ground four Counsel submitted that the learned trial Judge, after finding that the Respondent's contract of employment was properly terminated, went on to consider the claim for Mental shock and stress. Counsel referred to the case of **Attorney General v D.G. Mpundu**[2] wherein the Supreme Court considered the question of the recovery of damages for mental distress in an employer/employee relationship and observed that any award of damages for mental shock should be preceded by a breach of contract by the Defendant. That in the Appellant's case, the trial Judge found, and rightly so, that there was no wrongful termination of the contract. He

submitted that the trial Judge went further to state that "*the clause invoked is the one that both parties were aware of and should as such have been prepared for*". He contended that the Appellant therefore, did not breach the employment contract by paying the Respondent the salary in lieu of notice. Counsel submitted that the learned trial Judge omitted an important aspect in his analysis as to how the termination of the Respondent's employment of contract occurred. He submitted that, by the Respondent's own evidence, he stated that he was unofficially informed, therefore the Appellant was at pains to understand how it was capable of causing mental shock to the Respondent.

5.5 Counsel contended that the claim for mental shock should not succeed because it has already been shown that the Appellant did not breach the contract and that the Respondent belabored under the mistaken impression that the Appellant breached the contract by terminating the employment contract as there was no charge or disciplinary procedure against him. Counsel's contention was that the trial Judge fell into grave error when he gave the award based on other considerations, specifically that

someone from IT unofficially informed the Respondent of the termination of this contract of employment. In support of this, he relied on the case of **Chilanga Cement PLC v Kasote Singogo**[3]. Counsel emphasized that for recovery of damages for mental shock in employment, there has to be a breach of contract on the part of the Defendant and that in *casu* the trial Judge did not indicate how the Appellant breached the employment contract to warrant the award of damages for mental shock.

6.0. **ARGUMENTS IN OPPOSITION**

6.1 Counsel for the Respondent filed heads of arguments on 3rd September, 2021.

6.2 In ground one, Counsel submitted that in *casu* the amount payable to the Respondent upon termination was total gross salary because it was fixed and not determined. Further, that only twelve months were remaining on the contract therefore this period cannot be said to be a genuine pre-estimate in terms of normal damages to be recovered in a claim.

6.3 Counsel argued that the clause in issue was not penal in nature. He cited the case of **Zamtel v Eve Banda**[1] to illustrate that in this cited case the issue of whether the clause was enforceable was whether it is was regarded as a liquidated damage clause or penal clause. Counsel argued that the amount payable upon termination is the total gross salary and therefore it was fixed or determined. Counsel submitted that in previous decisions, the court did not deal with the issue of liquidated damages clause or penalty clause with respect to an employee in a senior position and if they had done so they would have concluded that the clauses in issue were liquidated damage clauses and not penalty clauses. Reference was made to the case of **Savenda Management Services v Stanbic Bank Zambia Limited**[4]. Counsel submitted that the previous decisions on penalty clauses/liquidated damage clauses did not wrestle with whether such clauses in fact breached laws or known public policies. Therefore they were per incuriam on this point. That on the basis of the foregoing, it was shocking that the Appellant alleged that clause 10.1 was made in terrorem. Lastly, it was submitted that it was impossible for the Respondent being an individual to have threatened the Appellant.

come back from duty in Ndola. Thereafter, the Appellant should have called the Respondent for a meeting to inform him of his termination. Further, that this should have been communicated by an appropriate officer. Counsel submitted that the manner in which the Respondent received news of his termination was shocking and in breach of the Reporting Structure. Further, that it was abrupt as it was received before the letter of termination was drafted. Counsel argued that in casu, there was a breach and the Respondent is entitled to damages for mental shock and distress. To fortify his argument, Counsel referred to the case of **Bank of Zambia v Kasonde**[6] in which the Supreme Court held that:-

> **"if the defendant is a public institution they must adhere to the principles of fair play.....All employees should enjoy equal treatment under the ruling regulations"**.

6.8 He urged that ground four be disallowed.

7.0. **ARGUMENTS IN REPLY**

7.1 In reply to the Respondent's heads of argument, the Appellant argued that the argument in ground one by the Respondent was misconceived because the Respondent misdirected himself on the

applicability of the principle of per incuriam and that the sum to be paid in the event of premature termination of the Respondent's employment contract was specified. That the correct position is that no figure was ever agreed upon.

7.2 Counsel argued that the clause in contention can be best described as one that is in a "state of flux" because any final figure payable is based on the period remaining for the contract to run its full course. This he argued was because the correct position was that each month served on the contract meant the period remaining on the unserved portion reduced, as such the clause had no fixed figure.

7.3 Counsel reiterated his position in ground one that this Court in the **Eve Banda** case, interpreted the Zamtel Employment Contract, *vis à vis* the enforcement of the clause stating that an employee shall not be paid for the remainder of the contract in the event of premature termination.

7.4 He argued that the principle of *Stare Decisis* was applicable and that the High Court was bound to follow this Court's decision in the **Zamtel v Eve Banda**[1] case. He contended that there was nothing new presented by the Respondent to warrant this Court

to revisit its decision in the **Zamtel v Eve Banda**[1] case. Therefore, he submitted that ground one had merit and ought to be upheld.

7.5 Counsel argued that the Respondent's arguments in grounds two and three were misplaced because the Appellant's arguments in support of grounds two and three were premised on what the High Court Judge said in his Judgment. Counsel argued that the Respondent clearly misdirected himself by attributing these words to the Appellant when they were verbatim of what the Judge said.

7.6 Moreover, that the issues raised in these grounds were clear and that they had nothing to do with what the gross salary was but whether gross salaries can be converted to gratuity when there is a specific and clear clause on gratuity. He submitted that grounds two and three had merit and ought to be upheld.

7.7 In ground four, Counsel submitted that the Respondent called to aid the case of **Swarp Spinning Mills Plc v Chileshe**[5] to argue that damages for shock, distress, and mental torture can be awarded in cases other than where there is breach of contract.

7.8 Counsel argued that the Respondent misdirected himself on the facts in the above-mentioned case. He submitted that in that case, the Plaintiff sued for wrongful and unlawful termination and the

High Court found that the terminations were wrongful. He argued that the Superior Courts have guided that wrongful termination is termination done in breach of the employee's conditions of employment. Counsel argued that the **Swarp Spinning Mills Plc**[5] case dealt with the quantum of damages awarded for wrongful termination. However, in this case he submitted that the Respondent has not stated which provisions of the conditions of employment were breached in the manner the termination was allegedly communicated to him. He maintained that ground four had merit and should be sustained.

8.0 **HEARING**

8.1 At the hearing Counsel for the Appellant, Ms. Chibabwe relied entirely on her heads of arguments and heads of argument in reply filed into Court and prayed that the Court upholds the appeal.

8.2 Counsel for the Respondent Mr. Kaunda equally relied on his heads of arguments of 6th September, 2021 and prayed that this appeal be dismissed.

9.0 DECISION OF THIS COURT

9.1 We have perused the Record of Appeal and considered the Judgment of the Court below and the submissions filed by learned Counsel for the Appellant and Respondent.

9.2 In ground one, the issue to be resolved is whether the clause in the employment contract of the Respondent is a liquidated damage clause and whether it was penal in nature and unenforceable. For reference the clause provides as follows:

"10. Both parties may terminate this agreement by giving 1 month's written notice thereof to paying in lieu of notice. NOTHWITHSTANDING the above.

(a) where an employee terminates the contract before the expiry of the contract period, the employee shall pay the employer a sum equal to the employees' total gross salary for the remainder of the contract period.

(b) Where the employer terminates the contract for reasons other than misconduct or performance, the employer shall pay the employee a sum equivalent to the employee's total gross salary for the remainder of the contract period."

9.3 It is trite law that a contract is a set of promises which the law will enforce. A contract gives rise to obligations which are enforceable and recognized by law. In **G H Treitel, the Law of Contract, 7th**

Edition, Steven and Sons, the authors state that a contract is an agreement giving rise to obligations which are enforced or recognized by law. Further, that an agreement is made when one party accepts an offer made by the other. The cases of **The Hannah Blumenthal**[7] and **Smith V. Hughes**[8] also support this principle.

9.4 Further to the aforementioned, the case of **Printing and Numerical Registered Company v Simpson**[9] establishes the following principle in contract law:

> ***"... if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."***

9.5 The view that we take is that a person is bound to a contract if he has agreed to the terms proposed by the other party and the other party knows this or actually believes this. In *casu,* we are of the considered view that the parties agreed to be bound by terms as set out in clause 10.1 (b) of the employment contract.

9.6 Be that as it may, we are alive to decisions of the Supreme Court in the various cases brought to our attention on the subject of this appeal. In the case of **Zamtel v Eve Banda**[1] this Court discussed at length clause 9.1 (b), which was a similar provision as in the present case.

9.7 In particular, we held in that case that the impugned clause 9.1(b), a similar clause to this one was penal in nature and that the amount payable under the clause was imposed in terrorem. Further that the clause did not constitute a genuine pre-estimate of the loss but that the clause was a deterrent to breaching the contract and was unenforceable.

9.8 Arising from the above case, we hold the view that in the present case, the impugned clause 10.1(b) is penal in nature and the amount payable under the clause was imposed in terrorem. We believe the clause does not constitute a genuine pre-estimate of the loss as elucidated in the **Zamtel v Eve Banda**[1] case.

9.9 Further, this Court is bound by the principle of *stare decis* and we are thus properly guided in arriving at the decision we have; on the principle of pre-estimated liquidated damages and penal

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9.9 Further, this Court is bound by the principle of *stare decis* and we are thus properly guided in arriving at the decision we have; on the principle of pre-estimated liquidated damages and penal

clauses. We therefore, hold the view that ground one has merit and succeeds.

9.10 Grounds two and three were argued together and the issues to be resolved centre on the calculation of gross salaries as the basis for paying gratuity. In our considered view, and having found in ground one that clause 10.1(b) is unenforceable, it follows that the Judge below ought not to have ordered that the Appellant pay gross salaries in the amount of K244,880.00 as gratuity because the clause he used to justify this payment is unenforceable and therefore untenable. His gratuity was payable on his basic salary only. Thus, grounds two and three have merit.

9.11 In ground four, the Respondent contends that damages for shock, distress, and mental torture are not only awarded in cases of breach of contract. In the case of **Swarp Spinning Mills Limited v Sebastian Chileshe and Others**[5], the Supreme Court stated that:

> *"The Court can only depart from the normal measure of damages where the circumstances and the Justice of the case so demand. The Court will usually consider situations where*

the termination is inflicted in traumatic fashion which causes undue distress or mental suffering."

9.12 The Appellant argues that damages for mental distress can arise if caused by the Defendant's conduct in breach of contract. The trial Judge took the view that the manner in which the termination was effected, namely while the Complainant was out on duty in Ndola and the termination being announced to him by a junior officer from the IT department by way of a phone call was inappropriate. This according to the Judge, was shocking and he proceeded to award three months' salary as damages for mental shock and distress.

9.13 We agree with Counsel for the Respondent that the Respondent holding a senior position as he did, his termination ought to have been carried out in an appropriate manner. This could have included waiting for the Respondent to come back from duty in Ndola, informing the Respondent of his termination by either a meeting or a written official letter which should have been delivered by an appropriate officer. Therefore, the argument by the Appellant that because the termination was not wrongful it means

that the manner in which the news of termination was delivered was justifiable does not find favour with us.

9.14 The issue raised was not about wrongful dismissal but rather the manner in which the news about the Respondent's termination was conveyed to him. We hold the view that the manner in which the termination was done, whether unofficial or otherwise was shocking, and caused stress and trauma. The learned Judge was justifiable to award three months' salary as damages. Therefore, this ground lacks merit and fails.

9.15 In conclusion, the net result is that the appeal substantially succeeds, save for ground four which fails.

9.16 This being an employment matter, each party to bear own costs.

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M. J. SIAVWAPA
JUDGE PRESIDENT

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE