IN THE HIGH COURT OF ZAMBIA
011/HN/CA.36
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

KAWAMBWA TEA COMPANY LIMITED **APPELLANT**

AND:

RICHARD NDASHE CHIPANAMA **RESPONDENT**

CORAM: SIAVWAPA J

FOR THE APPELLANT: MR. MUMA OF MESSRS CHITABO CHIINGA ASSOCIATES
FOR THE RSPONDENT: IN PERSON

J U D G M E N T

AUTHORITIES REFERRED TO:

1. Anthony Khetani Phiri V Workers' Compensation Control Board
2. Lloyd V Brassey
3. Chilanga Cement PLC V Singogo
4. Barclays Bank PLC V Union of financial & Allied Workers'
5. Zambia Railways Limited V Philip Shipota & Another
6. Zambia Railways Limited V Richard Chipanama

LEGISLATION

1. Subordinate courts Act chapter 28 0f the laws of Zambia
2. High Court Act chapter 27 of the Laws of Zambia

This is an appeal and a cross-appeal against the judgment of the subordinate court of the first class for the Ndola District. The Respondent through a default writ of summons filed in the subordinate court claimed the sum of K25, 437, 081.00 from the Appellant. In its judgment, the subordinate court found that the Respondent's termination of employment was by way of redundancy pursuant to section 26B of Employment Act. The court further found that the Respondent was entitled to be paid his salaries up to the time his benefits were paid in accordance with section 26 (3) (b) of the Employment Act.

The Appellant raised six grounds of appeal namely;

1. That the learned trial magistrate erred in law and fact when she held that there was a redundancy situation in the Appellant company as there was no evidence of this
2. That the learned trial magistrate erred in law and fact when she held that the post of human resource manager had been down-sized as there was no evidence to support this finding
3. That the learned trial magistrate erred in law and in fact when she held that the mere engagement of Nerol Katwishi in the position personnel officer amounted to down-sizing of the post of human resource manager as this is contrary to the evidence on record

4. That the learned trial magistrate erred in law and fact when she held that the Plaintiff was repatriated on 23rd April 2009 as there had been no need to do so because he had, three weeks prior t his termination, moved to Ndola where he had been recruited from
5. That the learned trial magistrate erred in law and fact when she held that the letter of offer of employment did not provide for termination of contract
6. That the learned trial magistrate misdirected herself when she held that the Plaintiff had proved the existence of a redundancy situation in the Appellant company as this is not supported by evidence

In his cross-appeal, the Respondent has raised two grounds as paraphrased from his heads of argument for cross-appeal;

1. Repatriation of a former employee is a terminal benefit paid at the end of employment either in cash or by physical transportation
2. Supreme Court has made interest uniform payable at short term deposit rate up to date of judgment and thereafter at lending rate

By consent, the parties opted to have the appeal determined solely on the record and heads of arguments and they both filed their heads of arguments and replies to both the appeal and the cross-appeal.

In the heads of argument, the Appellant argued grounds 1 and 6 and 2 and 3 together while grounds 4 and 5 were argued separately. In arguing grounds 1 and 6 which seek to nullify the lower court's finding that there was redundancy in the Appellant Company, it has been submitted there was no evidence of the Appellant Company ceasing to carry on its business or reducing the its manpower. To support the argument, the case of Anthony Khetani Phiri V Worker's Compensation Control Board[1] was cited. The decision in that case was to the effect that where a statutory board is dissolved and another created to carry on the same business, the employees who continue with the new employer are not deemed to be redundant. This particular employee was offered employment by way of transfer from the former employer to the new employer but turned it down.

This case, though good law, it is not apparent that the facts thereof are on all fours with the case before me. The facts in the cited case show that the Appellant had been offered a job by the new employer in the same capacity as he was with the dissolved company but that he turned it down. However, in this case, the Respondent was actually terminated and the circumstances are clearly different. The only argument in this case is whether or not the Respondent was terminated on account of deemed redundancy as provided for by section 26B of the Employment Act. I therefore, find the Phiri case and the English case of Lloyd V Brassey[2] cited on the two grounds, misplaced.

[1] (2003) ZR 13
[2] [1968] 2QB 98

The Appellant has also argued in the alternative that even assuming that the redundancy situation existed in the Appellant Company, section 26B falls under part 4 of the Employment Act which deals with oral contract of service. Since the contract of employment between the Appellant Company and the Respondent was written, section 26B did not apply. To support this argument, the case of Chilanga Cement PLC V Singogo[3] was cited. In that case, the Supreme Court of Zambia confirmed its earlier decision in the case of Barclays Bank PLC V Zambia Union of Financial & Allied Workers' Union[4] that section 26B did not apply to written contracts.

On grounds 2 and 3 which seek to nullify the lower court's finding that the post of human resource manager was down-sized by the employment of Miss Katwishi as personnel officer to replace the Respondent, it has been argued that the same did not amount to down-sizing. It has also been argued that Miss Katwishi did not apply for the position of human resource manager which position still existed awaiting for the right person to fill it.

On ground 4 which seeks to nullify the lower court's finding that the Respondent was repatriated on 23rd April 2009, it has been submitted that in fact, the Respondent had already moved to Ndola, the base of his recruitment three weeks prior to his termination. It has further been argued that since the responded had left the station without permission and refused to return

[3] (2009) ZR 122
[4] SCZ No. 17 of 2007

when asked to, there was not need to repatriate him and that the provision of transport to collect his goods from the station was a by the way.

Ground 5 disputes the lower court's finding that the Respondent's letter of offer of employment did not provide for termination of contract and paragraph 4 of the letter was cited as containing the said provision.

In response to the Appellant's heads of argument, the Respondent argued ground grounds 2 and 3 together while the rest were argued separately. His argument in response to ground 1 is that one Lucias Kapila, who was the Appellant's Marketing and Public Relations Manager, testified before the lower court that a redundancy situation existed in the Appellant Company and that down-sizing was also taking place. He argued that the employment of Miss Nerol Katwishi in a lower position of personnel officer as his replacement was enough evidence of the down-sizing. He further argued that the Appellant Company's failure to pay salaries to its employees was also proof of redundancy.

On grounds 2 and 3 he argued that Miss Katwishi, though employed in a lower position, occupied his former office, handled the files he was handling and occupied the same house he was occupying. He further submitted that Miss Katwishi resigned her position after six months because the Respondent Company could

not pay her salaries. This submission merely augments his submissions on ground 1.

In response to ground 4, he submitted that there was evidence before the lower court that his duties as human resource manager covered all the Appellants offices at Kawambwa, Lusaka and Ndola and that he could be at any one of the three stations at any time during his tenure. He accordingly submitted that his repatriation only arose on 17th July 2008 when his services were terminated and he was accordingly repatriated on 23rd April 2009.

In response to ground 5, he simply refuted the submission that the lower court made a finding that his letter of offer of employment did not provide for termination of employment.

In response to ground 6, he submitted that the fact that the Respondent paid him a redundancy package and repatriated him was enough evidence of the existence of a redundancy situation in the Appellant Company.

In his cross-appeal, the Respondent has argued that under section 13 (2) (b) and section 26B of the Employment Act, he was entitled to his wages until the date of his repatriation. He further argued that the practice by the Supreme Court of Zambia is to award interest at the Bank of Zambia short term deposit up to the date of judgment and thereafter, at the Bank of Zambia lending rate. He accordingly rejects the interest awarded at 10% by the lower court as being outside the current practice. He referred to the cases of Zambia Railways Limited V Philip K. Shipota & Austin S.

Phiri[5] and Zambia Railways Limited V Richard Ndashe Chipanama[6].

In reply to the cross-appeal, it has been submitted with respect to the first ground that there was no law in Zambia providing for payment of salaries until repatriation to a person whose employment has been terminated. It has been further submitted that section 13 (2) (b) does not provide for payment of salaries but reasonable subsistence expenses or rations before and during the journey. It was submitted that the said section did not apply to the Respondent as he was terminated pursuant to his conditions of service whilst residing in his own house in Ndola. It was also submitted that section 26B of Act No. 15 of 1997 only applied to employees who have been declared redundant which was not the case with the Respondent.

As for ground two, it was submitted that awarding of interest was in the court's discretion which has not been taken away by the current practice referred to by the Respondent.

Beginning with the appeal, I note from the arguments by both parties that the main issue for determination is whether or not the lower court was right in finding that the Respondent's termination of employment was by way of redundancy by virtue of the provisions of section 26B of the Act No. 15 of 1997. The section is reproduced hereunder for ease of reference.

[5] No. 2002/HN/CA 52(HC)
[6] SCZ Appeal No. 143 of 2002 (SC)

The contract of service of an employee shall be deemed to have been terminated by reasons of redundancy if the termination is wholly or in part due to –

(a) The employer ceasing or intending to cease to carry on business by virtue of which the employee was engaged; or
(b) The business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern

In her judgment the learned trial magistrate found that the Respondent's job was down-sized because the Appellant employed Miss Katwishi as personnel officer when the Respondent was terminated from employment. Based on that finding, she came to the conclusion that the said down-sizing amounted to a redundancy in terms of section 26B of the Act.

This conclusion by the learned trial magistrate is not supported by the provision cited because nowhere in the relevant section is down-sizing or down-grading of a position stated as a factor of redundancy. It will be noted that whereas subsection (a) applies where the company stops or intends to stop carrying on the business for which an employee was engaged, subsection (b) applies when the business does away with or reduces the number of employees to carry out a particular type of work for which the employee was engaged.

It will be noted here that none of the above was the reason for the termination of the Respondent's employment because the record does not disclose that evidence was presented to that effect in the lower court. As trial court's we should only act on evidence adduced and not speculation and the evidence before the trial court is that the Respondent was terminated with no reasons given. It was therefore, not open to the trial court to impute redundancy in the termination. It is also noteworthy that the introductory part of section 26B makes it clear that the termination must be wholly or in part due to the two subsection that follow and so, the trial court ought to be on the lookout for an express or implied statement in the letter of termination pointing to the reason for termination as either one or both of the subsections.

In this case, the learned trial magistrate simply placed reliance on the evidence of PW2 showing that after the Respondent's employment was terminated, the person who was employed to perform the duties previously performed by the Respondent was engaged in a lower position than that held by the Respondent. In this regard, the learned trial magistrate fell into three errors namely;

1. to hold that employing somebody in a lower position amounts to down-sizing of the position held by the Respondent without any evidence that the position of human resource manager which the Respondent held had been abolished

2. to hold that down-sizing a particular position creates redundancy and
3. Even assuming that 1 and 2 above were the correct positions, the same were events after the fact as they occurred after the Respondent's employment had been terminated.

In the result, it is clear that the learned trial magistrate misdirected herself when she found that the Respondent's termination of employment was by way of redundancy. The correct position is that the Respondent was terminated in accordance with paragraph three of the offer of employment letter which provides for the giving of a month's notice by either party or a month's salary in lieu thereof exhibited as GM1. The letter of termination exhibited as GM1 is evidence of that position and it is not in dispute that the Respondent was paid his terminal benefits accordingly. Having found that the Respondent was not terminated on account of redundancy, I do not find it necessary to address the Appellant's argument in the alternative that section 26B of Act No. 15 of 1997 does not apply to written contracts as the argument has been rendered irrelevant.

As for whether or not the Respondent was repatriated, it is common cause that section 13 of the Employment Act makes it mandatory for the employer to meet all expenses relating to repatriation of a terminated employee from his station to the place of recruitment. It is not in dispute that the Respondent was recruited from Ndola and stationed in Kawambwa. On that

account alone, the Appellant was under obligation to comply with section 13 of the Act. The argument by the Appellant that at the time of his termination, the Respondent was at his home in Ndola is irrelevant. What counts is the formal termination date and not the location of the employee at the time.

I however, note that the Respondent was actually repatriated on 23rd April 2009 following his termination on 17th July 2008 following the payment of his terminal benefits. In this regard the learned trial magistrate found that the Respondent was entitled to payments of his salaries up to the date of payment of terminal benefits. This was in light of her finding that the Respondent was terminated on account of redundancy. However, in view of my dismissal of that finding, it follows that section 26B (3) which provides for the continued payment of salaries to an employee terminated on account of redundancy, does not apply to the Respondent.

As for ground 5, relating to the termination clause, I have already found as a fact that paragraph 3 of GM1, the letter of offer of employment, provides for termination by either party by giving a month's notice for a confirmed employee. The Respondent has refuted the allegation. I however, note that at page J4, in the first line, the learned magistrate makes the following statement;

> "I have perused 'D1'. It does not provide for termination"

In paragraph 3 of the same page, she states as follows;

"The Plaintiff was given notice of the termination so going by the provision of section 36(1) of the Employment Act, the termination was lawful."

What I am not certain about is whether the 'D1' refers to the letter of officer of employment, which is also exhibited as GM1 and if that is the case, then the learned trial magistrate misdirected herself in making that finding. She nonetheless found the termination by notice lawful pursuant to section 36 (1) of the Act. Either way, the outcome would not be different as the effect is that the Respondent was terminated by notice and not by reason of redundancy.

The net effect of my findings is that the appeal is allowed and the judgment of the lower court is set aside.

I now turn to the cross-appeal and it is noted that in the first ground, the Respondent seeks to claim payment of salaries from the date of termination up to the date his terminal benefits were paid. This ground cannot succeed in view of my earlier finding that the termination was not by reason of redundancy but by a contractual clause.

As for the second ground which seeks to have interest paid in accordance with the practice establish by the Supreme Court of Zambia which is usually, at the short term deposit rate from the date of the writ until judgment and thereafter at the lending rate, whereas it is true that the award of interest is within the discretion of the court, It is noted that this is not just a practice, but a matter of legislative action. In terms order XXXVI Rule 8 of

the High Court Rules, interest is shall be paid at the average of the short-term deposit-rate per annum.

I am however, mindful that this matter was heard by the subordinate court and Order XXXV Rule 8 of the Subordinate Court Rules, provides as follows;

> ***"Where a judgment or order is for a sum of money, interest at six per centum shall be payable thereon, unless the court otherwise orders."***

In this case, the learned trial magistrate exercised the discretion as provided in the rule to award interest at rates otherwise than the six per centum stated there and as such I cannot interfere with that discretion. This ground must equally fail and I dismiss the cross-appeal accordingly.

Costs are for the successful party.

DATED THE 29th DAY OF FEBRUARY 2012

J.M. SIAVWAPA

JUDGE