

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE

2012/HK/15

(CIVIL JURISDICTION)

SMART PHIRI - PLAINTIFF
AND
FIRST QUANTUM MINERALS AND OPERATIONS LIMITED - DEFENDANT
(MINING DIVISION)

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 4th day of December,
2012

For the Plaintiff: Mr. C. Chali - Messrs Nkana Chambers

For the Defendant: Ms. N. Mulenga - Messrs Abha Patel & Associates

JUDGMENT

Case referred to;

1. Zambia National Provident Fund v. Y. N. Chirwa (1986) Z.R. 74

The Defendant took out a writ of summons accompanied with a statement of claim seeking the following reliefs, namely,

- (a). a declaration that the termination of his contract of employment was unlawful and wrongful,
- (b). damages for the unlawful and wrongful termination of the said employment,
- (c). damages for inconvenience and mental torture,
- (d). interest on sums found due;
- (e). any other relief that the court may deem equitable.

According to the statement of claim, the Plaintiff was employed by the Defendant on 6th November, 2006 at the Defendant's mine at Solwezi as a Rear Dump (RD) Operator in the Defendant's Load and Haul Department. On 6th November, 2008 the plaintiff was verbally informed by the Defendant's Human Resources Superintendant that his contract of employment had been terminated; he was told to go home and that he would be given the letter of termination later. However, he was not given such letter until 17th July, 2009. He was also not paid the salary from November, 2008 and was not paid his accrued benefits. The Plaintiff further contended in his statement of claim that he was dismissed for the offence of absenteeism for which he was neither charged nor tried, hence the further contention that the termination was unlawful and wrongful.

In its defence, the Defendant admitted that the Plaintiff was employed by the Defendant as pleaded and that such employment was governed by the letter of offer of employment as well as by the Collective Agreement entered into between the Mine Workers Union of Zambia (MUZ) and the National Union of Miners and Allied Workers (NUMAW) on the one hand and the Defendant Company on the other, and further by the Defendant Company's Disciplinary Code which were in force at the material time. The Defendant admitted having terminated the said employment but pleaded that said termination was due to Plaintiff's absenteeism from work without following the laid down rules and was in accordance with the conditions governing the said employment. The Defendant denied that the termination was unlawful or wrongful or that he was entitled to any relief.

The Defendant raised a counter claim for salaries and allowances wrongly paid to the Plaintiff during the period of his wrongful absence from work, and further damages for the Plaintiff's wrongful termination of his employment by his desertion without giving appropriate notice to the Defendant that he was leaving his employment.

At the trial the Plaintiff identified the document at pages 1 to 4 in his Bundle of Documents dated 6th November, 2006 as the letter of offer of employment which he accepted by signing it. The letter provided, inter alia, for sick leave, mode of termination, and **“other standard conditions of employment, including the disciplinary code and any other**

agreement as made between the workers representatives and management ...where necessary". The Plaintiff also identified the Disciplinary Code which provided for offences and the sanctions attaching thereto. I shall return to these documents later in this judgment.

The Plaintiff testified that sometime in November, 2008 whilst serving at the Solwezi Mine, he went to see Mr. JOEL CHAKANA, the Defendant's Human Resources Superintendent, (HRS) to complain about the leave days which were not being properly credited on his pay statements. He said Mr. Chakana told him he would discuss the issue with the Plaintiff later but meanwhile informed the Plaintiff that the company had decided to lay him off. The Plaintiff was accordingly told to go home to await the letter of termination, which the Plaintiff did. While awaiting the letter, the Plaintiff observed that he was not paid mid-month salary or end-month salary for November, 2008. When he went to complain to the HRS he was told to just go back home and wait. When the Plaintiff said he needed to relocate the family to Ndola, the HRS told him to go and wait for the final letter in Ndola. When the Plaintiff moved to Ndola he used to call on Mr. BONIFACE MUTUMBA, the HRS at Ndola, who kept telling the Plaintiff to just wait while his problem was being sorted out.

Finally on 17th July, 2009 the Plaintiff received the letter of termination together with his dues. The letter was actually dated 28th October, 2008 and appears at page 16 of the Plaintiff's Bundle of Documents. The letter reads in part:

"SUBJECT : TERMINATION OF EMPLOYMENT

This letter serves to confirm that you have been TERMINATED from employment regarding the offence of absenteeism.

Our records show that you were absent from work over three months without official leave. Being away from work without official leave is against the company policy. According to FQMOL disciplinary code being absent from work without official leave for five days or more for a first time offender is summary dismissal.

Arrangements will be made to pay your entitlements less any indebtedness to the company once you have completed the necessary clearance procedures".

The Plaintiff said he queried the HRS at Ndola as to why he was so terminated when he had even been receiving bonuses. He said for the period June, 2008 to October, 2008 he had been working and was being paid. He identified the pay statements for the said period in his Bundle of Documents. Some of the pay statements included an Attendance Bonus in October, 2008 which he said is only paid to an employee who has not gone on leave or who has not absented himself from work. He said he used to sign the SHIFT CHECK LISTS for all the months in question on the basis of which the salaries were prepared. The Plaintiff said he was not charged with any disciplinary offence or even heard prior to the termination of his employment. He said he was duly paid for the months he worked and denied the Defendant's counterclaim.

Under cross examination the Plaintiff said that when he went to see Mr. CHAKANA (HRS) in June, 2008 over the leave days he did not ask for time off to go for medical treatment. He said that during the period June to October, 2008 the Company's employees used to be paid twice, first at mid month and then at the month-end. However, he said he did not receive the pay for mid November, 2008. He said on 17th November, 2008 he did not go to the mine site and he denied having met Mr. CHAKANA (HRS) on 18th November, 2008 because, he said, he was at home. He said as a shift worker he was entitled to a shift differential allowance. However, for the period June to October, 2008 he was not paid that allowance. He said he did not claim any shift differential allowance because he did not notice that none was being paid during June to October, 2008. He said he did not get any sick leave note in that period because he was never sick. He said the letter of termination was faxed to the Defendant's Ndola office where he received it personally from the hand of Mr. MUTUMBA (HRS) who also paid him the benefits. He said he had only surrendered the identity card to the company's security office on 19th October, 2011 but he still had the personal protective equipment with him.

DW1 was JOEL CHAKANA who was the Company's Human Resource Superintendent based at Solwezi at the material time. He confirmed that the Plaintiff had indeed been employed from 1st November, 2006 as an RD Operator based at the Company's mine at Solwezi. He also identified the letter of offer of employment and said that the Plaintiff was

also subject to other conditions of service stipulated in the Collective Agreement which the company had signed with the MUZ to which the Plaintiff was a member. He identified the Collective Agreement in issue which appears in full at pages 5 to 25 of the Defendant's Bundle of Documents.

DW1 said that sometime in June, 2008 the Plaintiff went to his office with a recent history of burns allegedly sustained by him during a domestic quarrel with his wife. On viewing the burns, DW1 thought they were very severe and that the Plaintiff required immediate medical attention. He accordingly advised the Plaintiff to go for treatment and to obtain a note from the Doctor for the record. The Plaintiff then left DW1's office. According to DW1, he next saw the Plaintiff on 16th November, 2008 when the Plaintiff was taken to DW1's office. Before 16th November, 2008, DW1 said, the Plaintiff had not given them any sick note from the Doctor. As far as DW1 was aware the Plaintiff did not report for work between June, and October, 2008. No one knew why the Plaintiff had not been working since he had not made any application for any form of leave.

Regarding sick leave, DW1 first referred to clause 6 c of the letter of employment which provides thus:

“In the event that you are unable to execute your normal duties due to illness or accident, you shall, on the production of medical certificate from a registered medical practitioner, be granted sick leave at full pay for the next three months. Should you then still not be able to report for duty, your contract of employment will be reviewed and may be terminated on medical grounds”.

The witness also referred to Clause 12 of the Collective Agreement the relevant part of which reads:

“If an employee falls sick and produces a letter from a medical practitioner stating he is unfit for work then the employee will be paid for the period he is off sick up to a limit of three months full pay and three months half pay in any 24 month period. If an employee is off sick for a period of more than 30 days in any 6 month period the

company reserves the right to insist on the employee taking a medical and if necessary take a medical discharge.

It is noted that employees who are off sick must submit a sick note from a Medical Practitioner (explaining in detail the illness) to their respective supervisors no later than the third morning of their absence. If a sick note is not received on the morning of the third day the employee will be marked A.W.O.P and will not get paid for those days. If no sick note is received by the morning of the fifth day the employee may be dismissed in absentia”.

DW1 said that upon leaving his office in June, 2008 the Plaintiff did not produce any medical certificate within the time prescribed in the conditions governing his employment. On 16th November, 2008 when the Plaintiff was taken to DW1's office, he was asked if he had any medical certificate, but he did not produce any. Instead the Plaintiff only said he was sorry and pleaded for leniency.

DW1 said that when he advised the plaintiff in June, 2008 to go for medical treatment they had hoped that he would obtain and submit a medical certificate if he was to stay off sick. In that belief the Accounts Department had been advised to leave the Plaintiff on the payroll. In that arrangement the Plaintiff was able to receive his salary from June, to October, 2008. However, in October, 2008 the Human Resource Department received complaints from the Plaintiff's supervisor that he had not been reporting for work. On 28th October, 2008 a letter was written to the Plaintiff terminating his employment. The letter was kept on the Plaintiff's file at the company because no one knew where he was at the time and it was only handed to him when he was taken to DW1's office in November, 2008. According to DW1, the Company stopped remitting the Plaintiff's salary to his Bank after 28th October, 2008 and he only reported at the mine site on 16th November, 2008 when the Plaintiff discovered that his pay for mid-November, 2008 had not been remitted. His Production Manager queried the Plaintiff's presence at the site and sent him to DW1's office.

DW1 said in dismissing the Plaintiff the company had invoked the provisions of the Disciplinary Code which provided for summary dismissal for first breach for absenteeism without official leave for five days or more. This was the offence for which the Plaintiff was dismissed. The witness said the Plaintiff was not charged with offence because he was not available to be charged and no one knew his whereabouts. When the Plaintiff was handed the letter of dismissal in DW1's office he was asked to surrender his Personal Protective Equipment (PPE's) which are company property, so that his terminal dues could be formalized but he did not do so up to the time of the trial.

It was DW1's evidence also that the salaries paid to the Plaintiff from June, to October, 2008 were in error because he had not worked during that period. He said the Plaintiff was a shift worker and that all shift workers were paid a shift differential allowance.

At the material time the company was running on two shifts, namely, one from 06:00 hours to 18:00 hours and the second from 18:00 hours to 06:00 Hours. The shift differential allowance was calculated at the rate of 1.5% of the daily rate multiplied by the number of night shifts worked in the month and was paid together with the basic salary and other allowances for each month. This was in accordance with clause 3.11 of the Collective Agreement which provides:

“With effect from 1st June, 2006 a shift differential of 1.5% of the basic pay will be paid for those working a full night shift for the number of night shifts worked”.

DW1 said in the normal course of his employment the Plaintiff was going to work night shifts during the period June to October, 2008. The shift pattern for each shift worker was designed to be five (5) days of 06:00 hours to 18:00 hours, then five (5) days of 18:00 hours to 06:00 hours without any break, then five (5) days off duty. Thereafter the cycle would start all over again. This pattern applied to the Plaintiff. However, the Plaintiff did not work any shifts during the June to October, 2008 period, and consequently was not paid any shift differential allowance, because he was absent. No such allowance was reflected

on the Plaintiff's pay statements for that period, while his pay statements for the period January, to May 2008 (appearing at pages 1 to 5 of the Defendant's Supplementary Bundle of Documents) reflect such an allowance. DW1 said the shift pattern was a requirement because the employees in the Plaintiffs Department were in three crews which swung according to the 5-5-5 day shift patterns.

Regarding the attendance bonus, DW1 said that the bonus is paid to an employee who attains 100 percent attendance at work in the month. However, the bonus paid to the Plaintiff in October, 2008 was in error because he was not reporting for work at all.

DW1 said the check list was kept for machinery, and not personnel, so as to monitor when the machinery was due for maintenance. He said it did not relate to the payment of an employee's salary.

It was also DW1's evidence that for the period not worked, the Plaintiff was not entitled to accrue any leave days. Clause 6(a) of the letter of employment provides:

“You will be entitled to 24 days annual leave to be taken subject to management approval”.

And according to Clause 8.1 of the Collective Agreement leave days accrue at the rate of 2 days per calendar month. DW1 said the plaintiff was, therefore, wrongly credited with leave days from June, to October, 2008.

Prior to the termination of his employment, DW1 said, the Plaintiff did not raise any queries regarding leave days.

Under cross examination DW1 said the Plaintiff continued to be paid while he was absent because the mechanized accounting records had marked him as “**sick**” in that period. He said there was no human intervention to stop making the payments until queries were raised by his supervisor. However, the Plaintiff was not paid any shift differential allowance

because there were no papers submitted to accounts office that the Plaintiff was changing shifts between June, and October, 2008. The witness said that the Plaintiff was paid his terminal dues at the company's Ndola office, instead of Solwezi, which was erroneous. At the time he was paid in July, 2009 he had not been formally cleared and was supposed to be paid at Solwezi after being cleared.

After conclusion of the trial on 20th September, 2012, I invited Counsel for the parties to file their submission within the agreed period of 14 days. However, up to the time of delivering this judgment I only received submissions from Ms. Mulenga, Counsel for the Defendant. I am grateful to said Counsel for her extensive arguments which I have carefully considered and taken into account in arriving at my decision.

There is no dispute that the Plaintiff had been employed by the Defendant Company as an RD Operator by letter dated 6th November, 2006. I also find it not in dispute that the plaintiff's employment was subject to the terms and conditions contained in that letter as well as in the Collective Agreement signed between the MUZ, to which the Plaintiff belonged, and the Defendant Company. There was also a Disciplinary Code which was applicable to the Plaintiff. The three sets of documents stipulated the circumstances under, and reasons for, which the Plaintiff's employment could be terminated.

I further find it as a fact that the Plaintiff's employment was terminated by letter dated 28th October, 2008 for the offence of absenteeism from work. According to DW1, the Plaintiff did not work from June, 2008 after he was advised to seek medical treatment for the burns he had sustained from the domestic quarrel with his wife. He was required to furnish the company with a medical sick note if he was to stay away from work justifiably. The Plaintiff failed to do so but stayed away until 16th November, 2008 when he purported to report at the mine site. By then the letter of termination had already been written and was pending on his personal file.

The Plaintiff, on the other hand, claimed to have been working throughout the period June to October, 2008. He said that is why he was being paid his salaries during that period. He produced the pay statements for that period.

On the evidence before me I do not accept that the Plaintiff worked during that period. The Plaintiff's own evidence was that he was a shift worker and that as such he was entitled to a shift differential allowance. However, for the period June, to October, 2008 he was not paid that allowance. He said he did not claim the allowance because he did not notice that it was not being paid to him during that period. I refuse to accept that explanation. In my view he should have observed the discrepancy in his pay because the allowance was supposed to be a regular item on his pay statements. For example, during the period, January, to May 2008 the shift differential allowance, though a small amount, was regularly paid to him. I therefore accept DW1's evidence that had the Plaintiff worked during that period he would inevitably have worked some night shifts which could have triggered the payment to him of the shift differential allowance. This would have been unavoidable considering the company's shift pattern as explained by DW1. Further the Plaintiff's own supervisor sent him off to DW1 when the Plaintiff purported to report back for work on 16th November, 2008. This was because the supervisor knew that the Plaintiff had not been reporting for work.

Having found as a fact that the Plaintiff had not worked from June, to October, 2008, I now turn to inquire if he had any justification for staying away from work. Although the Plaintiff denied having seen DW1 in June, 2008 in connection with the burns he had suffered, I find the evidence of DW1 to be more truthful on the issue. The Plaintiff said in June 2008 he had gone to see DW1 to question how his leave days were being undercredited. That could not have been true because the pay statements for January to May, 2008 showed that he was earning two days per month, which was his entitlement. There was therefore no need for the Plaintiff to go and see DW1 over leave days. In my opinion, he had gone to see DW1 because he required time off for medical treatment for his burns, which he even showed to DW1.

DW1 advised the Plaintiff to seek medical treatment and to provide a sick note if he was to be off sick. He did not provide that sick note within the period stipulated in his conditions of service. When the Plaintiff was taken to DW1's office he was asked about the sick note. The Plaintiff did not produce any. Instead he said he was sorry and pleaded for leniency.

In my view, on the evidence before me, the Defendant company was entitled to take disciplinary action against the Plaintiff for breach of the company's regulations as to absence from work.

DW1 admitted that the Plaintiff was not charged for absenteeism or desertion prior to his dismissal. He said that was because the Plaintiff was not available and they did not know his whereabouts. However, the Plaintiff has not demonstrated that the dismissal was wrongful or unlawful, as pleaded. Ms. Mulenga's submission on the point was that, since the Plaintiff had committed the offence, the court ought to find that the Defendant was entitled to terminate the employment because the offence committed attracted summary dismissal.

In this regard, learned Counsel relied on the decision of the Supreme Court in the case of ZAMBIA NATIONAL PROVIDENT FUND v. Y.N. CHIRWA (1986) Z.R. 74 in which it was held:

“Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity”.

I agree entirely with Ms. Mulenga's submission that the failure of the Defendant to charge or hear the Plaintiff over his absence cannot be faulted in the circumstances of this case. In particular Clause 12 of the Collective Agreement empowered the Defendant to dismiss **“in absentia”** an employee who absented himself from work for the specified number of days. This means the employee did not need to be charged or heard.

In the circumstances I do not find anything wrongful or unlawful in the Defendant's decision to terminate the Plaintiff's employment.

The Plaintiff's entire action is, therefore, dismissed for lack of merit.

Regarding the Defendant's counter claim, I find that the Plaintiff was not entitled to any salaries or allowances, including the accrual of leave days or any benefits, during the period June, to October, 2008. This is on account of my finding that he did not work during that period. The salaries and allowances paid to him and benefits credited to him during that period were erroneously paid or credited. I cannot allow the Plaintiff to unjustly enrich himself by keeping the said benefits. I accordingly enter judgment for the Defendant on its counter claim as follows:

1. K13,639,750 being the salaries and allowances erroneously paid to the Plaintiff during the period June, to October, 2008.
2. Interest on the sum awarded at the Bank of Zambia long term deposit rate from November, 2008, till the date of this judgment, and thereafter at the short term deposit rate until full payment.

The Defendant had also claimed the sum of K3,369,500 being one month's salary plus allowances in lieu of giving the Defendant notice of his leaving employment. This is provided for under Clause 1 of the letter of employment. This I do grant with interest similarly as above.

With regard to damages for breach of the employment contract, my view is that the claim is adequately catered for under the claim for a month's salary and allowance in lieu of notice. In other words, one month's salary and allowances is reasonable compensation to the Defendant for breach of the contract by the Plaintiff.

The Defendant shall have the costs of the action, said costs to be taxed if not agreed,

Delivered at Kitwe in Open Court this 4th day of December, 2012

I.C.T. Chali
JUDGE