

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP/IRCLK/171/2016

BETWEEN:

JAMES BANDA

AND

NERIA'S INVESTMENTS LIMITED



COMPLAINANT

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 20th day of October, 2016

Appearances:

For the Complainant: Mr. L. Phiri of Messrs. Chonta, Musaila & Pindani Advocates

For the Respondent: No Appearance

JUDGMENT

20th October, 2016

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***

Cases Referred to:

- 1. Tholani Zulu and Others vs. Barclays Bank Zambia Limited (2003) Z.R. 127***
- 2. Gerald M. Lumpa vs. Maamba Colliers Limited (1988-89) Z.R. 217***
- 3. Zambia Consolidated Copper Mines vs. James Matale (1995-97) Z.R. 144***



1.0 COMPLAINANT'S CASE

- 1.1 On 26th April, 2016, the Complainant filed Notice of Complaint pursuant to **Section 85(4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**
- 1.2 The grounds upon which the Complaint was presented were that the Complainant's services with the Respondent were terminated on 24th February, 2016, the reason being that he was a non performing employee who refused to carry out delegated functions.
- 1.3 The Complainant claimed that his termination was without justification that it was wrongful, unreasonable and unfair.
- 1.4 At trial, the Complainant was the only witness in support of his case.
- 1.5 He testified that he was employed as Regional Supervisor – Western Province on 9th June, 2015 by the Respondent (exhibit '**JB1**' is the Contract of Employment).
- 1.6 He further stated that on 24th February, 2016, the Respondent wrote a termination letter to him (exhibit **JB3**). The said letter referred to clauses 2, 8, 13, 17 and 27 of the Disciplinary Code of Conduct for the Respondent (exhibit '**JB2**').
- 1.7 The Complainant testified that Clause 1 of the same Disciplinary Code of Conduct provided that:

“Disciplinary action will not be taken against an employee until an employee has been given a chance to exculpate himself/herself.”

- 1.8 The Complainant testified that in his letter of dismissal, clause 2 was cited as one of the reasons for the termination of employment.
- 1.9 Clause 2 prescribed an offence of leaving work without permission of immediate Supervisor and the penalties are: Verbal warning on first breach and Dismissal on second breach.
- 1.10 The Complainant told Court that he was never charged with the offence under Clause 2 aforesaid.
- 1.11 On Clause 8 of the Disciplinary Code, the Complainant stated that the Offence of Careless or inaccurate work is prescribed and the penalties are verbal warning on first breach, suspension on second breach and Dismissal on third breach. He told Court that he was never charged for this offence.
- 1.12 On Clause 13 which is stated as Habitual/Persistent Late Arrival whose penalties were: verbal warning for 1st breach; suspension for three days without pay for second breach and Dismissal for 3rd breach. The Complainant testified that he was never charged with this offence.

- 1.13 As regards reference to Clause 17 in the Disciplinary Code of the Respondent where the offence of Refusal to obey lawful instructions including refusal to work is provided, the Complainant stated that the penalties given here were suspension for three days without pay for 1st breach and Termination on the second breach. He told Court that he had never been charged of this offence.
- 1.14 On Clause 27 which provided an offence of Misconduct and Insubordination to Superior with the sanction of written warning on first breach and Dismissal on the second breach, the Complainant again testified that he was never charged on this offence.
- 1.15 The Complainant testified that he had never been charged of any offence that was referred to in his termination letter and that had he been charged, he would have had a chance to exculpate himself.
- 1.16 It was his testimony that the purported letter of termination was in fact a dismissal.
- 1.17 He further stated that Clause 21 in the Employment Contract (exhibit **JB1**) provided for a termination Clause. His interpretation of the termination Clause was that either party to the Contract could terminate by giving a month's Notice or payment in lieu of Notice. He testified this Clause did not

apply when the services of employee were terminated as a result of disciplinary allegations.

1.18 The Complainant asked the Court to grant him the following reliefs:

- (a) Damages for wrongful, unlawful, unwarranted and unfair termination of employment;
- (b) Interest;
- (c) Any other reliefs and costs.

2.0 RESPONDENT'S CASE

2.1 On 31st May, 2016, the Respondent filed its Answer supported by an Affidavit sworn by on **Munaf Patel** its Chief Financial Officer.

2.2 The Respondent accepted that the Complainant was its employee until 24th February, 2016 when it terminated his services.

2.3 The Respondent stated that the termination was justified and was done in accordance with the laws and laid down procedures.

2.4 Respondent denied that the Complainant was entitled to any of the relief he sought from Court.

- 2.5 In the affidavit in support of Answer, the Respondent's Chief Financial Officer at paragraphs 10 and 11 averred that the Complainant on several occasions left work without permission which resulted in the Respondent to suffer financial loss and damage, hence the decision to terminate his Employment Contract.
- 2.6 On 14th September, 2016 when this matter came up for trial the Respondent was not in attendance. I proceeded to hear the Complainant's case after which I adjourned the case to allow the Respondent time to be present. On the same day I made an order that if the Respondent failed to attend Court on the adjourned date, I would proceed to render judgment based on Viva Voce evidence of the Complainant and Affidavit evidence of both parties.
- 2.7 On 23rd September, 2016, the Respondent was again not before Court and there was an affidavit of Service on records. I then made an order that I would proceed to render Judgment as earlier ordered.
- 2.8 My opinion is therefore based on the viva voce evidence of the Complainant and affidavit evidence of the parties.

3.0 FINDING OF FACTS

- 3.1 Based on the oral and documentary evidence before me, I find the following as undisputed facts:

- (a) The Complainant was employed by the Respondent on a fixed one year written Contract from 9th June, 2015 to 8th June, 2016 as a Regional Supervisor;
- (b) 24th February, 2016, the Respondent terminated the Employment Contract of the Complainant for failure to adhere to work ethics, non-performance and refusal to carry out delegated functions, contrary to Clauses 2, 8, 13, 17 and 27 of the Respondent's Disciplinary Code of Conduct.
- (c) The Complainant claimed that the termination was unlawful, unfair and wrongful as he was not given chance to be heard on the allegations that led to the termination of his employment;
- (d) The Respondent contended that the termination was justified and done in accordance with the law and Disciplinary code.

4.0 ISSUES FOR DETERMINATION

4.1 Arising from the facts on record, the following are the issues I will determine:

- (a) Whether the termination was wrongful, unfair, or unlawful?

5.0 OPINION

5.1 It is clear from the record that the Employment relationship between the parties to this suit was reduced into writing.

5.2 It follows therefore that the relationship was regulated by the Employment Contract and the ***Employment Act, Chapter 268 of the Laws of Zambia.***

5.3 In terms of Clause 21 of the Employment Contract signed by the parties, each party was obliged to give one (1) month notice in writing to terminate the Contract or pay one (1) month's gross salary in lieu of notice. Clause 21 aforesaid goes further to provide that:

"This provision does not apply where services have been summarily terminated as per Disciplinary Code."

5.4 On 24th February, 2016, the Respondent terminated the Employment Contract of the Complainant without notice but paid the Complainant in lieu of Notice. In the same termination letter, the Respondent gave reason for termination, these being purported breaches by the Complainant of Clauses 2, 8, 13, 17 and 27 of the Disciplinary Code.

5.5 By giving the reasons for termination, the Respondent was purporting to comply with the requirement of the Statute.

- 5.6 In particular the Respondent was trying to fulfil requirements of Section 36 (1) (c) as amended by Act No. 15 of 2015 which provides that:

“A written Contract of service shall be terminated in any other manner in which a Contract of Service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee’s employment.”

Further Section 36 (3) provides that:

“The Contract of Service of an employee shall not be terminated unless there is a valid reason for the termination connected with the Capacity, Conduct of the employee based on the operational requirements of the undertaking.”

- 5.7 Clearly, the Statute has provided the guidance on how written Contracts can be terminated by either party to them. The Statute has given the employer extra obligations to give the reasons for termination if it initiates the termination.

Further, for the reasons of termination to be valid, those reasons should be connected with the capacity of the

Employee's performance of his duties, the conduct of the employee or that the operational requirements of the employer would not require the services of the employee.

- 5.8 If follows that the employer can invoke and use a termination clause in the Contract of Employment to terminate employment of an employee.
- 5.9 This has been settled to be a lawful way of terminating employment. The cases of ***Tholani Zulu*** and ***Others vs. Barclays Bank Zambia Limited, Gerald M. Lumpa vs. Maamba Colliers Limited*** and ***Zambia Consolidated Copper Mines vs. James Matale*** and authorities in this aspect.
- 5.10 Prior to the enactment of Act No. 15 of 2015, there was no obligation for the employer that opted to use the termination Clause to give notice. However, after the enactment of Act No. 15 of 2015, all employers are obliged to give reasons for termination. If no valid reason is given by an employer that terminates employment using a notice Clause, then that terminating may be held to unfair.
- 5.11 In casu, the Respondent terminated the Complainant's employment by invoking the termination Clause in the Employment Contract and went further to fulfil the statutory requirement of giving reasons for termination.

- 5.12 The reasons given were that the Complainant was failing to adhere to work ethics, non-performance and refusal to carry out delegated functions.
- 5.13 In terms of Section 36(3) of the Employment Act, these were valid reasons for termination as they were connected to the capacity and conduct of the Complainant, during the course of employment.
- 5.14 I have taken cognizance of the fact that under Clause 21 of the Employment Contract signed by the parties, there is a proviso to the effect that the termination Clause would not apply where services have been summarily terminated as per Disciplinary Code.
- 5.15 If the termination of the Employment contract was done prior to the enactment of Act No. 15 of 2015 aforesaid, an argument that this Court has powers to delve behind the real reason for termination would be entertained.
- 5.16 The Statute has however, now given clear directive of what needs to be done when an employee invokes a termination Clause. If there is a conflict between the Contract of Employment and the Statute as regards the application of the Notice Clause, then provisions of the law reign supreme.
- 5.17 In casu, the provisions of the law will prevail. The Respondent terminated the Contract in accordance with the law as is

- 5.18 Since I have found that the termination was justified, I find that the Complainant is not entitled to any of the claims prayed for.
- 5.19 I consequently dismiss the entire Complaint as it lacks merit.
- 5.20 I make no order for costs.
- 5.21 Leave to appeal to the Court of Appeal within 30 days granted.

Dated the 20th day of October, 2016

.....
M. MUSALUKE
JUDGE

