

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

COMP NO.349/2016

BETWEEN:

CHIPUNGU CHILUFYA DZEKEDZDEKE

COMPLAINANT

AND

ZAMBIA TELECOMMUNICATIONS  
COMPANY LIMITED

RESPONDENT



Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 5<sup>th</sup> day of September, 2017

**Appearances:**

*For the Complainant:* Mr. M. Bwalya of Messrs. Ellis & Co

*For the Respondent:* Mr. J. Malama and Ms. C. Chakanika – In House Counsel

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**JUDGMENT**

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**Legislation referred to:**

1. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

**Cases referred to:**

1. *Attorney General vs. Richard Jackson Phiri, (1988-89) Z.R. 121*
2. *Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango, (2009) Z.R. 22*
3. *Caroline Tomaidah Daka vs. Zambia National Commercial Bank, (2012) ZR 8 HC*
4. *Chilanga Cement Plc vs. Kasote Singogo, (2009 Z.R. 122*
5. *Fidler vs. Sun Assurance Co. of Canada, (2006) 25 C.R 3*
6. *Keays vs. Honda Canada Inc., (2008) 2.5. C.R. 362*
7. *Justine Mbita Silumbwe vs. Barclays Bank of Zambia Limited, SCZ Judgment No. 4 of 2017*

1.0 **COMPLAINANT'S CASE**

- 1.1 On 25<sup>th</sup> July, 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 on which the Complaint was presented were that the Complainant was on 25<sup>th</sup> April, 2016 unfairly, unlawfully and wrongfully dismissed from employment purportedly on the charges of poor supervision, and gross negligence of duty under clause 15, offence number 19 and 49 of the Respondent's Disciplinary Code and Grievance Procedure.
- 1.3 The Notice of Complaint was supported by the affidavit deposed to by the Complainant.
- 1.4 At trial the Complainant was the only witness that testified for her case and gave evidence on oath.
- 1.5 The gist of the Complainant's case is founded on the facts that she was employed by the Respondent on a three years fixed term contract effective 4<sup>th</sup> March, 2016.
- 1.6 That she was employed as a Senior Supply Chain Manager in grade ZT3. Her job entailed effective and efficient management and coordination of procurement of goods, works and services as required to support the efficient operations of the Respondent. This was to be done in accordance with the Public Procurement Act, Procurement Regulations and Guidelines.

- 1.7 On 19<sup>th</sup> November, 2014, the 60<sup>th</sup> Ordinary Board meeting of the Respondent approved the disposal of some motor vehicles and they were to be auctioned by public tender.
- 1.8 This task was given to the Complainant as Head of Procurement who in turn delegated this task to a Mr. Alex Chanda the Fleet Team leader.
- 1.9 It transpired that the Fleet Team Leader did not follow the Procurement Procedures of engaging an Auctioneer. Consequently, Hest World Auctioneers were engaged to conduct the auction and this resulted in the unauthorized sale of six (6) motor vehicles not approved for sale by the Respondent's Board.
- 1.10 On 13<sup>th</sup> April, 2016, the Complainant was charged by her Supervisor with the following offences:
- “(a) Poor supervision and*
- (b) Gross negligence of duty under clause 15.0 offence numbers 19 and 49 of the Zamtel Disciplinary and Grievance Procedure respectively.”*
- 1.11 On 15<sup>th</sup> April, 2016, the Complainant exculpated herself. In her exculpatory letter, she admitted that the Fleet Team acted fraudulently by authorizing the auction without a Purchase Order for the sale of six motor vehicles which were not on the list of approved motor vehicles for auction.

- 1.12 She further denied the charges as she believed the Fleet Team was conversant with the Zambia Public Procurement Act which should have guided them, even in her absence.
- 1.13 On 15<sup>th</sup> April, 2016, a Disciplinary Committee Meeting was held to deliberate the charges brought against the Complainant. The Complainant was in attendance at the hearing and gave oral submissions on her case.
- 1.14 After the deliberations, the Complainant was found guilty as charged and a recommendation for her dismissal was made.
- 1.15 On 25<sup>th</sup> April, 2016, the Complainant was dismissed from employment and given 14 days in which to appeal her dismissal to the Chief Executive Officer.
- 1.16 On 6<sup>th</sup> May, 2016, the Complainant appealed her dismissal to the Chief Executive Officer.
- 1.17 On 9<sup>th</sup> June, 2016, the Appeals Committee heard the Appeal and upheld the decision of the Disciplinary Committee to dismiss the Complainant.
- 1.18 The Complainant claims that the appeal ought to have been heard within 10 days of 6<sup>th</sup> May, 2016 when she lodged the appeal and not on 9<sup>th</sup> June, 2016 as this was contrary to clause 10.2.9 of the Respondent's Disciplinary Code.
- 1.19 As a result the Complainant claimed the following:

- “(i) Damages for unfair, unlawful and wrongful dismissal;*
- (ii) Damages for embarrassment and injury to the Complainant’s reputation;*
- (iii) Damages for shock;*
- (iv) Payment of gratuity at 30% of the Complainant’s last drawn basic salary in line with clause 10 of the Employment Contract herein;*
- (v) Reimbursement of all medical expenses incurred by the Complainant up to the date of judgment;*
- (vi) Punitive and exemplary damages;*
- (vii) Further relief the Court deems fit;*
- (viii) Interest on all the monetary claims above at the current bank lending rate;*
- (ix) Further relief the Court deems fit;*
- (x) Costs.”*

## 2.0 **RESPONDENT’S CASE**

2.1 On 19<sup>th</sup> august, 2016, the Respondent filed its Answer to the Notice of Complaint and stated that the Complainant as Head of Respondent’s Procurement Unit, was tasked to spearhead the process of disposing off specific assets of the Respondent’s motor vehicles through public auction.

- 2.2 That the Complainant assigned the instructions given to her to subordinates without due regard to their core competencies or skills given the task at hand.
- 2.3 That the Complainant did not properly supervise her subordinates thereby; leading to numerous flaws in the disposal process to the detriment of the Respondent.
- 2.4 That the Complainant was charged in accordance with the Respondent's disciplinary code and afforded an opportunity to exculpate herself.
- 2.5 That the Complainant was dismissed after going through the disciplinary hearing process.
- 2.6 At trial the Respondent called two witnesses; Ms. Betty Sikana its Human Resources Operations Manager and Mr. Ignatius Longwe its Supply Chain Manager.
- 2.7 The testimonies of both Ms. Sikana and Mr. Longwe were anchored on the fact that the Complainant delegated the instructions to conduct the Public auction to a Mr. Alex Chanda the Fleet Team Leader without due regard to compliance to procurement procedures in the engagement of the Auctioneer and that she did not provide adequate guidance to the Fleet Management Team on the proper conduct of the auction.

2.8 Further that the Complainant was charged, exculpated herself and was dismissed after undergoing the Disciplinary process as per provisions of the Respondent's Disciplinary Code.

2.9 It was the Respondent's contention that the Complainant was not wrongfully, illegally or unfairly dismissed and urged me to dismiss her claims.

### 3.0 **SUBMISSIONS**

3.1 I have had sight of the submissions by Counsel for their respective parties. I will not recite them in here but will make reference to them where necessary.

### 4.0 **ISSUES FOR DETERMINATION**

- 4.1 (a) Whether or not the dismissal of the Complainant was unfair and wrongful;
- (b) Whether or not the claim for payment of gratuity at 30% has merit;

### 5.0 **OPINION**

#### 5.1 **UNFAIR AND WRONGFUL DISMISSAL**

##### 5.2 (a) **Wrongful Dismissal**

5.3 For a claim of wrongful dismissal to succeed, the Complainant must adduce evidence and prove that the provisions of the Contract of Employment and/or Disciplinary Code of Conduct to which he/she was a party was breached by the Respondent when he/she was dismissed.

- 5.4 Wrongful dismissal is a common law term which in essence is a breach of Contract of Employment by the Employer.
- 5.5 When a claim for wrongful Dismissal is presented before Court, the duty of the Count is to examine if there was breach Contract of Employment by the Employer in the manner the dismissal was done.
- 5.6 The breach of Contract of Employment may take the form of a flawed disciplinary process. The cases of **Attorney General vs. Richard Jackson Phiri** and **Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango** are leading authorities on this aspect.
- 5.7 The Complainant's unchallenged evidence was that when she was dismissed, she appealed her dismissal to the Chief Executive offices on 6<sup>th</sup> May, 2016.
- 5.8 Evidence on record shows that the appeal was only heard on 9<sup>th</sup> June, 2016.
- 5.9 Clause 10.2.9 of the Respondent's Disciplinary Code provides:  
*"The appeal **must** (emphasis mine) be heard within 10 working days of lodging the Appeal."*
- 5.10 Evidence on record shows that the appeal was heard 34 days after the lodgment of the appeal and not within the mandatory 10 days provided for in the disciplinary code.

5.11 I have therefore, established that the Respondent breached its own code when it failed to comply to clause 10.2.9 when the appeal was not held within 10 days of its lodgment.

5.12 In light of the foregoing, I have no difficulty in finding that the Complainant's dismissal was wrongful. The claim for wrongful dismissal therefore succeeds.

5.13 Under Section 85A (a) it is provided that:

*"Where the Court finds that the Complaint or application presented to it is justified and reasonable, the Court **shall** grant such remedy as it considers just and equitable and may award the Complainant or applicant damages or compensation for loss of employment."*

5.14 Since I have found that the dismissal was wrongful and unjustified, it must be understood that the remedy for wrongful dismissal are damages. For wrongful dismissal, the measure of damages is limited to the amount of notice the employee would have received had the Contract been adhered to. This in essence reflects the contractual position that damages for breach of Contract should reflect the actual loss sustained.

5.15 Clause 13.1 of the Contract of employment executed by the parties provides for giving of 1 month notice terminate.

5.16 I, order that the Complainant be paid One (1) month's salary of her last drawn salary as damages for Wrongful Dismissal.

5.17 (b) **Unfair Dismissal**

5.18 The High Court in December, 2012 made an observation, in the case of ***Caroline Tomaidah Daka vs. Zambia National Commercial Bank***, that Unfairness is Statutory – related and is linked to protection of the Right of Employment and promotion of fair labour practices of requiring employers to terminate Contracts of Employment only on specified and reasonable grounds, and also providing for rare remedy of reinstatement.

5.19 Unfair Dismissal, therefore, occurs when an employee's contract is terminated in breach of a statutory provision.

5.20 In casu, the Complainant did not adduce evidence to show that there was a statutory breach by the Respondent. I, therefore, find difficulty to entertain this claim of Unfair Dismissal and, consequently, dismiss it for lack of merit.

5.21 (c) **Claim for Gratuity**

5.22 The employment contract signed between the parties at Clause 10.0 provides for payment of gratuity. Clause 10.0 provides:  
*“At the termination dates, the employee will be entitled to receive a contract gratuity of 30% (thirty percent) of the last drawn basic monthly salary multiplied by the number of months served under this agreement less any outstanding loan or*

*commitment as any other amount which the Company is by law entitled to recover from the employee.”*

5.23 Further, at clause 13.2 of the said employment contract it is provided as follows:

*“The Company may terminate for disciplinary reasons in line with Disciplinary and Grievance Code.”*

5.24 It is clear from the employment contract that the parties anticipated that the contract could be terminated through disciplinary reasons as was the case in casu.

5.25 When such a termination happens, clause 10.0 comes into play as it provides for the payment of gratuity on prorata basis. Payment of gratuity under clause 10.0 is specifically for instances when there is a termination and not at the end of contract.

5.26 The Respondent did not in fact challenge this claim by the Complainant both in its Answer and oral evidence of its witnesses.

5.27 I consequently, find that the Complainant is entitled to gratuity of 30% of her last drawn basic salary multiplied by three (3) months (being the number of months she served under her contract i.e. March, April, and May, 2016).

5.28 (d) **Claim for leave days**

5.29 Leave days are an accrued right and are paid regardless of the mode of exit from employment by an employee.

5.30 Clause 12.0 in the employment Contract of the parties to this suit provided that the Complainant would be accruing leave at the rate of two (2) working days per month.

5.31 From March, 2016 to June, 2016, the Complainant had accrued six (6) leave days.

5.32 I order that the Complainant be paid for six (6) leave days, on Conditions that leave days were not paid at the time she was dismissed.

5.33 (e) **Damages for Shock and Embarrassment**

5.34 The Complainant has claimed for damages for shock and embarrassment.

5.35 The Supreme Court in ***Chilanga Cement Plc vs. Kasote Singogo*** held that:

*“We are of the view ..... that such an award for torture or mental distress should be granted in exceptional cases, and certainly not in a case where more than the normal measure of Common law damages have been awarded.”*

5.36 I am guided by the Supreme Court holding but I will go further to explain why these are granted only in exceptional cases.

5.37 In the Canadian case of **Fidler vs. Sun Assurance Co. of Canada** the Court held that: “*damages for mental distress could be awarded if such as may be arising naturally from such breach of contract itself, or such as may be reasonable be supported to have been in contemplation of both parties.*”

5.38 This therefore, brings in an issue that the object of the Contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties.

5.39 Following up on the case of Fidler (Supra), the Supreme Court of Canada in the case of **Keays vs. Honda Canada Inc.** went on further to discuss the issue of damages for mental distress in employment contracts and held that:

*“Employment Contract is by its nature subject to cancellation on notice and thus at the time the Contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.”*

5.40 The ratio from the cited cases is that the damages for mental distress granted beyond notice period must be shown to have been within the contemplation of the parties at the time of

Contract and the psychological distress has arisen from the manner of termination.

5.41 An employee should therefore, prove that the manner of dismissal caused mental distress that was in the contemplation of the parties. Once that is proven, then as guided in the Singogo case, damages may be granted above the normal measure of damages.

5.42 In casu, the Contract of employment does not show that the parties contemplated a psychological distress resulting in a dismissal at the time of framing the employment contract. Indeed, the Complainant may have experienced normal distress and hurt feelings when she was dismissed. These feelings are however, not compensable as a dismissal such as the one that affected her is a clear legal possibility. Had the Complainant alleged malice and proved it, I would have been inclined to find for her. I am not therefore, persuaded to award damages for mental distress for the reasons I have given.

5.43 (f) **Claim for payment of allowances**

5.44 This claim was not supported by any evidence and therefore, fails and it is dismissed.

5.45 (g) **Claims for reimbursement of all medical expenses**

5.46 This claim was not supported by any evidence, therefore, fails and it is dismissed.

5.47 (h) **Punitive and exemplary damages**

5.48 The law is settled on the claim for exemplary damages. In the case of ***Justine Mbita Silumbwe vs. Barclays Bank of Zambia Limited, Mwanamwambwa D.C.J*** at page J26 states:

*“The law is well settled as to what constitutes exemplary damages and when they can be awarded. Exemplary damages are punitive. They are awarded where the conduct of the Defendant merits punishment. This is where his conduct is wanton; where he acts in contumelious disregard to the Plaintiff’s rights.”*

5.49 In casu, the Complainant’s dismissal was not marred with malice, insolence or any conduct which would warrant that I condemn the Respondent in exemplary damages.

5.50 The Complainant did not provide any evidence to justify the grant of these damages. I am therefore, not persuaded to award these damages.

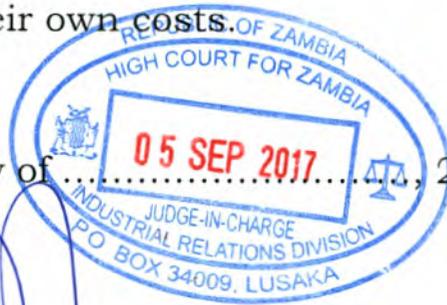
6.0 **CONCLUSION**

6.1 From judgment I make the following order:

- (a) The claim for wrongful dismissal succeeds and the Complainant is awarded one (1) month salary as compensatory damages;
- (b) The claim for 30% gratuity succeeds. The Complainant is awarded gratuity of 30% of her last drawn basic salary multiplied by three months;

- (c) The claim for payment of six (6) leave days succeeds on condition that this was not paid at dismissal.
- (d) The awards in paragraphs 6.1 (a) and (b) herein will attract interest at short term Commercial Bank rates from 25<sup>th</sup> July, 2016 until the date of judgment, thereafter, at the lending rates as determined by the Bank of Zambia from time to time until full settlement.
- (e) The claim for unfair dismissal fails and is dismissed;
- (f) The claim for shock and embarrassment fails and is dismissed;
- (g) The claim for payment of allowances fails and is dismissed;
- (h) The claim for reimbursement of medical expenses fails and is dismissed;
- (i) The claim for punitive and exemplary damages fails and is dismissed;
- (j) Each party to bear their own costs.

Delivered this ..... day of ....., 2017



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**M. MUSALUKE**  
**HIGH COURT JUDGE**