

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

COMP/411/2016

BETWEEN:

KASALWE NKALAMO
ANDREW MUKELABAI
CHRISTOPHER LWENJE



1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT

AND

NATIONAL BREWERIES PLC

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** on the 7th day of March, 2018

Appearances:

For the Complainants: Ms. A. Matantilo of Messrs. Ellis & Co

For the Respondent: Mr. A. Tembo of Messrs. Tembo, Ngulube & Associates

JUDGMENT

Legislation referred to:

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

Cases referred to:

1. *Zambia Consolidated Copper Mines Limited v James Matale (1995-97) Z.R. 144, (S.C.)*
2. *Atlas Copco (Zambia) v Andrew Mambwe, (SCZ), Appeal No. 14/2007*
3. *Redrilza Limited v Abuid Nkazi & 4 others, (SCZ), Appeal No. 101/2009*
4. *Josephine Mwaka Mwambazi v Food Reserve Agency, (SCZ), Appeal No. 128/2001*
5. *Manyaka v Van de Watering Engineering (Pty) Ltd (1997) II BLLR 1458(LC)*

6. *Gerald Musonda Lumpa v Maamba Coulleries Limited (1988-89) Z.R. 217*
7. *Zambia Privatisation Agency v James Matale (1995-1997) Z.R. 157 (SC)*
8. *McCall v Abelesy & Another (1997) 1 ALL ER 727*
9. *Attorney General v D. G. Mpundu (1984) Z.R. 6 (SC)*

On 31st August, 2016, **Mr. Kasalwe Nkalamo, Mr. Andrew Mukelabai and Mr. Christopher Lwenje** (Complainants herein) filed a Notice of Complaint against National Breweries Plc (Respondent herein) pursuant to section **85(4) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.**

The grounds on which the Complaint was presented were that, the Employment Contracts of the Complainants were unfairly and wrongfully terminated on or about 8th June, 2016 and that the reason given for the termination was: “*for operational requirements of the company.*”

The Complainants contended that the reason given for termination was not true.

The Complainants sought the following reliefs:

- (a) Damages for unfair and unlawful/wrongful termination;
- (b) Damages for injured reputation and embarrassment;

- (c) Payment of all allowances and leave days under the Contract of employment;
- (d) Reimbursement of all medical expenses incurred by the Complainants up to the date of judgment;
- (e) Damages for mental distress;
- (f) Punitive and Exemplary damages;
- (g) Interest on the said damages at the current bank lending rate;
- (h) Any other reliefs the Court may deem fit; and
- (i) Costs.

The Notice of Complaint was supported by affidavits. At trial each Complainant filed witness statements and relied on them as their evidence in chief.

Kasalwe Nkalamo was Complainants' witness number one (**CW1**) and testified that he was employed by the Respondent as a Management trainee in 2010 and later promoted as Plant Manager in September, 2011. That on 9th June, 2016 a Mr. Rumbani Mwandira a Plant Manager for Zambian Breweries based at Ndola Plant and a Mr. Richard Likuma, Plant Manager for the Respondent based at Ndola Plant visited him at his work place in Kitwe.

That he was advised to call his subordinates Mr. Andrew Mukelabai (the 2nd Complainant) the Packaging Manager and Mr. Christopher

Lwenje (3rd Complainant), the Brewing Manager after which letters of termination were handed to the trio by Mr. Mwandira. Further, that he was requested by Mr. Mwandira to handover the Plant to Mr. Likumba as he was no longer in employment.

He testified that, upon reading the letter of termination of employment, he discovered that the reason stated for termination was due to operational requirements as the Respondent was deemed not to be operating at optimum levels. It was his testimony that throughout his employment he was never subjected to any disciplinary process due to under performance or incompetence. That to the contrary, he was a higher performance who was always rated under category four (4) for high performers.

He stated that the termination of his employment was embarrassing as it looked like he had grossly misconducted himself and that as a result it was hard for him to find employment.

Under cross examination, the witness told Court that there was decrease in profitability of the Respondent but that this was due to increasing difficult economic fundamentals the Country was facing and competitive pressure from illegal bulk products on the market and nothing to do with operational issues.

He also told Court that after he was replaced by a Mr. Likumba, the Respondent posted profits but that this was not as a result of him being replaced. He attributed the rise in profit to the fact that the

bulk beer business had a trend when profits and losses were recorded. He stated that in January, a lot of people had challenges with the disposable income and therefore, no profits were expected in January. That, as the year progressed from July up to December, this was peak period and the Respondent was always making profit during this period.

The witness conceded that the Plant at Kitwe was not performing at optimal levels due to lack of technical know-how.

Mr. Andrew Mukelabai was the Complainant's second witness **(CW2)**. In his witness statement, he testified that he was employed by the Respondent on 3rd December, 2012 as a Team Leader. On 27th October, 2014, he was promoted to the position of Packaging Manager and was reporting to the 1st Complainant.

That on 9th June, 2016, his Supervisor, the (1st Complainant) called him to his office where he found a Mr. Mwandira, Mr. Likumba and a Mr. Mataka, Plant Manager for Zambia Breweries, Ndola Plant; Plant Manager National Breweries Ndola Plant and Human Resources Business Partner Zambia Breweries Ndola Plant respectively.

That, Mr. Mwandila handed him a letter of termination and was told to handover to Mr. Likumbi. That the reason stated in the termination letter was due to operational requirements.

He testified that he was never underperforming in his duties and that throughout his employment he was not subjected to any disciplinary process due to underperformance or incompetence. He stated that he was always rated at 4 for high performers.

Under cross examination, he testified that the contract he signed at clause 17, there was termination clause which gave right to either party to the contract to terminate. That, the Respondent terminated his contract and paid him in lieu of notice.

He testified that he was not privy to the official information that the plant was making profits or losses, though he knew that in the last half of 2015 financial year, the Plant was making loss as the sales volumes were dropping and the warehouse was full of products that were expiring.

CW2 placed the blame for the expiring products on the production team that was over producing the bulk beer.

He testified that when his contract was terminated, he was replaced by a Mr. Moonga Milimo who was Plant Manager at the Respondent's Plant in Chipata.

He told Court that if he was underperforming, he had expected the Respondent to have talked to him prior to the termination of his employment.

The Complainants' third witness (**CW3**) was Mr. Christopher Lwenje. In his witness statement, he testified that he was employed by the Respondent on January, 2013 as a Trainee Production Manager based at Chipata Plant. In August, 2013, he was promoted to Production Manager at Kitwe Plant.

That on 9th June, 2016, he was given a letter of dismissal by a Mr. Mwandira and he was told to handover to Mr. Likumba. That the reason stated in the termination letter was "*for operational requirements*".

He further stated that prior to the termination, he was a high performer with a grade 4 rating after performance appraisal. That he was never told or warned that the plant was underperforming prior to the termination of this contract. That his termination of employment was extremely embarrassing as he was told to handover immediately and asked to leave the plant and it looked like he had misconducted himself.

Under cross examination, CW3 told Court that the figures shown at page 3 of the Respondent's Bundle of Documents do not reflect the actual performance of the three Complainants.

In re-examination, the witness told Court that the financial statements the Respondent was relying on to show that there were losses during the period under review did not give a complete picture. He testified that, the financial statements submitted in

Court by the Respondent, did not have usage variances. This meant that the Financial Statements were not conclusive to indicate underperformance at the Plant.

On 7th October, 2016, the Respondent filed its Answer to the Notice of Complaint. In its Answer, the Respondent stated that the Contract of Service between the Complainants and itself provided that either party would terminate the Contract of Service by giving a month's notice or payment in lieu thereof.

That the Respondent exercised its contractual right and terminated the Contracts of Service for the Complainants and paid the terminal benefits due.

Further, that, the Respondent intimated the reason for the termination of employment with the Complainants and that reason was associated with operational requirements at the Respondent. That, the Complainants were not entitled to reliefs sought.

The Answer was accompanied by an affidavit in support deposed by Monde Chicha its Human Resource Business Partner.

At trial only one witness testified on behalf of the Respondent. In her witness statement, Ms. Kawena Mwansa (**RW1**), the Human Resource Business Partner testified that the Kitwe Plant of the Respondent was not performing at optimum levels, there was therefore, an urgent need for a turnaround of the business to

ensure continued profitability. The Respondent was therefore, looking for personnel with a particular skill set and technical knowledge to run the plant.

She further testified that, owing to operational requirements, the Respondent elected to exercise its contractual right to terminate employment contracts of the Complainants and clearly stating the reasons for termination.

She told Court that the Contracts of employment between the Respondent and the Complainants provided for termination by giving a month's notice or payment in lieu thereof.

That, the problems at the Kitwe Plant had arisen gradually over a period of time and the competence of the Complainants was not called into question neither were there allegations of misconduct but that a turnaround was required which was beyond the experience and expertise of the Complainants.

At the end of trial Counsel for both parties filed written submissions.

Counsel for the Complainants Ms. Mantatilo submitted that the termination of employment Contracts of the Complainants by the Respondent was wrongful and unfair. She asked me to closely examine the reasons that were advanced by the Respondent in terminating employment contracts as she believed the contracts

were terminated as a result of incapacity or misconduct and disguised as operational requirements.

She urged me to delve behind the termination clause to find the real reason for termination. In support of this argument, she cited the case of **Zambia Consolidated Copper Mines Limited v James Matale, Atlas Copco (Zambia) v Andrew Mambwe, Redrilza Limited v Abuid Nkazi & 4 others** and **Josephine Mwaka Mwambazi v Food Reserve Agency**.

Ms. Matantilo further argued that even though the Respondent abided by statutory provisions i.e. Section 36(1) of the Employment (Amendment) Act No. 15 of 2015 which obliges an employer to give reasons for termination, the reasons given in her client's case were not justified.

Ms. Mantantilo cited a South African case of **Manyaka v Van de Watering Engineering (Pty) Ltd** where it was held that an employer who dismisses for operational requirements must prove that the termination of employment was the only reasonable option open to him as a measure of last resort.

Counsel submitted that even though the Respondent gave the reason for termination as due to operation requirements, further reason was given that it was looking for personnel with a particular skill set. This in essence entailed that the Complainants were incompetent and had no capacity to run the Plant. If such was the

case, then, the Complainants could have been subjected to procedures that exist at the Respondent to address their shortcomings and not to rush to termination.

Court urged me to declare the termination unfair as it was a disguise for the alleged poor performance by the Complainants.

On the other hand, Counsel for the Respondent Mr. Tembo submitted that the Respondent validly terminated the employment of the Complainants due to capacity and operational requirements. He submitted that the Complainants were never rated lowly by the Respondent in the performance of their duties but that the Plant under their control was not performing at optimal levels and thus it required different skill set to run it profitably.

Counsel submitted that Clause 17 in the employment contracts executed between the Complainants and the Respondent provided for a right by either party to terminate by giving a month's notice or payment in lieu thereof. That, there was therefore, nothing wrong about the manner the Contracts were terminated as this was provided for in the Contracts signed. Counsel cited the cases of ***Gerald Musonda Lumpa v Maamba Collieries Limited*** and ***Zambia Privatisation Agency v James Matale*** to support his argument.

Mr. Tembo submitted that the Respondent in fact complied with the law by giving reasons of operational requirements for termination of employment contracts of the Complainants.

In relation to claim for damages for mental distress by the Complainants, Counsel for the Respondent submitted that damages for mental distress can only be awarded where there has been a breach of contract. The cases of *McCall v Abelesy & Another* and *Attorney General v D. G. Mpundu* were cited to support Counsel's argument.

It was submitted that in the case at hand, there was no breach of Contract on the part of the Respondent. The claim for damages for mental distress could therefore, not stand.

From the evidence and submissions on record, I find the following as undisputed facts in this cause.

- (a) That the Complainants were employed by the Respondent as Plant Manager, Packaging Manager and Brewing Manager respectively at the Respondent's Kitwe Plant;
- (b) The Contracts of employment for the Complainants were executed on 27th October, 2014 in respect of the 1st and 2nd Complainant and on 13th May, 2015 in respect of the 3rd Complainant.

- (c) Clause 17 in respect of the Contracts of employment for the 1st and 2nd Complainants and clause 16 in respect of the 3rd Complainant provided for Notice clause in terminating the employment contracts of the Complainants.
- (d) On 18th June, 2016, Employment Contracts for the Complainants were terminated by the Respondent using a notice clause and paying in lieu thereof;
- (e) The reason given for termination was operational requirements of the Respondent;
- (f) The Complainants have come to Court and are disputing that the reason given was not genuine but a mere disguise for the alleged incompetence which should have been investigated further through the disciplinary code.
- (g) On the other hand, the Respondent has argued that it followed the provisions of the Contract and the law in termination the employment Contracts of the Complainants.

The issues to determine are:

- (1) Whether or not the termination of contracts was done contrary to the provisions of the Contracts and law.
- (2) Whether or not I should delve behind the notice clause to find the real reason for termination.

(i) **Whether or not the termination of contracts was done contrary to the provisions of the Contracts and the law**

As rightly submitted by Counsel for both parties, where a Contract of employment provides for termination of employment by notice period or payment in lieu thereof, the giving of notice done in accordance with the Contract terminates the employment (**see *Gerald M. Lumpa v Maamba Collieries Limited***).

The Industrial Relations Court was clothed with the statutory mandate to do substantial justice to the parties before it (**Section 85(5) of the Industrial and Labour Relations Act**). It was because of that statutory mandate that the Court would go behind the notice clause and find the real reason for termination of employment contract. The Court was delving behind the notice clause with the full knowledge that at common law, it was legal to terminate employment contract without giving notice. It was realized that employment cases were sensitive and affected livelihoods of not only employees but their families as well. The Courts would therefore, where it was alleged that the employer hid behind the notice clause to terminate employment contract, delve behind the notice clause to find the real reason for termination in order to avoid injustice on the employee(s) affected. This was the trend until amendments were made to the Employment Act in 2015. The said amendments introduced Section 36(3) which provides that:

“The Contract of service of an employee shall not be terminated unless there is a valid reason for termination connected with the

capacity, conduct of the employee or based on the operational requirements of the undertaking.”

The Employment Amendment Act No. 15 of 2015 in essence has modified the common law principal that the employer can terminate employment without any reason. The requirement for giving a reason for termination is now statutory. Any employer who terminates employment without giving reasons as outlined in the amended Act breaches the law.

The amendment [**S. 36(3)**] does not go further to prescribe what the reasons should contain if it is to do with the conduct of the employee or what the operational requirements of the employer should be to enable it to terminate employment of employee.

I find that the amendment has not helped much as employers will be insisting that they gave the contractual notice to terminate and gave reasons as per statutory requirement. The employees on the other hand would be contesting those reasons as being mere disguise for getting rid of them. The balance then, has to be made by Courts looking at circumstances of each case.

In casu, indeed the Respondent followed the contractual provisions to give notice on termination and followed the statutory requirements by giving reasons for termination. What I need to determine is whether or not these reasons are genuine.

The reason given is that of operational requirements of the employer. The employer must satisfy the Court that laying off its staff for operation requirements is for business purposes and in order to save its business from collapsing. When Companies face certain economic facts, inevitable charge occurs and these are mainly attributed to downturn in production, sales or economy, introduction of technology, business relocation, business mergers or restructuring. All these will entail that certain employees would be affected negatively.

It is therefore, not the Court's duty to generally interfere with the bona fide powers of Management of Companies to change direction of their companies affected by the factors I have alluded to. If a company gives genuine reasons for change of staff because of operational requirements, then the Courts would not be seen to interfere and impose workers on an establishment which will fail to meet its obligation of paying salaries and statutory payments connected to employees.

In casu, evidence was led that the Kitwe Branch of the Respondent where the Complainants worked was in fact not operating at optimum levels. CW2 in fact told Court that the beer being brewed at that particular time started expiry in warehouses and these were eventually being destroyed. He told Court that sales had declined and the warehouse was full of products that were expiring.

Further, RW1 testified that since the Kitwe Plant was not operating at optimum levels, the Respondent needed to engage personnel with technical knowhow and expertise to turn round the profitability of the Plant.

Evidence was also led to the fact that immediately a Mr. Richard Likumba took over as Plant Manager, sale and profitability improved at the Kitwe Plant. This is evidenced by Respondents performance for the year 2015, 2016 and 2017, (see Respondent's Bundle of Documents). The performance for the financial year 2016 at the Kitwe Branch improved when Mr. Likumba took over in June, 2016 by recording a profit of K1,200,000.00 before tax as compared to losses recorded from February, 2016 to May, 2016.

From the foregoing, I find that the Respondent genuinely carried out re-organisation for operation efficiency. The Respondent therefore, took steps to streamline its operations for better efficiency and productivity. On the substantial merit of this case, I find that the reasons advanced by the Respondent for the termination of employment contracts for the Complainants were lawful and bonafide and made with just cause and excuse.

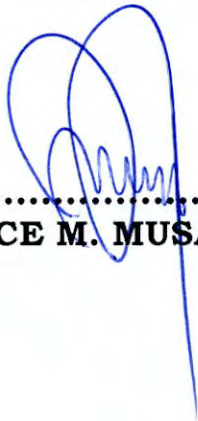
That said, the claim by the Complainants that their employment contracts were terminated unfairly and lawfully fails and is dismissed.

Having found that the termination of employment contracts of the Complainants by the Respondent was lawfully done, it follows that the other claims raised in the Notice of Complainant by the Complainants have become otiose and I need not consider them.

In sum, all claims by the Complainants fail and are dismissed.

Each party to bear own costs.

Delivered this 7th day of March, 2018



.....
JUSTICE M. MUSALUKE

