IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Civil Jurisdiction)

2016/HN/364

BETWEEN:

JOSEPHINE MAKASA — PLAINTIFF

AND

LAKE PETROLEUM LIMITED — DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS *23RD* DAY OF *MARCH*, 2020

APPEARANCES:

For the plaintiff: Mr. T. T Shamakamba, Shamakamba and Associates

For the defendant: Mr. N. Kamanga and Mr. K. Msoni, J.B. Sakala and Company

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J U D G M E N T

CASES REFERRED

1. HUMPHREY KOMBE MUSONDA V ZAMBIA FORESTRY AND FOREST INDUSTRIES CORPORATION LIMITED (2015) ZR VOL 3, 79
2. ZAMBIA NATIONAL PROVIDENT FUND V CHIRWA[2] (1986) ZR 70
3. KONKOLA COPPER MINES PLC V CHIMFWEMBE AND ANOTHER 2016 ZR VOLUME 2, PAGES 57 TO 76
4. KASEBA KATEYA V JOSEPH OSCAR SHAMBA AND BECMOS LIMITED (2010) ZR 21
5. SAMSON KATENDE, CROSBY BERNARD V NCF AFRICA MINING PLC (2011) VOLUME 2 ZR 112

6. MUSONDA CHARLES SAINI AND AMAZON SECURITY SERVICES LIMITED (2015) VOLUME 3 ZR AT PAGE 176
7. KONKOLA COPPER MINES PLC V GREENWELL MULAMBIA APPEAL NO.053/2013

By writ of summons accompanied by a statement of claim dated 18th November, 2016, **Josephine Makasa**, the plaintiff herein, sought an order that her dismissal from employment by **Lake Petroleum Limited**, the defendant herein, was unjustifiable and illegal. The claims endorsed in the writ of summons were for:

1. An order that the dismissal of the plaintiff by the defendant was unjustified, illegal and void;
2. An order that the dismissal of the plaintiff by the defendant was contrary to the code of conduct;
3. An order for damages for unjustified and illegal termination of unemployment;
4. Interest; and
5. Costs

In its defence filed on 30th December, 2016, the defendant averred that it did not have a policy for additional transport money to be offered to employees who resided in areas which were far from their assigned work stations. It was further averred that the plaintiff's dismissal was on the ground of her willful failure to execute her assignment as provided in the company's disciplinary and procedure code. It was the defendant's averment that despite management's

efforts to settle the issue amicably, the plaintiff did not heed to its advice and instructions.

When the matter was heard on 18th November, 2019, both parties were before court and they each called one witness.

The plaintiff, **Josephine Makasa**, was her own sole witness (**PW1**). Her testimony which was buttressed by her statement of claim was that she was employed by the defendant as a filling station attendant for Kapiri Mposhi on 14th February, 2013. She narrated that initially, she worked at Hilcrest filling station but that she was later transferred to Masala filling station. PW1 stated that during the time that she worked at Masala, the defendant served her a written warning for reporting late for work. She stated that the written warning was contrary to the disciplinary code in which a verbal warning was required for a first breach. She stated that the defendant later started paying her an additional sum of K200 as transport money because Masala filling station was far from where she lived in Chifubu.

It was PW1's evidence that when she was transferred to the Kabwe road filling station, she informed management that it was equally far from her residential area and requested that the defendant continues to pay her the additional transport money. PW1 asserted that she refused to sign her letter of transfer in the hope that the defendant would give her transport allowance as before.

PW1 narrated that later, the defendant's chief advisor wrote a letter asking her to give a written explanation for her refusal to sign the transfer letter. She indicated that the chief advisor's letter was at page 8 of her bundle of documents. The witness stated that she in her reply to the chief advisor, she requested him to facilitate some transport allowance to aid her trips to work every day. She stated that it was after this that she was served with a letter of dismissal. She added that the letter of dismissal did not stipulate the clause under which she was being dismissed.

It was PW1's evidence that her dismissal was contrary to the disciplinary code which provided for a written warning to be issued before an employee could be summarily dismissed. She urged the court to award her damages for unjustifiable dismissal.

In cross-examination, PW1 stated that the conditions of employment stipulated that she was to be given one month's notice before termination of the contract. She affirmed that her contract also contained a clause for summary dismissal on grounds of gross default, misconduct or breach or non-observance of the stipulations contained therein.

The witness affirmed that the defendant had the right to transfer her to any filling station. She confirmed that her letter of employment did not state that she was entitled to transport money if she was

transferred to a different station. She also confirmed that she was a unionised employee and that the collective agreement did not provide for additional transport money.

PW1 affirmed that the chief advisor's letter indicated that it was not the first time that she was refusing to sign a letter from head office. She explained that she did not refuse to work at Bwana Mkubwa filling station but that her refusal to sign the transfer letter was aimed at prompting the defendant to consider her transport logistics.

In re-examination, the witness stated that the defendant did not follow the procedure for dismissal as set out in the disciplinary code of conduct.

The defendant's witness (**DW1**) was **Mawili Mulenga**, the defendant's Industrial and Labour Relations Officer. He told the court that although he was only three months on the job, he was knowledgeable about what had transpired in this case. He stated that when the plaintiff was transferred to Bwana Mkubwa filling station, she refused to sign the letter of transfer on the basis that the new station was far from where she lived.

He explained that the plaintiff's salary which was tabulated in the contract already included transport allowance. He told the court that the contract also provided for the plaintiff to be transferred to wherever her services were needed. He referred the court to the

contract at pages 1 to 4 of the defendant's bundle of documents. He stated that the plaintiff breached the contract when she refused to go on transfer and this led to her dismissal on 4th August, 2016.

He stated that the plaintiff's dismissal was pursuant to her contract of employment and not the code of conduct.

During cross-examination, DW1 confirmed that under the disciplinary code, the first penalty for an employee who refused to undertake an assignment was to serve them with a written warning. He stated that notwithstanding, the plaintiff's dismissal was justified because the letter of appointment could over-ride the disciplinary code.

In re-examination, DW1 told the court that the plaintiff's letter of appointment also provided for summary dismissal in the event of non-compliance with the terms.

After the close of the case, counsel for the plaintiff and counsel for the defendant both filed in written submissions for which I am greatly indebted.

Counsel for the plaintiff, Mr. T. Shamakamba, submitted that the plaintiff's dismissal was illegal, null and void. He submitted that his client was charged as per the disciplinary code which stipulated that a written warning was the penalty for willful failure to execute an

assignment. He stated that the penalty of summary dismissal that was invoked was beyond the defendant's mandate.

Mr Shamakamba argued that the plaintiff's dismissal was wrongful because the defendant did not follow the provisions of the disciplinary code. He cited the case of **Humphrey Kombe Musonda v Zambia Forestry and Forest Industries Corporation Limited**[1] wherein the held the converse to be true; that the complainant's dismissal was not wrongful because the respondents followed the disciplinary process incorporated in its disciplinary code book.

Counsel also highlighted the court's holding in the case of **Zambia National Provident Fund v Chirwa**[2] that 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; as such the employee has no claim for wrongful dismissal or a declaration that the dismissal is a nullity. He argued that on the basis of this case, the plaintiff's dismissal was not a nullity.

Counsel submitted with regard to the plaintiff's claim for damages that the plaintiff was entitled to more than the notice period because the defendant had invoked its disciplinary procedure without any justification. He supported his position with the Supreme court's view in the case of **Konkola Copper Mines PLC v Chimfwembe and Another**[3] to the effect that damages for loss of employment could range from the payment equivalent to the notice period for

termination to two year emoluments, depending on the circumstances of each case.

Counsel argued that the plaintiff in the present case was entitled to damages worth more than the notice period because the defendant not only failed to increase the plaintiff's transport allowance but it also invoked the disciplinary process without any justification. Counsel prayed that the damages attract interest and an award of costs be made against the defendant.

On 26th November, 2019, counsel for the defendant, Mr N. Kamanga and Mr K. Msoni, also filed written submissions. It was their contention that since the appropriate punishment for the offence committed by the plaintiff was dismissal, the plaintiff had not proved that the defendant's termination of her employment was illegal, null and void. Counsel relied on the case of **Kaseba Kateya v Joseph Oscar Shamba and Becmos Limited**[4] in which the court's sentiments were as follows:

> **Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed no injustice arises from the employee with the laid down procedure in the contract and the employee has no claim on the ground for wrongful dismissal in a declaration that the dismissal is a nullity.**

Counsel argued that the defendant had the power to dismiss the plaintiff and that its powers were validly exercised. They drew the court's attention to the case of **Samson Katende, Crosby Bernard v NCF Africa Mining Plc**[5] in which it was held that:

> **The court cannot be required to sit as a court of appeal from a decision of administration tribunals to remove its proceedings or inquire whether its decision was fair or reasonable and that the court ought to have regard only to the question whether the tribunal had valid disciplinary powers and if so, whether such powers were validly exercised.**

Counsel also contended that the refusal by the plaintiff to go on transfer amounted to a fundamental breach of employment and a discharge of the contract. By comparison, counsel brought to the fore the case of **Musonda Charles Saini and Amazon Security Services Limited**[6] in which the court opined that: –

> **The refusal by the complainant to obey a lawful directive to work as a static guard amounted to a repudiatory or fundamental breach of the contract of employment which went to the root of the contract and led to its discharge without any need for acceptance by the respondent. By wilfully surrendering his uniform and leaving the company, the complainant discharged the contract.**

They wound up their submission with the contention that the plaintiff was correctly dismissed from employment by the defendant

as she had contravened the letter of employment and the code of conduct.

I have considered the evidence on record and the testimonies of both parties and I find that the following facts are undisputed: that the plaintiff was employed by the defendant as a filling station attendant by a letter of employment which she signed on 14th February, 2013; that her letter of employment indicated that she would be subject to the company code of conduct; that on 9th October, 2015, the plaintiff also signed an employee's disciplinary code of conduct; that on 25th July, 2016, the defendant wrote a letter transferring the plaintiff from Hilcrest filling station to Bwana Mkubwa filling station but the plaintiff did not endorse her signature on the said letter as required.

I further find that on 26th July, 2016, the defendant wrote a letter requesting the plaintiff to give a written explanation on why she had not signed her letter of transfer. The plaintiff wrote back to the defendant stating that her refusal to sign the letter was because reporting to her new station required her to spend five kwacha (K5.00) per day on transport which would have been costly on her. It is also not in dispute that the plaintiff was later summarily dismissed by the defendant on the ground of wilfully failing to execute the assignment given to her.

I have noted from the evidence that the plaintiff's contention is that her dismissal was illegal because the disciplinary code stipulated

that a first breach only warranted a written warning. The defendant's argument however is that the plaintiff's dismissal was pursuant to her letter of employment which did not require her to be served with a prior written warning before being dismissed.

Having regard to the evidence before me, the issue falling for resolution in this matter is whether the plaintiff had committed an offence which entitled the defendant to summarily dismiss her.

From the evidence on record, it is clear that the plaintiff had signed a letter of appointment (which the parties have also been referring to as the contract of employment) and an employees' disciplinary code. The plaintiff's employment was therefore governed by the said two documents and the defendant had the option to dismiss the plaintiff pursuant to the letter of employment or the disciplinary code, depending on the offence that the plaintiff had committed.

In the letter of employment, the clause for summary dismissal was couched as follows:

> ***Summary dismissal***
>
> *The employment may be terminated forthwith by the employer if it is found that the employee is guilty of any gross default, misconduct or breach or non-observance of any of the stipulations herein contained.*

A perusal of the disciplinary code reveals that it contained a list of offences and the penalties that could be meted out when breached. The plaintiff's letter of dismissal indicated that the disciplinary meeting found that she was "wilfully failing to execute the assignment given in accordance with the company policy". I have noted that while the letter of employment provided for summary dismissal, it did not outrightly mention the offence of wilful failure to execute an assignment; the offence was set-out in the disciplinary code. This entails that the defendant had decided to dismiss the plaintiff pursuant to the disciplinary code and having done so, it was obliged to impose the penalties that where set out therein. Under the disciplinary code schedule of offences and penalties, the sanction for a first breach of willful failure to execute an assignment was a written warning. An employee could only be summarily dismissed if it was their second breach.

My view is fortified by the case of **Konkola Copper Mines Plc v Greenwell Mulambia**[7] in which the Supreme Court upheld a substitution of penalty by the Industrial Relations Court in the following words:

> **The Disciplinary Code Schedule of Offences and Sanctions provided for the penalty of an unrecorded warning in respect of a first offender guilty of an offence. The Industrial Relations Court was on firm ground when it substituted the penalty of a dismissal with that of a**

> **warning because the evidence on record showed that the respondent was a first offender...**

In casu there was nothing that warranted the defendant to take the case from the realm of the warning that was provided in the disciplinary code. Being the plaintiff's first breach, the defendant was bound to give her a written warning.

I also wish to distinguish the circumstances of this case from the case of **Zambia National Provident Fund v Chirwa** which was cited by Counsel for the plaintiff. In that case, the court stated that the failure to comply with established procedure did not amount to a breach of contract and could give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void. It must be pointed out that the present case is beyond the ambit of the **Chirwa** case because the issue herein is not a failure to adhere to procedure but a diversion from a stipulated penalty. I must emphasise that an employer does not have unfettered power to mete out any penalty that it wishes contrary to the provisions of the disciplinary code but is obliged to impose the penalties stipulated in its disciplinary code.

From the foregoing, I find that it was erroneous for the defendant to charge the plaintiff under the disciplinary code and then adopt the penalty provided for under her letter of employment. The only lawful avenue available to the defendant, had they wanted to resort to the

plaintiff's letter of employment to dispense with her services was to invoke the termination clause.

I have no hesitation in asserting that the plaintiff's contract of employment was improperly terminated. Any breach of any of the terms of the contract between the plaintiff and the defendant as to the mode of termination should entitle the aggrieved party to damages. In this case, the only proper way of terminating the plaintiff's employment as provided for under her contract was to give her one month's notice or one month's salary in lieu of notice. Thus, the plaintiff is entitled to one month's salary in lieu of notice being the usual damages which arise from such a situation.

I award damages to the plaintiff consisting of her usual one month's gross consolidated salary in lieu of notice, with interest thereon at the current bank lending rate from the date of the writ to the date of final settlement.

Cost are awarded to the plaintiff to be taxed in default of agreement.

Dated this *23rd* day of *March*, 2020.

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M.CHANDA
JUDGE