

IN THE HIGH COURT FOR ZAMBIA
 INDUSTRIAL RELATIONS DIVISION
 HOLDEN AT LUSAKA
(Civil Jurisdiction)

COMP NO. IRCLK/110/2021

BETWEEN:

PIUS CHILUFYA KASOLO
AND
ZCCM INVESTMENT HOLDING PLC



CORAM:

Hon. E. MWANSA Esq : **JUDGE**

APPEARANCES:

For the Complainant : *Mr. W. Mubanga SC with N. Phiri –
 Messrs Chilupe Permanent Chambers*

For the Respondent : *Mr. Brian Mbilima – In House Counsel*

JUDGMENT

Authorities Referred to:

Statutes

1. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*
2. *The Employment Act Chapter 268.*
3. *The Employment (Amendment) Act No. 15 of 2015.*

Cases

1. *Sarah Aliza Vekhnik -V- Casa Del Bambini Montessori Zambia Limited (2018) ZMCA 312.*
2. *Attorney General -V- Paul Chilasha (2019) ZMSC 338.*
3. *Supabets Sports Betting -V- Batuke Kalimukwa (2019) ZMSC 27.*
4. *Albert Mupila -V- Yuwei (2022) ZMIC 3.*
5. *Zambia Consolidated Copper -V- Matale SCZ Judgment No. 9 of 1996.*
6. *Amiran Limited -V- Robert Bones Appeal No. 42/2010.*
7. *Giles Yambayamba -V- Attorney General and National Assembly SCZ 26/2015.*

1. INTRODUCTION

- 1.1 The case before me is one that was filed on 1st March, 2021, and allocated to my sister Judge. On her being moved to another station as Resident Judge, the case was then re-allocated to me on 24th March, 2022. It appears also that my sister had lost jurisdiction of the matter following the expiration of one year after lodging the same.
- 1.2. The grounds upon which this Complaint is presented allege very briefly as follows:

In a letter dated 31st January, 2019 from the Respondent to the Complaint, the Complainant's employment with the Respondent was unjustifiably and illegally terminated in that the said letter did not give valid reasons connected with his conduct or performance and neither was he accorded an opportunity to be heard prior to termination, and this was

contrary to Section 5(a) and (b)(3) of the Employment (Amendment) Act No. 15 of 2015.

1.3 The termination was therefore, without a valid reason and was thus in contravention of Section 5(a) and (b) (3) of the said Act.

1.4. The Complainant then seeks the following relief:

1.4.1. A declaration and an Order that the termination of the Complainant's employment was in breach of Section 5(a) and (b) (3) of the Employment (Amendment) Act No. 15 of 2015.

1.4.2. A declaration and an Order that the termination of the Complainant's employment was of a permanent nature as provided under Section 2 of the Act.

1.4.3. That full payment of the Complainant's accrued salaries be made for the remainder of his contractual term;

1.4.4. That the Complainant be paid a pro-rated salary as an entitlement under Clause 8 of the amended contract dated March, 2018;

1.4.5. That the Complainant be paid all benefits and

allowances enjoyed by him in the course of his employment provided for in his contract of employment.

- 1.4.6. That he be paid all accrued leave days as provided for in Clause 10 of the contract dated September, 2018;
- 1.4.7. That he be paid a bonus for dividend declared in the 2018 and 2019 financial years; namely two months salary and tax paid by the Respondents;
- 1.4.8. That the Complainant be allowed to retain the company car Registration BAF 1328 Toyota Land Cruiser, and a Laptop;
- 1.4.9. That there be interest and costs on the sums due.
- 1.4.10. That the Court considers any other relief that may be available.

2. COMPLAINANT'S CASE

The Complainant was the only witness called for the prosecution of his case.

- 2.1. His testimony was to the effect that he was

employed as Managing Director on 1st October, 2014 to 30th September, 2017. This was a fixed term contract.

- 2.2. That during his term of employment, he enjoyed allowances and benefits as in the contract as well as sitting allowances by sitting on boards.
- 2.3. According to the Complainant, he worked very well and turned the Respondent company into World Class Investment Company.
- 2.4. That despite the positives made, the press, namely, the Lusaka Times and The Mast carried articles brandishing him as a traitor among other negatives and called for his removal.
- 2.5. He testified that on 31st January, 2019, he had a telephonic conversation and later met with the chairman of the Respondent company, One Eric Silwanba S.C. at the Latitude Hotel where he was informed that his (Complainant's) comments on the Sales Tax had been blown out of proportion and that he had been instructed to terminate the contract of employment with immediate effect.
- 2.6. That on the 1st February, 2019 without warning,

a letter of termination was announced to the Country on ZNBC TV at a press conference conducted by the Minister of Mines and the then Press Secretary to the President of the Republic of Zambia, Amos Chanda.

- 2.7. That a letter terminating his employment was handed to him. In an Affidavit Supporting the Complainant, the date the letter was handed to the Complainant was not mentioned, but it is dated 31st January, 2019, on "PCK7".
- 2.8. According to the Complainant, the said letter did not carry any reasons for such termination, contrary to the provisions of the Employment (Amendment) Act No. 15 of 2015.
- 2.9. The Complainant acknowledges receipt of three month's salary in lieu of notice and a few other benefits.
- 2.10. The Complainant's position which he seems to repeat severally, is that the termination of employment only alleged that the same was to pave way for the appointment of a new Chief Executive Officer (CEO) who was to run with the new strategic plan.

- 2.11. According to him, he should have been charged with an offence(s) since the termination was precipitated by allegations against him.
- 2.12. That in the premises, the termination by invoking the notice clause amounted to flagrant abuse of the same in that a notice clause should not be used as a substitute to dismissal.

3. RESPONDENT'S CASE

- 3.1. The Respondent called one witness Patson Banda, who agreed materially, with the background given by the Complainant.
- 3.2. That the Complainant was paid his terminal dues by way of an electronic transfer, in accordance with policies and the contract under which the Complainant served.
- 3.3. That further, the Respondent, on the 18th March, 2019, wrote two letters to the Complainant offering him the motor vehicle Land Cruiser BAF 2425 and the Laptop Computer and request to reconsider terminal benefits ('PB6').
- 3.4. That the issues of the press calling for his neck had nothing to do with the Respondent.

- 3.5. And further that the letter of termination gave Three Months notice payment in lieu of notice as provided by the contract of employment and that a reason was also very clear in the same to pave way for a new Chief Executive Officer who was to run with the strategic plan.
- 3.6. The Respondent then went on to name items included for payment as the terminal benefits. These included, gratuity pro-rated, accrued leave days and three months' pay in lieu of notice less only what the Complainant owed the company.

4. ISSUES FOR DETERMINATION

- 4.1. Whether the reasons given by the Respondent for termination using the notice clause are valid or whether the veil cannot be pierced.
- 4.2. Whether in the circumstances, the termination could be held to be wrongful or unlawful.

5. REASONING

- 5.1. The record is very clear that both parties are agreed as to the manner of termination. That the said termination was by way of the notice clause pursuant to clause 28 of the contract of employment.
- 5.2. For ease of reference clause 28 referred to above

provides as follows:

“28.1 The contract may be terminated by the company giving the Employee Three (3) Months’ notice in writing or payment of three (3) months’ salary in lieu of notice or by the Employee giving three (3) months’ notice in writing or payment of Three (3) months’ salary in lieu of notice....”

- 5.2.1. The Complainant was paid and he accepts that three months’ salary in lieu of notice was paid.
- 5.3. I do agree with the Complainant that no disciplinary action was taken against him. The Respondent preferred to separate with the Complainant by way of the notice clause earlier cited and quoted.
- 5.4. And since the Complainant’s contract was entered into in 2017 and terminated in January, 2019, it appears settled that the Employment Act Chapter 268 of the Laws of Zambia (Amendment) Act No. 15 of 2015 is good law to be applied in our present situation.
- 5.5. The relevant provision in that Act is Section 36 which provides as follows; I quote in extantia;

"36(1) A written contract of service shall be terminated-

- (a) by the expiry of the term for which it is expressed to be made; or
- (b) by the death of the employee before such expiry; or
- (c) In any 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 the employee's employment.

(2).....

- (3) 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 or based on the operational requirements of the undertaking. (emphasis mine).

5.5.1. The reason given in the termination letter to the Complainant, and dated 31st January, 2019 is as here below: "...As you are aware, the company has recently adopted a new strategic plan for the period 2018-2023.

The company has decided to terminate your services to pave way for a new Chief Executive Officer to run with the new strategic plan....." (emphasis mine).

5.6. It is submitted on behalf of the Complainant that the purported reason for the termination of the Complainant's contract was a vague smoke screen reason and not a valid one as envisaged by Section 5(b)(3) earlier quoted.

5.7 It is also canvassed that the Complainant did not understand why he was not charged if he had done something wrong.

5.7.1. The Respondents have answered this one saying, they are not aware of anything wrong that the Complainant could have done that is why the notice clause was preferred.

5.8. It has also been argued on behalf of the Complainant that there were disagreeable events that happened just before the termination. Such events as:

5.8.1. The press conference by the Minister of Mines (Hon. Musukwa) and the press aide to the President then Mr. Chanda Amos.

- 5.8.2. The question and or comments by the Bloomberg Journalist who asked Dr. Kasolo - (Complainant on his position about the Sales Tax in the Mines);
- 5.8.3. The refusal by the Complainant, of Ms. Christa Kalulu's (Permanent Secretary State House then) request to sponsor Senior State House Staff to Cape Town for the mining indaba;
- 5.8.4. Social media reports or articles that the Complainant was going to challenge the then Republican President at the party conference to be held at Mulungushi Rock of authority. And many other such social media articles and comments.
- 5.8.5. The Republican President saying "Kasolo aya sana"; and
- 5.8.6. The phone call from Mr. Eric Silwamba (Chairman of the Board) stating that the Republican President had asked him to terminate the contract of employment of the Complainant.

- 5.9. Quite clearly these things could or could not have happened in the way the Complainant would like the -Court to believe. But the Complainant seems to allege a lot of these things without backing them up with independent testimonies or evidence. I am not sure if the Complainant is asking the Court to take Judicial notice of, for example, his telephone conversation with Mr. Eric Silwamba; or the many social media comments and articles about him challenging the candidature of the Presidency; or that the President said "Kasolo aya sana".
- 5.10. Should the Court take judicial notice of these activities? I have my serious doubts and the answer is then NO. Judicial notice cannot be taken of such things as private telephone discussions, the social media comments and articles. The Complainant needs to establish on a balance of probabilities that these things happened. He has not done so.
- 5.11. The above position has been arrived at with a clear understanding that this Court is mandated to do substantial justice unencumbered by Rules of Evidence as well as those of procedure.
- 5.12. Since I find it uncomfortable to agree on the face

of it, that the actions allegedly prior to the termination took place for lack of agreeable evidence, because it is only the Complainant's assertion, I refuse to delve into or to pierce the veil to accept these as the real reasons for the termination.

5.13. But I ask myself if the reason stated in the letter of termination namely "to pave way for a new Chief Executive Officer to run with the new strategic plan..." is a reason valid enough for this purpose.

5.14. The Section in contention is clear that a valid reason must be connected with the capacity, conduct of the employee or be based on the operational requirements of the undertaking.

5.15. We have already mentioned, maybe in passing, that the conduct of the Complainant was not an issue as it was not in question. His capacity was also unquestionable.

5.16. What about operational requirement? Google gives the meaning of Operational requirements as:

"Statements that identify the essential capabilities, associated requirements,

performance measures, and the process or series of actions to be taken in effecting the results that are desired in order to address mission area deficiencies, evolving applications or threats or emerging technologies or system cost improvements.....”¹

- 5.17. I accept this as the very basic meaning of operational requirements. And if this is so then A Strategic Plan is an operational document, without even defining it here.
- 5.18. That being the case, the reason given by the Respondent for the termination is therefore an operational one hence valid and in compliance with the requirement of Section 36(3) of the Employment Act (as amended).
- 5.19. It would have been a different thing had the letter not carried any reason at all or had the meaning of “operational requirement” been something else.
- 5.20. Still further, the reason given need not satisfy the Employee or Complainant in this case. It is the Court that needs to be satisfied that the reason is

¹ <https://www.mitre.org/publications>

valid or not. I am satisfied that the reason given falls within the requirement of the law.

- 5.21. That said, the separation on the impugned notice of termination is without fault, and there is thus no wrongful or unlawful termination.
- 5.22. There will be no damages awarded where the suit fails as this one does.
- 5.23. There is a plethora of decided cases that give guidance on the issues before me. I have had time to peruse a number of them (not all for want of time) that Counsel in their plurality have alerted this Court to. And I am grateful for the good practice. Bravo.
- 5.24. The case of *Tolani Zulu and Musa Hamwala - V. Barclays Bank Zambia Limited SCZ Judgment No. 17/2003* is particularly inspiring. Somewhere in that Judgment, we find the following:
"..... The Respondent opted to use the notice clause in the Agreement, which was an option open to them. The lower Court was of the view that the Respondent had sufficient material from which they could have given in terminating employment instead of the notice

clause. This was a misdirection as we have already stated. The Respondent had a number of options open to them; they could have had the Appellants prosecuted; put on disciplinary charges or opt to give them notice required under the conditions of service or pay the amount in cash in lieu of notice..."

6. CONCLUSION

- 6.1. All told, I am satisfied that the termination letter based on the notice clause was compliant with the applicable law and as such the termination was lawful. There is no declaration to make to the contrary.
- 6.2. I have given an understanding as to why the Complainant was not passed through the disciplinary process. And as an icing, I have quoted the case of *Tolani Zulu and Another -V- Barclays Bank (Z) Limited*. There are many such cases with such guidance.
- 6.3. In this discourse I have excluded the events that allegedly preceded the termination. I have explained that away by stating that there may be problems of admitting the Complainant's version of the story in the material particular for cogency reasons. I have also

recoiled at accepting yet other versions on the doctrine of Judicial notice for reasons stated.

- 6.4. There is evidence that all salaries were paid as well as allowances and prorated gratuity at termination.
- 6.5. Salaries for the remainder of the contract which has not been worked/performed cannot be awarded as that would amount to unjust enrichment. So it fails.
- 6.6. There is therefore no award to make in the Complainant's favour. This suit is unsuccessful.
- 6.7. I make no Order as to costs. Leave to appeal is granted.

Dated this 30th day of June, 2022.

.....
E. MWANSA
HIGH COURT JUDGE

