IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)

IRC/ND/41/2021

BETWEEN:

LAWRENCE MUSAKANYA — COMPLAINANT

AND

OMEGA RISK SOLUTIONS (Z) LIMITED — RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in Open Court on the 31st day of March, 2022.

For the Complainant: In Person,
For the Respondent: Mr. J. Zimba, Area Manager.

JUDGMENT

Cases referred to:

1. Eston Banda and Another v the Attorney General, Appeal No. 42 of 2016.
2. Bethel Mumba and Another v Africa Market (Trading as Shoprite Checkers) Complaint No. IRC/ND/80/2015.
3. Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited (Appeal No. 129 of 2017.
4. Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami (2004) Z.R. 244 (S.C.).

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. 2021.

By notice of complaint supported by an affidavit filed into Court on 26th July, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. *An order that his dismissal was wrongful and unlawful.*
2. *An order for payment of damages for wrongful and unlawful dismissal.*
3. *Any other relief the Court may deem fit.*
4. *Costs of and incidental to the action.*

In his affidavit in support of the notice of complaint, the complainant deposed that he was employed by the respondent as a Security Guard on 3rd April, 2018 on permanent basis. That from the date of his engagement, he used to execute his duties with excellence and he never faced any disciplinary charges or acted in any manner that could be regarded as gross. The complainant deposed that on 4th June, 2021, he developed severe malaria for which he constantly visited the hospital. That the said health condition became unbearable and he was admitted to Ndola Teaching Hospital from 14th to 20th June, 2021. That he was issued with a medical report and he communicated with the Human Resource Officer. However, the Human Resource Officer sent him a message stating that he should not report back for work as his employment had been terminated whilst he was admitted in hospital. He produced the patient discharge summary form, 'LM1' to that effect. That he was dismissed from employment on 15th June, 2021 on

allegations that he had deserted work for an unknown period without any explanation. He stated that he was not given an opportunity to exculpate himself and no disciplinary hearing was held in which he could have had a chance to explain why he was not reporting for duty. That he had since suffered loss by the abrupt loss of employment which he would not have suffered had the respondent followed the procedure as prescribed by the rules of natural justice.

The respondent did not file an answer but called one witness during trial.

During trial, the complainant testified that he started working for the respondent as a Security Guard in March, 2018. That he worked for three years and five months before being dismissed on 15th June, 2021. That the reason for his dismissal was because he/had not reported for work for three days without an explanation.

The complainant explained that in the same month of June, 2021, he fell ill and was admitted to Ndola Teaching Hospital on 14th June, 2021. That he was diagnosed with malaria and he was also experiencing chest pains. That he communicated with the Human Resource Officer, Mr. Andrew Mulenga via a phone call on 15th June, 2021 who advised him to send him a copy of a sick note so that it could be sent to payroll before it closed. The complainant

stated that he sent pictures of sick notes from the Mine Masala clinic via WhatsApp and also explained that the sick note from Ndola Teaching hospital would be given to him upon being discharged. After sending him the WhatsApp message, Mr. Mulenga phoned him and told him that he was not sick and he asked him to report for work the next day failure to which he was going to be dismissed. He testified that on 15th June, 2021, he tried to call Mr. Mulenga later on in the evening but the phone went unanswered. On Friday 18th June, 2021, he sent a text message to Mr. Mulenga informing him that he was feeling better and might report for work on Sunday. In response, Mr. Mulenga wrote back to him stating that his employment had already been terminated. He then phoned Mr. Mulenga to confirm what he had said in the text message and Mr. Mulenga confirmed that the position was as stated in the text message. That on Sunday, 20th June, 2021, he was discharged from hospital. On 21st June, 2021 he called Mr. Mulenga to inform him that he had a sick note and he was desirous to return to work but Mr. Mulenga reiterated that his employment had been terminated as of 15th June, 2021.

The complainant explained that he used to work from Kalumbila and fell ill in Ndola whilst he was on his off-days. That his termination letter was taken to him by his colleague who had gone to Ndola during his off-days on 25th June, 2021.

The complainant stated that the manner in which his employment was terminated was unfair because he had communicated with Management about his sickness. That the respondent did not take into consideration the period he had worked for the company and it terminated his employment whilst he was on his sick bed. That he had accrued a lot of leave days which the company could have used instead of dismissing him from employment. That he was seeking damages and costs.

During cross-examination, the complainant admitted that he was put on bed rest on 4th June, 2021 which expired on 6th June, 2021. He confirmed that his sick note was genuine. The complainant admitted that medical files would remain at the clinic after being attended to. That he was not aware that Mr. Jackson Zimba went to Masala clinic and found that the sick note was not genuine. Further, that Mr. Zimba had his file number.

When referred to a sick note dated 7th June, 2021, the complainant admitted that it was the sick note he had presented to the respondent. He stated that he was supposed to report back for work on 4th June, 2021. That he did not report for work because he was sick and he went to Main Masala Clinic for medical attention. That the medical personnel gave him three days' bed rest. He stated that the file number for the clinic was indicated on the sick note. When referred to the sick note on page 1 of the respondent's notice of intention to produce dated

4th June, 2021, the complainant stated that there was no file number. That the date stamp from Masala clinic and signature of the clinician were proof that it was a genuine sick note. He admitted that the date shown on the date stamp was altered as it was showing the date as '02'. When referred to the sick report at page 2, the complainant admitted that he was attended to at New Masala clinic and that he was given three days' bed rest. He confirmed that the file number indicated on the said sick report was his file number. The complainant explained that with regard to the first sick note dated 4th June, 2021, he was told that the sick notes had run out and they just wrote on a plain paper. That the one dated 7th June, 2021 at page 2 of the respondent's notice of intention to produce had a file number because it was the actual sick note form. He admitted that he was given another sick note on 10th June, 2021. He stated that it was not true that the record from New Masala clinic showed that he went to the clinic on 9th June, 2021. That it was not true that he had gone to the clinic on 9th June and was referred to Ndola Teaching hospital (NTH) on patient's request. When referred to the picture at page 5 of the respondent's notice to produce, the complainant admitted that the file number indicated on the document was his file number. When referred to the document at page 6 of the respondent's notice to produce, the complainant admitted having gone to the Masala clinic on 7th June, 2021 and was given three days' bed rest. When referred to the document at page 7 of the respondent's notice to produce, he denied having gone to the

clinic on 9th June, 2021 and requested to be referred to NTH. When referred to page 9 of the respondent's notice to produce, the complainant stated that he was referred to NTH from New Masala clinic on 14th June, 2021. He stated that he did not have the referral letter but just had the sick note from NTH.

In re-examination, the complainant stated that the sick note on page 1 of the respondent's notice to produce was corrected from 2nd June to 4th June, 2921 because the clinic's date stamp was behind and the clinician corrected the date after realising that the date was 4th June, 2021. He stated that he did not go to New Masala clinic on 9th June, 2021. That he went there on 10th June, 2021 and he was referred to NTH on 13th June, 2021. That the picture at page 4 with his file number did not indicate his name as the name shown started with the letters 'K.A.M.R' when the first letters of his name were 'L.A.W.R.E'.

RW1 was Andrew Mulenga, Security Human Resource Officer in the respondent company.

He testified that on 21st May, 2021, the complainant started his off-shift from Kalumbila site for two weeks. That he was supposed to report back for work on 4th June, 2021 but he did not do so. That the respondent had no information as to why the complainant did not report back for work. On 6th June, 2021, the complainant was called and asked why he did not report back for

work, and the complainant responded that he was given three days' bed rest by New Masala clinic. That he advised the complainant that he could not report back for work if he was not feeling well and advised him to stay in Ndola but to return to work with a sick note. He also advised the complainant to send the sick note via WhatsApp and the complainant stated that he would look for a phone with WhatsApp and send the sick note. However, the complainant did not send the sick note on that day. That he called the complainant on 10th June, 2021 again and asked him why he did not report for work when he was given three days' bed rest from 4th to 7th June, 2021, and the complainant responded that he had been given three more days of bed rest which were expiring on 12th June, 2021. Then he advised the complainant to ensure that he took all the sick notes for the days he said he had been given bed rests. In response, the complainant told him that if he failed to send the sick notes by WhatsApp, he would send them through his colleagues who were returning to Kalumbila. The witness testified that that was the last day they spoke. That on 15th June, 2021 as he was working on the payroll inputs, he called the complainant but the complainant did not pick up his phone. That after counting the days the complainant did not communicate and since the days he was given had expired, he followed clause J12 of the respondent's disciplinary code of conduct which provided that an employee who was absent from work for three shifts could be dismissed from work in absentia. That on 18th June, 2021, the

same day that the complainant sent him three sick notes, the complainant called him to ask if he could report for work. That among the sick notes he had sent were for the dates 13th to 15th June, 2021. That there was no sick note which was indicating that he was sick which made the respondent dismiss him from employment with effect from 15th June, 2021. That the complainant informed him that even during that time he was still sick. When the witness asked him why he did not sent any sick notes, the complainant stated that he could not submit the documents when his employment had already been terminated. The complainant then told him that he was going to take the respondent to the Labour Office and the witness advised him to go ahead.

When cross-examined by the complainant, the witness stated that on 6th June, 2021, he did not know that the complainant was sick because he had not communicated. He stated that he did not receive the sick note on 4th June 2021 which the complainant had sent through his workmate Joseph Mulenga. The witness admitted having communicated to the complainant on 6th June, 2021. He also admitted that they communicated on 10th June, 2021 and that was the last time they communicated. He stated that he called the complainant on 15th June, 2021 but he did not pick up. That he received all the information on 18th June, 2021 and that he was not aware that the complainant had been admitted to the hospital. That he had excluded the days from 4th

to 12th June, 2021 because there was communication. He stated that they did not communicate on the 12th. That the last time they communicated was on 10th and 18th June, 2021. That he had called the complainant on 15th June, 2021 to find out why he had not reported for work but the complainant did not answer the phone. That he and the complainant never communicated between 10th and 18th June, 2021 over his being admitted to the hospital. That on 18th June, 2021, the complainant told him that he was going to take him to the Labour Office and subsequently to Court. The witness stated that no one from the company went to the complainant whilst in hospital because after attending clinic, he did not send the referral letter to show that he had been admitted in hospital. The witness conformed that he was not aware that the complainant was admitted to NTH from 14th to 20th June, 2021 because he did not send the referral letter. He stated that the complainant was not asked to exculpate himself or to accord him a disciplinary hearing because according to the respondent's disciplinary code of conduct, an employee was supposed to inform the company at least six hours before beginning his shift to update the company in case of anything. That the complainant did not inform the respondent about his condition.

RW1 stated that the complainant had only 24 leave days and according to the company policy, any employee who had more than 24 leave days forfeited the excess days to the company.

When asked if the complainant had taken leave or paid for leave days between October, 2020 and the date of dismissal, the witness reiterated that according to their company policy, any employee who had more than 24 leave days forfeited the excess days to the company. That leave could only be granted upon submission of an application by an employee. He disputed the complainant's claim that he had gone to see his supervisors in order to apply for leave and that he was told that he could not do so because of shortage of manpower. The witness stated that he was disputing the complainant's statement since he was not the one who made such a statement. That he did not know anything about the promise to pay the complainant for accrued leave days because he was not the one who attended the meeting at the Labour office. That he could not answer why the complainant was not paid for his accrued leave days because the complainant was not communicating with him concerning the said leave days. That according to him, the complainant was paid for 24 accrued leave days upon the termination of his employment.

Both parties indicated that they were not making any final submissions but they were relying on the evidence on record. However, Mr. Zimba, who was representing the respondent, submitted that the discharge slip at page 9 of the respondent's notice of intention to produce had no official date stamp.

I have considered the complainant's affidavit evidence and the oral evidence by both parties. I have also considered the brief oral submission by Mr. Zimba.

It is common cause that the complainant was employed by the respondent as a Security Guard on 3rd April, 2018 on permanent basis until his contract of employment was terminated on 15th June, 2021 on the ground that he had been absent from work for more than three shifts.

The brief history leading to the termination of the complainant's employment was that on 21st May, 2021, the complainant proceeded on his off-shift for two weeks which was ending on 4th June, 2021. After the end of his off-shift, the complainant did not report back for work for the reason that he had suffered from severe malaria. On 6th June, 2021, the Human Resource Officer, RW1 phoned him to find out why he had not reported back for work. In response, the complainant informed RW1 that he had been put on three days' bed rest by the medical personnel at New Masala clinic where he was receiving medical attention. Then RW1 advised him to submit to him sick notes covering the period of his absence and that this was to be done before the complainant could report back for work. The complainant did not send any sick notes via WhatsApp as advised by RW1. On 10th June, 2021, RW1 phoned the complainant again and asked him for the reason why he had not reported for work since the days

of bed rest had expired. The complainant indicted to RW1 that he was still unwell. He was then advised to take all sick notes to RW1 for the period that he had been absent from work.

It was the complainant's evidence that from 14th to 20th June, 2021, he was admitted in Ndola Teaching hospital as shown by the patient discharge summary, 'LM1'. That whilst admitted in hospital, RW1 sent him a message indicating that he should not report for work because his employment had been terminated on 15th June, 2021.

Being disenchanted with the respondent's decision of terminating his employment, the complainant commenced this action contending that his dismissal was wrongful and unlawful, and he was, therefore, claiming for payment of damages accordingly. During trial, he also claimed for payment of accrued leave benefits. The respondent vehemently opposed the complainant's claims.

Based on the evidence in this matter, there are only two questions for determination as follows:

1. Whether the termination of the complainant's employment was wrongful and unfair.
2. Whether the complainant is entitled to the payment for accrued leave days.

As regards the complainant's claim for an order declaring the dismissal wrongful and unlawful, the Supreme Court in the case of **Eston Banda and Another v the Attorney General**[1], has guided that:

> **"There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst 'unfair' refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term 'unlawful' to mean 'unfair' is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book Employment Law in Zambia: Cases and Materials, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."**

Further, the learned authors, Judge W.S. Mwenda and Chanda Chungu, in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:

> **"Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified."**

On the above authorities, I am of the view that the relief that the complainant is seeking is for an order that his dismissal be

declared to have been wrongful and unfair, hence the main question that has been set for the determination by the Court.

For the complainant to succeed in his claim for wrongful dismissal, he has to prove, on a balance of probabilities, that the respondent breached the disciplinary procedure and/or a term of his contract at the time he was dismissed. As for unfair dismissal, the complainant has to prove that a specific statutory provision was breached by the respondent or that the dismissal was based on unsubstantiated reasons.

With regard to the first issue, the complainant has contended that his dismissal from employment was wrongful because he was not given an opportunity to exculpate himself and that no disciplinary hearing was held at which he would have had a chance to explain why he was not reporting for work. On the other hand, the respondent has argued that after the expiry of the period of the complainant's bed rest and having had no information regarding his absence from work, it had to terminate his employment in absentia in accordance with the provisions of clause J12 of its disciplinary code.

I have considered the parties' opposing arguments.

First and foremost, I note that none of the parties had produced to the Court the respondent's disciplinary code thereby making it

impossible for the Court to know the disciplinary procedure that ought to have been invoked by the respondent in terminating the complainant's employment. That notwithstanding, it is settled that the principles of natural justice also apply to the disciplinary process arising from employment contracts. Therefore, in determining whether the termination of the complainant's contract of employment was proper and/or fair, I will take into account the principles of natural justice.

In the present case, it is not in dispute that the complainant was not formally charged for the alleged offence of desertion and was not given an opportunity to exculpate himself neither was there any disciplinary hearing conducted to determine his fate. The respondent simply summarily dismissed him without according him an opportunity to be heard and to defend himself. I find that the respondent's action was contrary to the principles of natural justice. It should be stressed that there is always the need for an employer to formally charge an employee prior to his/her dismissal on disciplinary grounds. In the case of **Bethel Mumba and Another v Africa Market (Trading as Shoprite Checkers)**[2], it was held that:

> **"In industrial and labour matters, the need for an employer to charge an employee with a disciplinary offence and to give such an employee an opportunity to be heard before any sanction can be imposed cannot be over-emphasised as the same is the hallmark procedural and legal requirement in dealing with disciplinary process in employment matters."**

Further, in the case of **Sarah Aliza Vekhnik v Cash Dei Bambini Montessori Zambia Limited**[3], the Court of Appeal observed that:

> **"In English law, natural justice is a technical terminology for the rule against bias (nemo judex in casua) and the right to a fair hearing (audi alteram partem), put simply it is the 'duty to act fairly.' The right to a fair hearing requires that individuals should not be penalised by decisions affecting their rights of legitimate expectation unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case."**

Furthermore, the requirement for the rules of natural justice to be complied with in order for a dismissal to be deemed fair was re-affirmed in the case of **Zambia China Mulungushi Textile (Joint Venture) Limited v Gabriel Mwami**[4] where it was held that:

> **"Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."**

Section 52(3) of the Employment Code Act No. 3 of 2019 has reinforced the common law position of affording an employee a chance to be defend himself where it is alleged that such an employee has committed an offence before terminating his contract of employment. The said section provides that:

> **"An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard."**

In casu, it is clear that in terminating the complainant's employment, the respondent did not comply with both the principles of natural justice and the statutory provisions cited

above. In this regard, the complainant has, on a balance of probabilities, proved his claim that his dismissal was wrongful and unfair. Therefore, he is entitled to the payment of damages for wrongful and unfair dismissal.

I have considered all the circumstances surrounding the manner in which the complainant's employment was terminated. This case is deserving of an award of damages beyond the common law measure of damages. Therefore, I award the complainant damages equivalent to four months of his last basic salary plus allowances. The amount is to be agreed or assessed by the learned Deputy Registrar in default of such agreement.

The complainant has also claimed to be paid for 37 accrued leave days. In opposing the complainant's claim, RW1 stated that by the time the complainant was being dismissed, he had only 24 accrued leave days and that the excess number of days had been forfeited by the respondent. That it was the respondent's company policy that an employee who had accumulated 24 leave days had to proceed on leave as the company had stopped commuting leave days.

I have considered the opposing arguments of the parties.

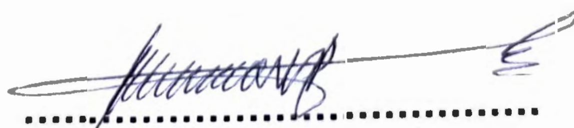
Since RW1 did not dispute that the complainant had accumulated leave days in excess of 24 and he did not produce the

respondent's policy document which restricted the accrual of leave days to only 24 days, I find that the complainant has, on a balance of probabilities, proved that he had 37 accrued leave days at the time of his dismissal. Accordingly, the respondent should pay the complainant for the 37 accrued leave days less the number of leave days for which the respondent may have paid the complainant. The quantum shall be agreed by the parties or in default of such agreement, the same shall be assessed by the learned Deputy Registrar.

In summary, the complainant has succeeded in all his claims for damages; and the payment for accrued leave days. The sum to be found due to the complainant shall attract interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complainant to the date of the judgment and thereafter, at 10% per annum until full settlement.

I make no order for costs. Each party will bear own costs.

Delivered at Ndola this 31st day of March, 2022.



....

Davies C. Mumba
HIGH COURT JUDGE