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IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(INDUSTRIAL/ LABOUR DIVISION)

COMP NO. IRC/ND/73/2017

BETWEEN:

MUBITA ANAWANA

COMPLAINANT

AND

DRILL AFRICA ZAMBIA LIMITED

RESPONDENT

BEFORE: Hon Judge E.L. Musona

For the Complainant: In person

For the Respondent: Mr. M. Ndhlovu-Logistical Officer

JUDGMENT

Date: 26th October, 2017

CASES REFERRED TO:

1. Zambia Privatisation Agency v James Matale (1995-1997) ZR 157
2. Makaya v Payless Supermarket (Pty) Ltd (2007) 1 BLR 521
3. Zambia China Mulungushi Textiles (Joint venture) Ltd v Gabriel Mwami, SCZ Appeal No. 28 of 2003

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4. Setrec Steel and Wood Processing and 2 Others v Zambia National Commercial Bank Plc SCZ Appeal No. 39 of 2007
5. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)
6. Khalid Mohamed v Attorney General (1982) Z.R. 49
7. Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC
8. Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002
9. Munkansemu Nyirenda v Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/ 2013
10. Marshal v Harland & Wolff Limited (1972) 1 WLR 899

LEGISLATION REFERRED TO

1. Section 36 of the Employment Act Chapter 268 of the laws of Zambia as amended by Act No.15 of 2015

OTHER WORKS REFERRED TO

1. Paragraph 323 of Halsbury's Laws of England, Volume 16, 4th Edition
2. N.M. Selwyn, 'Selwyn's Law of Employment', 14th Edition, Oxford University Press: Oxford, at page 411

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This Complaint was filed by Mubita Anawana. The Complaint was filed against Drill Africa Limited. I shall therefore refer to Mubita Anawana as the Complainant and to Drill Africa Limited as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following reliefs :-

1. Damages for wrongful and unfair dismissal.
2. Damages for pain and suffering.
3. Payment of one months' salary in lieu of notice.
4. Interest.
5. Costs.
6. Any other dues that the court may deem fit.

The duty for this court is to ascertain whether or not the Complainant has proved his claims.

In his evidence, the Complainant CW1 told the Court that he was employed by the Respondent on the 15th of December, 2015 as a mechanic/driver and was deployed to work in the Democratic Republic of Congo. He worked until 6th April, 2017 when the contract was terminated. CW1 told the court that sometime in 2017, as he was on his way to the work site, the truck he was working with got stuck in the mud. He started digging in order to free the truck, in the process he felt a sharp pain in the back. He was given time to go to the clinic at the site, he was put on bed rest and he was not able to work for ten (10) days due to backache. As he was not responding to treatment while he was at the site, the Supervisor who was the Respondent's site administrator by the name of Mr. Guy Mbondo gave him permission to leave the site and travel back to Ndola in Zambia for

medical treatment. The site clinic did not have an x-ray machine and the Respondents did not make any arrangements for him to go to a big hospital in the Democratic Republic of Congo.

The Supervisor gave him transport money to travel from the site to Kolwezi town. He was further given transport money to travel from Kolwezi town in the Democratic Republic of Congo to Ndola in Zambia. He left the site on 24th March, 2017, he arrived in Ndola on the 28th of March, 2017 and he reported to the Respondents' office in Ndola. He saw the Director Mr. Roberto Russo and explained to him why he had left the site. His leaving the site to seek medical treatment in Zambia for the backache sustained while on duty did not sit well with the Director, who told him that his services were no longer required and he should just wait for his letter of termination of employment. He further told the court that he went to the Respondents' company clinic and he was attended to by Doctor Tailor who gave him 3 days bed rest. Doctor Tailor asked him to submit an x-ray for the backache. He finally received his termination letter on 7th April, 2017 which did not state a reason for termination. The letter is marked as exhibit "AM2" in the Complainant's Affidavit in Support of Notice of Complaint.

The Respondents' called two (2) witnesses. RW1 was Mcfallen Ndhlovu. He told the court that the Complainant had worked for the Respondents for almost sixteen (16) years on several contracts. His last contract where he was employed as a mechanic/ driver with effect from 15th December, 2015 was the one in issue. Before the Complainant left Zambia to go and work for the Respondents in the Democratic Republic of Congo, he underwent medical checkups which proved that he had backache. While he was in Congo, he became unruly to his bosses and he wanted to return to Zambia. He did not inform the Respondents about the accident he had with the truck he was working with in Congo and he never reported to the Respondents about his backache. This did not sit well with the Respondents' management.

RW1 told the court that the Complainant was attended to at the Respondents' hospital in Congo and he was given 7 days off work. He came back to Zambia on his own accord, the only reason the Respondents gave him transport money to travel back to Zambia was that he wanted to walk back all the way to Zambia. When he arrived in Zambia, he did not report to the Respondents' offices but sent his wife to pick up a sick note, which the Respondents declined to give. He was attended to at the Respondents' clinic here in Zambia. In cross-examination RW1 told the court that he had no documentary proof to show that the Complainant deserted work.

RW2 was Guy Mbondo. His evidence was that he received instructions from the Respondents to go to Kolwezi town to meet the Complainant and take him to the hospital. When he met the Complainant, he told him that he wanted to take him to a big hospital in Kolwezi so that his backache could be treated, however, the Complainant refused and insisted on travelling back to Ndola in Zambia. When he met the Complainant in Kolwezi, he was not seriously sick and he was able to move by himself from the site to Kolwezi which is about 120 kilometres from the site. He told the court that he then gave transport money to the Complainant to enable him to travel back to Ndola although he was the only mechanic at the site and was needed by the Respondents.

RW2 told the court that when the Complainant arrived in Zambia, he did not report back to him on how he travelled, hence he became a deserter. In cross-examination, RW2 told the court that he only found out from the site that the Complainant was complaining about backache. The procedure when an employee fell ill at the site was to report to the Supervisor, who would then refer the employee to the clinic at the site. If the ailment cannot be treated at the site clinic, then the employee would be referred to a big hospital.

Having considered the evidence in this case, I must now consider the relief sought.

1. Damages for wrongful and unfair dismissal

Wrongful dismissal is a dismissal which arises when the employer has breached a term of the contract of employment when dismissing the employee. Wrongful dismissal also arises when the allegation upon which the employee was dismissed was not proved against the employee.

The contract of employment which the Complainant signed with the Respondents provides for termination of employment as follows:-

“ 15. TERMINATION OF EMPLOYMENT

The Employer may terminate this Contract of Employment as follows:

15.2 Upon completion of probation period, either party must give the other Thirty(30) days' notice, which may be given at any time.

15.3 Either party to this Contract may, at his discretion, pay the other party in lieu of notice.

15.4 If the services of the Employee are summarily terminated for disciplinary reasons, no notice period or pay on lieu of notice is required.

15.5 In the event that the Employee is absent from work for more than Five (5) consecutive working days for any reason without notifying the Employer of his/her whereabouts, this Contract of Employment will terminate on the last day the Employee had reported for duty.”

I have also seen the letter of termination of employment which was issued by the Respondents and marked as “AM2” in the Complainants Affidavit in Support of Notice of Complaint which provides that:-

“ From: Site Administrator- DrillAfrica-Congo SARL

Date: 6 April, 2017.

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Dear Mr Mubita,

RE: TERMINATION OF EMPLOYMENT CONTRACT

This serves to inform you that your employment with DrillAfrica-Congo SARL has been terminated effective 7 April, 2017.

You shall be paid the following;

- i. Days worked up to the last shift
- ii. Leave days accrued if any.”

It is evident from the letter of termination written by the Respondents to the Complainants that there was a breach of contract because the Complainant was not given any notice or paid in lieu of notice as provided in clause 15.3 of the contract.

In the case of *Zambia Privatisation Agency v James Matale (1995-1997) ZR 157*, the court stated that:-

“Where the contract expressly or impliedly provides that the relationship of employer and employee is to endure for a certain time, the contract will be determined at the conclusion of such period. Termination before the agreed date may take place either lawfully or wrongfully by one of the events or acts to be discussed below. If such termination is lawful, then the parties will be discharged from the obligation of the contract without any liability there under. If it is wrongful on the other hand, the party guilty of premature determination will be in breach of the contract and will be liable accordingly.”

The Complainant's contract of employment was wrongfully terminated because he was not given any notice and this was a breach of contract which makes the Respondents liable. Further Section

36 of the Employment Act Chapter 268 of the laws of Zambia as amended by Act No.15 of 2015 provides that:-

“ 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

(c) in any other 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 that employee's employment.

(2) Where owing to sickness or accident an employee is unable to fulfill a written contract of service, the contract may be terminated on the report of a registered medical practitioner.

(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.”

Based on the foregoing provision of the law, a valid reason has to be given to an employee by the employer before his or her contract of employment is terminated. The letter of termination of contract that was given to the Complainant by the Respondents does not disclose any reason at all for termination of his employment. The Respondents' Answer to Notice of Complaint filed into court on 30th June, 2017 states in paragraph two (2) that the Complainant was away from employment for more than ten (10) days, hence he became a deserter. The Respondents are relying on clause 15.5 of the contract of employment that was signed by the Complainant. The allegation of being absent from work for more than 10 consecutive working days for any reason without notifying the Respondents of his whereabouts was not proved against the Complainant.

From the evidence on record, it is not in dispute that the Complainant informed the Respondents that he had backache while he was in the Democratic Republic of Congo. The Site Administrator

Mr Guy Mbondo who was RWI confirmed to the court that he was instructed by the Respondents to pick up the Complainant from the work site and take him to the hospital as he was complaining of backache. RWI told the court that he gave transport money to the Complainant to travel back to Ndola, Zambia for medical treatment. CWI who was the Complainant told the court that when he arrived in Ndola, he went to the Respondents' hospital for treatment and he produced a medical report marked "AM3" which he obtained from Ndola Teaching Hospital where he was referred by the Respondents' hospital. CWI told the court that after he obtained treatment, he went to the Respondents' offices in Ndola and he met the Director Mr Roberto Russo who was not happy that he had come back to Zambia for treatment. This goes to show that the Complainant notified the Respondents' of his whereabouts, and the Respondents' authorized his coming to Zambia for treatment by giving him transport money hence the allegations of being a deserter were not proved against him.

I am persuaded by the case of *Makaya v Payless Supermarket (Pty) Ltd (2007) 1 BLR 521*, where it was stated that:-

"The court ought to determine whether there was any evidence to prove that the Appellant had indeed committed an offence for which he ought to have been dismissed"

Further, in the case of *Marshal v Harland & Wolff Limited (1972) 1 WLR 899*, it was stated that:-

"If the employee demonstrates that they are able to perform the duties and responsibility of that job, even after a period of absence from work, a termination of employment will not be valid and will be harsh and unreasonable. If an employer has dismissed an employee due to persistent illness the court will consider if the dismissal was fair. Relevant consideration will include whether there was fair consultation with the employee for the true medical position and whether the employer sought a reliable medical opinion before making his decision."

This now leads me to the claim for unfair dismissal. Unfair dismissal relates to disciplinary procedure in dismissing the employee. If the disciplinary procedure is not followed, the dismissal amounts to unfair dismissal. In order for the dismissal to be fair, the employer must adhere to disciplinary procedures and the reason for the dismissal must be valid.

According to Paragraph 323 of Halsbury's Laws of England, Volume 16, 4th Edition :-

"In determining whether the dismissal of an employee was fair or unfair, it is for the employee to show:

- (1) What was the reason, or if there was more than one, the principle reason for the dismissal, and
- (2) That it was a reason which:
 - (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
 - (b) related to the conduct of the employee..."

The Complainant was not charged with the offence of being absent from work. He was not even given a chance to exculpate himself over the allegations of deserting work because the Respondents were aware that the Complainant was suffering from backache and undergoing medical treatment. The Respondents did not even bother to get a medical opinion in relation to the backache before terminating the Complainant's contract of employment

According to the learned authors, N.M. Selwyn, 'Selwyn's Law of Employment', 14th Edition, Oxford University Press: Oxford, at page 411:-

"There are two stages in the process of determining whether or not a dismissal is fair. The first is the means whereby the decision is reached; that is, the procedures followed by the

employer before arriving at the decision to dismiss the employee. The second stage is the actual decision taken; whether the employer acted reasonably in dismissing the employee”

In the case of *Zambia China Mulungushi Textiles (Joint venture) Ltd v Gabriel Mwami*, SCZ Appeal No. 28 of 2003, the Supreme Court held that:

"It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."

I am also alive to the Supreme Court decision in the case of *Setrec Steel and Wood Processing and 2 Others v Zambia National Commercial Bank Plc* SCZ Appeal No. 39 of 2007. In that case the Supreme Court stated that:

"a decision on the merit is a decision arrived at after hearing both parties. "

The Complainant was not given the right to be heard and this is against the rules of natural justice. The decision to terminate the Complainant's contract of employment was not arrived at on merit as he was not given an opportunity to be heard. This amounts to unfair dismissal. The Complainant has proved his claim for damages for wrongful and unfair dismissal.

A complainant has to prove his or her claim in order to succeed. I am well guided by the cases of *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 172 (SC), *Khalid Mohamed v Attorney General* (1982) Z.R. 49 and *Galaunia Farms Limited v National Milling Corporation Limited* (2004) ZR 1 SC where it was held that:-

"A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment."

In the case of **Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002**, it was held that:-

“The normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice where the contract is silent. The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering”

Further, in the case of **Munkansemu Nyirenda v Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/ 2013** it was held that:-

“In our view, the circumstances of this case would justify a departure from the normal award of one months’ salary in lieu of notice as damages. The Appellant was dismissed on the basis of an offence which was not committed by him. In light of these circumstances, we find merit in the appeal and we award the Appellant damages for unlawful dismissal equivalent to his three months’ salary including all allowances and perquisites”

Based on the aforecited cases, I am of the considered view that the Complainant was dismissed on the basis of an offence which was not proved against him and he was not even given an opportunity to answer to the allegation of being absent from work for more than 10 days or given an opportunity to prepare himself for the adverse decision that befell him. My considered view is that the Complainant was treated in a harsh manner with blatant disregard of the rules of natural justice. This is a proper case to depart from the normal measure of damages and I hereby award the Complainant damages for wrongful and unfair dismissal equivalent to six (6) months’ salary including all allowances and perquisites. Further, the Complainant should be paid one months’ salary in lieu of notice as he was not given any notice before his contract of employment was terminated despite the contract providing for notice. These damages shall attract interest at the

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short term deposit rate prevailing from the date of the Notice of Complaint to the date of Judgment and thereafter at the current Bank of Zambia lending rate until full payment.

2. Damages for pain and suffering.

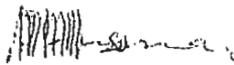
The Complainant has not shown this court any pain he has suffered. I have gone through the entire evidence in this case and I have not seen any pain or suffering that the Complainant went through as he did not lead any evidence to attempt to support his claim. It is not automatic that once a claim against dismissal succeeds, then even the claim for damages for pain and suffering will succeed. The Complainant must lead evidence to prove the nature and extent of pain and suffering.

I am again well guided by the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)**, **Khalid Mohamed v Attorney General (1982) Z.R. 49** and **Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC**. This claim is accordingly dismissed.

Costs of these proceedings go to the Complainant.

Leave to appeal within 30 days from today is granted

Delivered and signed at Ndola this 26th day of October, 2017



Hon E.L. Musona

JUDGE

