IN THE HIGH COURT FOR ZAMBIA COMP NO. IRC/ND/11/2017
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(INDUSTRIAL/ LABOUR DIVISION)

BETWEEN

OLIVER CHINYAMA COMPLAINANT

AND

SPECTRA OIL CORPORATION LIMITED RESPONDENTS

BEFORE: Hon. Judge E.L. Musona

For the Complainant: Mr. B. Katebe of Messrs Kitwe Chambers

For the Respondents: Mr C. Sianondo of Messrs Malambo and Company

JUDGMENT

Date: 12th day of December, 2017

Cases referred to

1. Mwenya v CFB Medical Centre Limited SCZ Appeal No.9 of 2015
2. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)
3. Khalid Mohamed v Attorney General (1982) Z.R. 49
4. Galaunia Farms Limited v National Milling Corporation Limited (2004) ZR 1 SC

5. Zambia Privatisation Agency v James Matale (1995-1997) ZR 157
6. Ster Kinekor v Attorney General 2010/HP/346
7. Zambia China Mulungushi Textiles (Joint venture) Ltd v Gabriel Mwami , SCZ Appeal No. 28 of 2003
8. Setrec Steel and Wood Processing and 2 Others v Zambia National Commercial Bank Plc SCZ Appeal No. 39 of 2007
9. Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002
10. Munkansemu Nyirenda v Zambia Forestry and Forest Industries Corporation Limited Appeal No. 127/ 2013

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

This Complaint was filed by Oliver Chinyama. The Complaint was filed against Spectra Oil Corporation Limited. I shall therefore refer to Oliver Chinyama as the Complainant and Spectra Oil Corporation Limited as the Respondents which is what the parties to this action actually were.

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

1. An Order that the Complainant's termination letter of employment by the Respondent dated 10th November 2016 contravened Section 36 (c) (i) and 36 (3) of the Employment Act Chapter 268 as amended by Act No. 15 of 2015 of the Laws of Zambia and therefore null and void and is of no legal effect.

2. An Order for damages for breach of contract.

3. An Order for damages for the manner in which the employment was terminated, the embarrassment endured, inconvenience and the mental and physical torture suffered.

4. An Order that the Complainant was placed on redundancy by the Respondent in its letter dated 10th November 2016 and;

5. An Order for payment of the Complainant's salary until the payment in full of his redundancy benefits as required by law.

6. Any other Order or award as the Court may consider fit in the circumstances of the case.

7. Interest on all monies found due

8. Costs of and incidental to the proceedings.

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

In his evidence, the Complainant CW1 testified that he was employed by the Respondent with effect from 2nd January 2003 as a security guard. He referred to his letter of employment marked as "OC1-OC2" in the Complainant's Affidavit in Support of Notice of Complaint. He was confirmed as a security guard on permanent and pensionable establishment on the 11th of April 2003 as a result of his satisfactory performance. He was promoted as a forklift driver on 1st June, 2012. In 2013, he fought with a workmate and was given a final warning by the Respondent, he served the warning period until it expired. He told the court that on the 10th of November, 2016, his employment was terminated by the Respondents and no reason was given for the termination. He referred to the letter of termination marked as "OC12" in the Complainant's Affidavit in Support of Notice of Complaint.

He told the court that his duties as a forklift driver, were loading and offloading goods in the Respondent's warehouse. He would be given a list of goods to load and off load and he would object if there was something unusual on the list. He had never been charged with fraud by the Respondent at the time he was in employment. In cross-examination, he told the court that it was not proper for a forklift driver to give a customer goods which were not specified on an invoice. He was referred to a document marked "MH 2(a) in the Respondent's Affidavit which was an overtime claim. His evidence was that sometimes when he indicated hours for overtime, his Supervisor would cancel those hours and put a smaller figure instead, as overtime. When he was referred to a document marked "OC 13" in the Complainant's Affidavit which shows his terminal

pay, he told the court that he was paid his dues by the Respondent and in addition he was paid his pension.

RW1 relied on his Affidavit filed into court on the 16th of May 2017 as evidence in chief. The said Affidavit was to the effect that the conditions of service which the Complainant signed with the Respondent provided for termination of employment by one month's notice or payment in lieu of notice. The Complainant was involved in fighting on duty and he was issued a final warning. During his employment, the Complainant falsified overtime claims by inflating the same. The Affidavit deposed to by RW1 also stated that there was gross misconduct on the part of the Complainant as he would facilitate the fraudulent release of products from the Respondent when the invoices were issued to other customers, hence his conduct merited dismissal and the Respondent was entitled to terminate his employment.

In cross-examination, RW1 admitted that no reason was given by the Respondent for the termination of the Complainant's employment who was a permanent and pensionable employee. He told the court that a final warning is valid for as long as possible and the Complainant was given a final warning for fighting on duty. The Complainant was not charged by the Respondents for any allegations of fraud. RW1 was referred to documents marked as "MH 2(a) (b) (c) in the Respondents' Affidavit which were overtime claims, he told the court that the person who signed those overtime claims was the Respondents' Operations Manager Mr. Hyden Banda. He further told the court that the document marked as "MH3" in the Respondents' Affidavit which is one of the documents on which fraud was alleged against the Complainant was prepared by the Respondents' Depot Manager. When referred to "MH4" in the Respondents Affidavit which was a gate checkers register dated 22nd February, 2016, he told the court that at that date, the Complainant was a forklift driver. The Complainant's name did not appear on the names of the guards who were on duty on that day.

When referred to a document marked as "MH5" in the Respondent's Affidavit which is a tax invoice on which the Respondents were alleging fraud on the part of the Complainant, RW1 told

the court that the said document was prepared by the Respondent's Depot Manager and not the Complainant who was a forklift driver.

RW2 was Isaac Nduli and he told the court that the Complainant was initially employed by the Respondents as a security officer and his duty was to protect company property and ensure that no goods should leave company premises without proper documentation. The Complainant was later promoted to forklift driver and his duty was to load and offload goods using verified documents. He told the court that once an invoice is generated by the Respondent's depot manager, the invoice is taken to the warehouse where the depot controller assigns someone to load the goods specified on the invoice. If the goods require a forklift in order to be loaded, then the forklift operator would come in. Once the goods are verified, they are loaded and the invoice is taken to the security officer at the gate who records in the gate checkers register after verification.

In cross-examination, RW2 told the court that no reason was given by the Respondent for the termination of the Complainant's employment and the letter of termination does not refer to any offence committed by the Complainant. When he was referred to a document marked as "MH7" which is the Respondent's Disciplinary Code, he told the court that a final written warning was only valid for 6 months and the final warning written to the Complainant was dated 3rd December, 2013. Overtime payment claims written by the Complainant were approved by the Respondent's Operations Manager Mr. Hyden Banda who was superior to the Complainant. RW2 would verify if the overtime claims were correct by looking at the number of hours indicated for the work done.

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

1. An Order that the Complainant's termination letter of employment by the Respondent dated 10th November 2016 contravened Section 36 (c) (i) and 36 (3) of the Employment Act Chapter 268 as amended by Act No. 15 of 2015 of the Laws of Zambia and therefore null and void and is of no legal effect.

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-

(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.

(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."

The letter of termination of employment that the Respondent wrote to the Complainants and is marked as "OC 12" in the Complainant's Affidavit in Support of Complaint reads as follows:-

"10 November 2016

Mr. Oliver Chinyama

C/o Spectra Oil Corporation Limited

P O Box 21086

KITWE

Dear Mr. Chinyama

TERMINATION OF EMPLOYMENT

We regret to inform you that your services with the company have been terminated with effect from 11th November, 2016.

In line with your terms and conditions of service which you signed when you joined the company, you will be paid your terminal benefits as follows:-

1. Salary up to 11th November, 2016
2. Encashment of accrued leave days
3. One month salary in lieu of notice and

4. **Pension contributions to Saturnia Regna in accordance with the rules of the Pension Trust....**

We would like to thank you for the services rendered during your stay with the company and wish you good luck in your future endeavours.

Yours sincerely
SPECTRA OIL CORPORATION LIMITED"

This letter does not disclose any reason for the termination of the Complainant's employment. The Respondents' answer to Notice of Complaint filed into court on the 16th of May, 2017 states in paragraphs 3 and 4 that the Complainant was involved in gross misconduct in his operations by facilitating the fraudulent release of products from the company and was also fraudulently altering over time claims to include hours he did not work for. These two reasons were only brought up by the Respondent when court proceedings were commenced by the Complainant, as he was never charged for the alleged offences. There is clearly no valid reason related to the conduct of the Complainant that was disclosed by the Respondent in its letter of termination, as the reasons advanced in the Respondent's answer were, in my considered view, an afterthought.

This is in contravention to Section 36 of the Employment Act Chapter 268 of the Laws of Zambia as amended by Act No. 15 of 2015. In the case of **Mwenya v CFB Medical Centre Limited SCZ Appeal No.9 of 2015** it was stated that:-

"According to section 36 (1) (a) and (c) as amended, an employer cannot terminate a written contract of an employee without giving the employee reasons and such reasons must be valid."

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."

The Complainant has managed to prove his claim and I hereby order that the Complainant's termination letter of employment by the Respondent dated 10th November 2016 contravened Section 36 (c) (i) and 36 (3) of the Employment Act Chapter 268 as amended by Act No. 15 of 2015 of the Laws of Zambia.

2. An Order for damages for breach of contract

In the case of **Zambia Privatisation Agency v James Matale (1995-1997) ZR 157**, it was held 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."

In the case of **Ster Kinekor v Attorney General 2010/HP/346**, it was held that:-

"If the employer terminates outside the provisions of the contract, then he is in breach of contract, and is liable in damages for breach of contract."

Appendix 1 to the Respondents' Disciplinary Code which is marked as "MH7" in the Respondents' Affidavit provides that:-

"A manager may be called upon to hold a disciplinary hearing at which allegations against an employee are evaluated. The Manager should check that the employee was informed in

advance about the allegation, his right to representation and the right to respond to the arguments"

The Complainant was never charged for the alleged offences of fraudulent alteration of overtime claims or fraudulent release of products from the Respondents' company. No disciplinary hearing was held and the Complainant was never informed about the allegations. This is in breach of the Respondents' Disciplinary Code which forms part of the contract that the Complainant signed with the Respondents.

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 never given a chance to be heard or defend himself on the allegations that were only brought up by the Respondents after legal action was commenced against them. The Respondents stated in their Affidavit in Support of Answer filed into court on the 16th of May, 2017 that the Complainant was serving a final warning, prior to the termination of his employment. However, contrary to the evidence on record, Clause 8 of the Respondent's Disciplinary Code marked as "MH7" in the Respondents' Affidavit provides that:-

"8-DISCIPLINARY ACTION

Stage 3-Final Written Warning

A final written warning is deemed to lapse after the expiry of 6 months from date of issue"

The final warning which was given to the Complainant by the Respondent for fighting on duty was issued on the 3rd of December, 2013. The Complainant's employment was terminated on the 11th of November, 2016. This clearly shows that the warning to the Complainant had already lapsed at the time his employment was terminated and it cannot be brought into issue by the Respondents who are just fishing for reasons because they did not give any valid reason. They did not charge or hear the Complainant, hence the allegations of fraud were not proved against him and this was in breach of contract. The Complainant is therefore entitled to damages for breach of contract.

I am well guided by the case of **Swarp Spinning Mills v Sebastian Chileshe SCZ Judgment No. 6 of 2002,** where 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 perquisities"

Based on the aforecited cases, I am of the considered view that the Complainant's employment was terminated on the basis of offences which were not proved against him and he was not even given an opportunity to answer to the allegations of fraudulent alteration of overtime or fraudulent release of products 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 breach of contract equivalent to twelve(12) months' salary including all allowances and perquisites. These damages shall attract interest at the 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.

3. An Order for damages for the manner in which the employment was terminated, the embarrassment endured, inconvenience and the mental and physical torture suffered.

The Complainant has not shown this court any embarrassment, inconvenience, mental and physical torture he has suffered. I have gone through the entire evidence in this case and I have not seen any mental or physical torture 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 for damages for breach of contract succeeds, then a claim for embarrassment, inconvenience, mental and physical torture will also succeed. The Complainant must lead evidence to prove the nature and extent of embarrassment or inconvenience. This claim is accordingly dismissed.

4. An Order that the Complainant was placed on redundancy by the Respondent in its letter dated 10th November 2016 and;

5. An Order for payment of the Complainant's salary until the payment in full of his redundancy benefits as required by law.

I have chosen to consider the fourth and fifth claim as one as they essentially relate to the same thing. Redundancy only arises in two scenarios namely the employer ceasing or intending to cease, to carry on the business by virtue of which the employee was engaged; or the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged, and the business remains a viable going concern.

The Complainant has not led any evidence before this court to show that the Respondents have ceased to carry on business or that the Respondents were reducing the requirement for employees to carry out work of the particular kind that the Complainant was doing. To the contrary, the evidence on record is that the Respondent company is still operational. The Complainant has not proved that the reason his employment contract terminated by the Respondents was redundancy, hence the claims for on order that the Complainant was declared redundant and should be paid his salary until full payment of his redundancy package fail.

Costs of these proceedings go to the Complainant.

Leave to appeal within 30 days from today is granted

Delivered and signed at Ndola this 12th day of December, 2017

Hon. E.L. Musona
JUDGE