IN THE HIGH COURT FOR ZAMBIA 1988/HP/1373

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

CONSTABLE FLYWELL BOTHA Plaintiff

and

THE ATTORNEY GENERAL Defendant

Before the Honourable Mr. Justice B. K. Bweupe in Chambers at Lusaka on the 26th November, 1993 at 0910 hours.

For the Petitioner : Mr. K. Mwanza, John Kazuka & Company

For the Defendant : Mr. D. Kasote, State Advocate

J U D G M E N T

In this case, the Plaintiff's claim is for;

1. A declaration that the Defendant's action to discharge the Plaintiff from the Police Force on the ground that he had turned professional in boxing in that other such boxers who turned professional are still employed by the Defendant as Police Officers
2. Annulment of the said decision, discharging the Plaintiff from the Police Force, and
3. Costs to and incidental to this suit.

Having heard the Plaintiff and his witness DW2 and the Defendant, I am satisfied that the Plaintiff's discharge from his employment was justified.

The facts say that the Plaintiff was called and interviewed by a Mr. L. A. Mulenga and persuaded him to stop boxing. This interview was followed by a letter No. PW154/3/16539 dated October 11, 1985 in which he was charged for turning professional and was given 14 days in which to exculpate himself. The Plaintiff refused to exculpate himself. The terms of Section 13 of Cap. 133 are very clear. Section 13 states and I quote: "No Police Officer shall, without the consent of the Minister, engage in any employment or office whatsoever other than in accordance with his duties under this Act". In his evidence the Plaintiff admitted that he was discharged because a Policeman is not supposed to become a professional boxer under Section 13 of Cap. 133.

He refused to accept the request by the Inspector General of Police to stop professional boxing. He did not do so because professional boxing was paying him more than what he was getting as a Police Officer. As I said, dismissal was justified and I will dismiss the claim with costs to the Defendant against the Plaintiff.

B. K. Bwoupo
JUDGE

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 8 OF 1993

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA AIRWAYS CORPORATION LIMITED Appellant

and

FLORA RUBIOLO Respondent

CORAM: Ngulube C.J., Gardner and Chirwa, JJ.S.
at Lusaka on 25th February and 14th September, 1993.

For the Appellant: Mr. A.G. Kinariwala, Legal Services Corporation.

For the Respondent: Mr. M.M. Ndhlovu, M.M. Ndlovu and Company.

J U D G M E N T

Chirwa J.S. delivered judgment of the Court:-

Cases referred to:-

(1) Mumba vs Zambia Publishing Company [1982] Z.R. 53

The history of this matter is that the respondent was employed by the appellant in 1967 as an air hostess and at the time of her termination of her employment she rose to the rank of Supervisor air hostess. Sometime in 1987 the appellant got some information from the security wings of the Government that the respondent was involved in drug trafficking. She was put on suspension while the appellant was investigating the allegations. Sometime in early 1988 the respondent had a meeting with some officials of the appellant including the Personnel Manager who was defence witness in the Court below. The meeting was about the allegations of the respondent's involvement in drug trafficking. The meeting took sometime and during the meeting the respondent was told that in view of the seriousness of the allegations she should resign or she would be dismissed.

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After the meeting she went home and wrote a letter dated 2nd May, 1986 resigning due to domestic problems which she wanted to sort out and handed this letter to the Personnel Officer of the appellant. Thereafter she went to seek legal advice where she was advised to withdraw the letter of resignation and in its place tender a letter of retirement. She wrote the letter of retirement as advised by her lawyers and again took this letter to the Personnel Officer and asked to withdraw her earlier letter of resignation but the Personnel Officer told her that he would forward her second letter but refused to surrender the resignation letter. On 15th June, 1988 the appellant, through the Personnel Manager wrote the respondent accepting her resignation and was told that her terminal benefits would be calculated up to 27th September, 1988. Being dissatisfied with the decision, the respondent sued the appellant in the High Court. The endorsement on the writ claimed for a declaration that:-

(a) She had not resigned from services with the defendant (appellant) and as such the defendant's acceptance of the resignation was null and void;

(b) the decision of the defendant (appellant) to back-date the resignation is null and void.

The learned trial judge after a trial found that the circumstances under which the respondent was made to write the letter of resignation were not free and voluntary in that she was given an option of resigning or to be dismissed and he granted the declaration that her purported resignation was null and void and the decision to back-date the letter was also null and void. He however ordered that since the respondent could not be forced back into employment she was entitled to damages as claimed to be assessed by the Deputy Registrar. It is against these declarations that the appellant has appealed.

Mr. Kinariwala for the appellant argued two grounds of appeal. The first ground was to the effect that the learned trial Judge erred in granting the declarations that the letter was written under coercion and duress in that her evidence to that effect at trial was not just a mere variation of the pleadings but a totally different case altogether and as such she was not entitled to the declarations granted. The second ground of appeal was that the learned trial Judge erred in holding that the resignation letter was not free and voluntary in that there was no evidence proving that fact.

In reply for the respondent it was submitted that what they claimed was a declaration that the respondent had not resigned so that if that was granted the respondent should have been treated as having retired so that she enjoys certain privileges such as free air travel wherever the appellant operated like others of the like of Mrs. Adams. It was also submitted that they were claiming damages for wrongful dismissal in this case three (3) months pay in lieu of notice. In reply to the argument that the respondent's case was different from that as pleaded, it was submitted that the appellant raised no objection to the evidence being led which was not in line with the pleaded case.

We have considered the arguments advanced by the parties. We note that the case for the respondent as pleaded was for a declaration that she did not resign from her employment because the letter purporting to be the letter of resignation was withdrawn. We further note that in her evidence the respondent stated that she was given a choice to resign or to be dismissed and that because the two choices were both detrimental she considered this as duress. Taking her evidence, we agreed with Mr. Kinariwala that the case as pleaded was not supported by evidence that could have earned her the declarations she sought. We would regard her evidence as not a variation or modification but a radical departure from her case which, as we said in Mumba v Zambia Publishing Company (1) would not entitle

3/her to.....

succeed. Her case was that she had withdrawn her resignation letter but the learned trial Judge considered the matter on the basis that she did not have a free will when she wrote the letter and because of this the letter was null and void ab initio. This total departure from the pleaded case cannot be supported by an argument that there was no objection from evidence being led establishing a totally different case. On the case as pleaded, the respondent having written a letter of resignation, which decision was a unilateral one on the part of the respondent, and the letter having been received by the appellant and acted upon, that conclusively terminated her employment. As the trial Judge correctly stated, the respondent could not be forced to work, the appellants could not have rejected the respondent's letter of resgnation. The best any party can fall on in situations of unilateral decisions such as termination of employment or services is damages measured in terms of length of notice required to be given before terminating employment if none is provided for, then a reasonable period of notice. Having said this, we agree with the appellant's argument that the learned trial Judge erred in granting the declaration that the letter of resignation was null and void. The resignation letter was valid and effectively terminated the employment. The respondent infact was fortunate in that she was given three months before her services were terminated and that was reasonable notice. We therefore set aside the declarations granted and hold that the resignation letter was valid. We therefore allow this appeal with costs both in this Court and the court below.

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M.S.W. NGULUBE
CHIEF JUSTICE

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B.T. GARDNER
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE