IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ APPEAL NO. 96 OF 1995.

ZAMBIA PRIVATISATION AGENCY Appellant

Vs

JAMES MATALE Respondent

Coram: Sakala, Acting Deputy Chief Justice, Chaila and Chirwa JJS.
1st February and 15th March, 1996.

For the Appellant, Mr. B.C. Mutale of Ellis & Company.
For the Respondent, Mr. F.M. Sikatana of Veritas Chambers.

J U D G M E N T

Sakala , Ag.D.C.J. delivered the judgment of the court.

Cases referred to:-

1. Posts & Telecommunications Corporation Ltd and Phiri, SCZ Judgement No.7 of 1995.
2. Ngwira Vs Zambia National Insurance Brokers, SCZ Judgement No. 9 of 1994.
3. Contract Haulage Vs Kamayoyo (1982) ZR 13.
4. Maclelland Vs Northen Ireland Health Services Board (1957) 2 ALLER 129.
5. Mumpa Vs Maamba Collieries Ltd, SCZ Judgment No. 29 of 1989.
6. Miyanda Vs Attorney-General (1985) 185.
7. African Association Limited and Allen (1910) 1KB 396 and 399.

This is an appeal against a judgment of the Industrial Relations Court holding that the termination of the respondent's employment by the appellant was unlawful and unjustified and ordering that the respondent be deemed to have completed his three years contract and be paid his salary and all allowances he was entitled to for the remaining term of the contract.

The facts of the case are that on 11th November 1992, following an advertisement and interviews, the respondent was employed as the first Director of the appellant agency on a contract period of three years. On 8th December 1992, the Chairman of the appellant wrote the respondent as follows:-

/...

"Dear Mr. Matale,

Re: APPOINTMENT AS DIRECTOR: ZAMBIA PRIVATISATION AGENCY.

Reference is made to your letter to me dated 11th November, 1992 concerning the above mentioned subject.

I was very pleased indeed to note your formal acceptance of your appointment to the position of Director of the Zambia Privatisation Agency. I have no doubt whatsoever that yours is a very well deserved appointment. You will certainly rise to the challenge of this important position in the Zambia Privatisation Agency.

Accordingly, you will wish to receive the reassurance of my determination to give you all the support and encouragement you require in discharging the onerous responsibilities of this office.

I intend to write a letter to Messrs. Ben Ngenda & Company, for the attention of Mr. Ben Ngenda, requesting them to prepare a suitable draft contract of service.

Again, I wish you every success in your endeavours.

Yours Sincerely,

J.M. Mwanakatwe,
CHAIRMAN."

It was common cause that by 8th September 1994 when the respondent's services were terminated with immediate effect, there was no formal suitable contract of service in place between the parties. The appellant's letter terminating the respondent's services dated 8th September 1994 reads as follows:-

"Dear Mr. Matale,

Following the adoption of Price Waterhouse restructuring report by the Zambia Privatisation Board, it has become necessary to reorganise top administration of the Agency.

Consequently, with regret, I wish to inform you that your services are terminated with immediate effect. You are requested to hand over all the keys, documents and other ZPA Property immediately to Mr. Stephen Mwamba.

By copy of this letter the Finance Manager is instructed to quantify the terminal benefits due to you and to effect settlement thereof.

On behalf of the Board, I wish to thank you for the services you have rendered to the ZPA and I wish you all the best in future.

Yours Sincerely,

K. Mumba, (Dr)
ACTING CHAIRPERSON OF
ZAMBIA PRIVATISATION AGENCY."

The termination letter did not make any reference to the termination being made under any contract of service but that it was "Following the adoption of Price Waterhouse restructuring report of the Zambia Privatisation Board." The respondent was paid three months salary in lieu of notice and a further three months payment as ex gratia.

The respondent brought a complaint before the Industrial Relations Court under Section 108 (2) of the Industrial and Labour Relations Act complaining that the termination of his employment by the appellant was discriminatory on the grounds of status, unlawful, malicious and contrary to the conditions of service and without reasons or merit. The respondent sought reliefs of full payment of salary together with all allowances and benefits attaching to the position of Director with all future improvements pertaining to changes of conditions of service from the date of unlawful termination of services to the date of expiration of the contract and damages for breach of contract and distress.

Both parties gave oral evidence at the trial. The case for the respondent was that he had been discriminated because the report from Price Waterhouse did not recommnd for his dismissal and that the dismissal had no basis. The court found that the respondent had not proved that the termination of his emploment was based on discrimination because he had not proved on a balance of probabilities that the termination was motivated by discrimination based on one or more of the grounds contained in Section 108 (1) of the Industrial and Labour Relations Act of 1993 namely; race, sex, marital status, religion, political opinion or affiliation, tribe extraction or social status. The court then proceeded to consider the second complaint that the termination was unlawful, malicious, contrary to the conditions of service and without reasons or merit. The court observed that the agency had under the Act power to appoint a Director and that the Agency was a body corporate capable of suing and being sued. The court noted that the Privatisation Act made no provisions for the removal of a Director once appointed but accepted that under the provisions of the Interpretation and General Provisions Act Cap 2, the Agency had power to remove the Director. The court found that the provisions of section 9 of the Privatisation Act in relation to requirements of holding meetings were mandatory and that the appellant had not complied with those provisions. The court held that the decision made at a meeting that did not comply with the provisions of the Act was null and void and made the orders appealed against.

On behalf of the appellant Mr. Mutale filed written heads of argument based on two grounds of appeal. The first ground was that the Industrial Relations Court misapprehended the law by holding that the appellant's decision to terminate the employment was unlawful as the respondent action was founded on section 108 of the Industrial and Labour Relations Act No. 27 of 1993. The gist of the submissions on this ground was that the respondent having commenced his action pursuant to section 108 (2) of the Industrial and Labour Relations Act, the court should only have considered the matters relied upon as set out in that section and therefore the court having found that discrimination had not been proved the court should have dismissed the complainant as being without merit. Counsel contended that the court fell into error by determining the legality of the termination as it had not been asked to do so and above all had no jurisdiction to decide whether the employment was lawfully terminated as it had become functus officio.

In reply to submissions on ground one, Mr. Sikatana who also filed written heads of argument on behalf of the respondent pointed out that the complaint on record set out other grounds in addition to discrimination and the court was entitled to consider all the matters pleaded. Mr. Sikatana further argued that the appellant being a statutory institution with specif provisions in relation to meetings by a statutory Board, the respondent was subjected to unprecedent procedures where the letter of termination gave reason for termination as the Report by Price Waterhouse which report never recommended the termination of the respondent's services.

We have examined the record before us. We note that the respondent's complaint was set out on a standard form headed NOTICE OF COMPLAINT UNDER SECTION 108 (2). Section 108 (2) of Act No. 27 of 1993 reads as follows:-

> "(2) Any employee who has reasonable cause to believe that the employees services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the court."

And section 108 (1) reads as follows:-

> "108 (1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds or race, sex, maritals status, religion, political opinion or affiliation, tribal extraction or social status of the employee."

Paragraph 4 of the Standard form of notice of complaint reads:-

> "The grounds on which this complaint is presented are (here summarise the facts and matters relied on in support of the complaint, stating the date of alleged occurrence of the event giving rise to this complaint.)"

The respondent cited four grounds upon which his complaint was presented namely:-

"The termination of employment of the complainant by the respondent was discriminatory on grounds of status, unlawful, malicious, contrary to the conditions of service and without reasons or merit."

The appellant's answer was couched as follows:-

1. "The complainant was employed under an ordinary contract of employment.
2. The relationship that was thereby created was that of master and servant.
3. The contract of employment was terminated so that the Zambia Privatisation Agency can re-organize its top administration following the adoption of the Price Waterhouse restructuring report."

We have no hesitation in agreeing with the Industrial Relations Court that the respondent did not prove discrimination as none of the reasons for discrimination as set out in section 108 (1) had been established. As we said in the cases of **Posts and Telecommunications Corporation Limited and Phiri (1)** and **Ngwira Vs Zambia National Insurance Brokers (2)** that discrimination must come within the subject matter of section 108. In the instant case however the respondent pleaded other grounds. The court in our view was entitled to consider those grounds particularly in the light of the appellant's answer to those grounds as set out above.

The question that we have to consider is whether the respondent's termination of employment was unlawful. The court below held that it was unlawful because the meeting at which the decision to terminate the services of the respondent was made did not comply with the provisions of section 9 of the Act in relation to proceedings of the agency in particular that the appellants failed to produce minutes of that meeting.

The respondent's services were terminated in accordance with the terms of a letter dated 8th September 1994. They purported to give a reason in that letter and they paid the respondents the terminal benefits which included three months salary in lieu of notice. It was common cause that the contract of employment in the instant case did not provide for termination of employment by notice or pay in lieu of notice. Be that as it may we accept that the relationship here as we said in **Contract Haulage Vs Kamayoyo (3)** was

that of Master and Servant. The case before us was not one involving contravention of statutory procedures and discriplinary proceedings. The payment in lieu of notice was a proper and a lawful way of terminating the respondent's employment on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice, see **Maclelland Vs Northern Ireland Health Services Board (4)**. In the case of **Mumpa Vs Maamba Collieries Limited (5)** we said, "it is the giving of notice or pay in lieu that terminate the employment. A reason is only necessary to justify summary dismissal without notice or pay in lieu."

We agree with counsel for the appellant that the respondent's termination of services was not unlawful as he was paid in lieu of notice which is a lawful way of terminating a contract of employment. This ground of appeal succeeds.

The second ground argued as an alternative to ground one was that the Industrial Relations Court misdirected itself by applying a wrong measure of damages for unlawful termination of contract, the correct measure being a reasonable period of notice as opposed to payment of the balance of unserved period of the contract of employment. The contention of Mr. Mutale was that the period of termination of employment by notice having not been stipulated the court should have resorted to what prevails at common law as outlined at page 469 of the Morden Law of Employment by G.H.L. Friedman. Counsel also referred us to the case of **Miyanda Vs Attorney-General (6)** as to a fair measure of damages and submitted that in the present case reasonable notice can be determined on the basis of the ZIMCO Conditions which could be three to six months notice.

In reply Mr. Sikatana submitted that this was not a proper case to consider the question of notice when the termination was illegal on the basis that the statutory provisions were not followed. Counsel further submitted that the measure of damages was outside the common law principle of reasonable notice in the instant case.

We have considered the second ground as argued. it is common cause that the three year contract did not make provision for termination by notice. The absence of notice clause in our view cannot be construed to have meant that either party was excluded from terminating the contract. In dealing with

ground one we have accepted on a proper construction of the letter of termination that the termination in this case was not unlawful because the payment in lieu of notice was a proper and lawful way of terminating the employment. The principles of law on termination of employment relationships are well illustrated by Friedman in the Book entitled The Modern Law of Employment at page 463 where under the heading "By Lapse of Time" the learned author states:-

> "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 obligations of the contract without any liability thereunder. 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."

We entirely agree with these principles. The learned author makes it very clear that damages measured by loss of salary for remainder of a fixed term of employment are only payable where the employer wrongfully repudiates the contract and not where termination is lawful as in the present case. (see pages 493 and 495).

The learned author further points out that the absence of any express terms of termination, and apart from misconduct the general principle applicable to such conctracts of employment is that the engagement can only be terminated by reasonable notice, see also African Association Limited and Allen (7).

We are satisfied in the instant case that the termination was lawful and that the measure of damages in the absence of any express terms must be reasonable notice period. What is reasonable notice depends on the facts of each case. Mr. Mutale has invited us to take into account the practice that existed in the ZIMCO Conditions of Service where reasonable notice was from three months to six months. We also take into account the numerous cases cited by Friedman under the paragraph headed "length of notice" at

page 469 to 470 of his book, The Morden Law of Employment where twelve months notice has been said to be a reasonable amount in the case of an editor of a newspaper.

The facts of the case before us were that the respondent was the first Director of the appellant. There was no allegation of misconduct or poor performance. In appreciation of his work the appellant found it fit in the absence of any terms to pay the respondent three months in lieu of notice and three months ex-gratia payment. These facts suggested that the appellant deserved a longer period of notice. On the facts before us we therefore hold that six months is a reasonable length of notice in the absence of any express terms for a first Director of a very important privatisation institution. This notice enables the ~~appellant~~ respondent to find alternative employment to mitigate his loss. This means ground two of appeal also succeeds. The appeal is therefore allowed. But we make no Order as to costs.

For avoidance of doubt, we hold that the respondent's termination of employment was lawful. The order of the Industrial Relations Court that the respondent be deemed to have completed his contract and be paid his salary and all allowances he was entitled to for the remaining term of three years contract is set aside and quashed. Instead the respondent will now be entitled to six months salary and all allowances he was entitled in lieu of notice less the three months in lieu of notice that hasalready been paid. The exgratia payment is not affected by the outcome of this appeal.

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E.L. Sakala,
ACTING DEPUTY CHIEF JUSTICE.

.....
M.S. Chaila,
SUPREME COURT JUDGE.

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D.K. Chirwa,
SUPREME COURT JUDGE.