

IN THE SUPREME COURT OF ZAMBIA

-APPEAL NO.28/2003

SCZ/8/40/2004

HOLDEN IN LUSAKA

[CIVIL JURISDICTION]

BETWEEN:

ZAMBIA CHINA MULUNGUSHI TEXTILES
(JOINT VENTURE) LIMITED

- APPELLANT

AND

GABRIEL MWAMI

- RESPONDENT

Coram: Chirwa, Mambilima and Silomba, JJS
On the 8th of April 2003 and 7th April 2004.

For the Appellant : Mr. J. Sinkende, Legal Counsel,
Zambia China Mulungushi Textiles
(Joint Venture Limited).

For the Respondent : Mr. E. M. Mukuka, of Mukuka and Company.

JUDGMENT

Mambilima JS, delivered the Judgment of the Court.

Cases referred to:

- (1) Ridge vs Baldwin [1963] Z All ER 66 at page 71
- (2) ZCCM Ltd vs Matali 1995/1997 ZLR 144 at page 147.
- (3) Vidyodayo University of Ceylon vs Silva [1964] 3 All ER 865.
- (4) Frances vs Municipal Council of Kuala Lumpur [1962] 3 All ER 633.
- (5) Raine Engineering Company vs Baker [1972] ZR 156
- (6) Zambia Airways Corporation Ltd vs G. Mubanga SCZ NO. 4 OF 1992.

Legislation referred to:**(1) The Employment Act Cap 268 as Amended by Act No. 15 of 1997.**

This is an appeal against the decision of the Court below, in favour of the Respondent, in which the Court found that the Respondent was wrongfully demoted by the Appellant and Ordered that he be reinstated to his former position.

The Respondent had moved the Court below through a Writ of Summons, claiming damages for wrongful demotion from the rank of Assistant Manager Marketing, to an unspecified job title in non managerial ranks. On 5th June 2001, the Appellant wrote to the Respondent stating inter alia:

"Following Management's investigations and findings in the operations of Mpika Retail Shop where the company had made a huge loss, it has been found that there are serious flaws in your management capacity to supervise effectively the operations of the retail outlets throughout the country.

As a result of this management has decided to demote you in rank and grade from your current grade of ZC7 to non-management scale of ZC 5. This demotion is with immediate effect. The actual position will however, be communicated to you in due course".

The rank of Assistant Manager, Marketing, in grade ZC7 carried a salary of K340,000 while the position to which the Responded was demoted carried a salary of K265,000.

The Respondent contended in the Court below that his demotion was unjustified and based on false allegations. He also contended that the demotion was in violation of his Conditions of Service in that he should have been charged with an offence in accordance with Clause 6.1 B. of his Conditions of Service and given an opportunity to exculpate himself. On the allegations in his letter of demotion that he had caused the Mpika Retail Shop to incur a huge loss, the Appellant told the Court below that although a stock count of September 2000 showed that things at Mpika were well, he did not agree. He had endorsed on the report that the records were not up to date and the daily stock count was

neglected. It was his view that the Management of the Appellant were therefore aware of the problems at Mpika. This report was on the stock count at Mpika, as at 23rd September 2000. It was prepared by the Marketing Section under the hand of a Mr. J. Mwiinga. The report recommended that there should be regular stock counts and proper maintenance of stock records.

The Appellant further told the Court below that in August 2000, he had written a Memorandum to the Deputy General Manager Commercial, warning that the practice of doing stock counts every three months was dangerous in that a Shop Manager would misuse the stock. He made the following recommendations:

- "1. Despite being a cost, Senior Managers, (i.e. Assistant Manager Marketing and above) must be allowed to check the shops randomly in a month to counter check on the Shop Manager's activities because many shops may be doing the same and in trying to save traveling costs, the company may be losing millions of Kwacha worthy of goods through unscrupulous practices.**
- 2. Stock count to be carried out on monthly basis on each shop.**
- 3. Marketing Officers to intensify their routine operations.**

4. **Shop Managers must be transferred regularly to improve on work efficiency and to avoid suspected customer relations and bad practices.**
5. **Regular meetings with Shop Assistants must be held by Assistant Manager-Marketing to educate them how to deal with such kind of discrepancies”.**

The Respondent went on to state that in some of the shops where losses were incurred like in Lusaka in 1999, where 10 bales of material was lost it was the Manager of the Shop who was demoted while in the case of the shops in Ndola and Kitwe which also recorded losses, none of the Managers had been demoted. He suspected that the Managing Director of the Appellant Company was behind his demotion. The Respondent prayed that his demotion should be nullified and that he be restored to his previous status of Assistant Manager, Marketing.

The Appellant contested the Respondent's prayer claiming that the Conditions of Service on which the Respondent was relying were never implemented. It was their position that these conditions of service which

contained the disciplinary and grievance code was a mere proposal. It was the contention of the Appellant that the Respondent's demotion was justified.

DW1 Albert Chifita told the lower Court that it was the Conditions of Service for non-represented members of staff from ZCI to ZC8 which were applicable. According to this witness, the Chief Accountant wrote to the Respondent on 15th November 2000 expressing dissatisfaction over the management and operations of the retail shops after which the Respondent was transferred to Lusaka to run fewer shops since it was felt that he was not able to run the 17 shops that he was in charge of. DW1 further testified that the Conditions of Service which were applicable did provide for demotion under Clause 20. He was however, not aware that the Respondent had made recommendations on how to improve the operations of the retail shops.

The Appellant's Chief Accountant Jiang Jong (DW2) also testified that after a meeting held on 10th November 2000 to discuss problems at Sales Depots, he wrote a letter to the Respondent informing him that the Appellant

Company was not happy with his performance. He was penalized and so were other officers who were found wanting.

The Deputy Manager Commercial, Mr. Steven Kayumba (DW3) told the Court below that the Respondent was responsible for planning and assessing how the Retail Shops were to run. He used to travel to various Retail outlets. This witness testified that the shop in Mpika was opened between June/July 2000, and according to his records, the shop did well from July up to November. According to this witness, the Respondent never told him that this shop was not performing well. He went on to state that when a team was later sent to Mpika to do a stock count, it was discovered that an amount of K89,557,510.66 had been lost. Before this discovery, the Respondent had been transferred to Lusaka as Assistant Manager in charge of 7 shops. He was brought back to Kabwe and demoted. DW3 conceded that the Appellant did not have an adequate fleet of vehicles to reach the various outlets.

After considering the evidence on record, the learned trial Judge found as a fact that the Respondent was an Assistant Manager in charge of Retail Shops when he was demoted and that he had worked under DW3 who was the Deputy Commercial Manager. The Judge also found that the Respondent's demotion

was triggered by the huge loss at the Mpika shop. After referring to the Disciplinary and Grievance Procedure Rules which were produced by the Respondent, under which an erring employ is supposed to be charged with disciplinary offence and given an opportunity to exculpate himself, and the Disciplinary Regulations referred to by DW1 which have no provision for charging an erring employee, the learned trial Judge concluded that the Regulations relied upon by the Appellant were vague. He concluded that the Respondent was actually efficient because he had observed that things were not running well at Mpika long before the big loss of over K89,000,000 was discovered. The Judge's conclusion appears to stem from the fact that the Respondent had disputed the report of September 2000 on the Mpika Retail Shop which showed that things were running well at Mpika. The Judge also found that management did not heed the Respondent's advice contained in his report of August 2000 that there should be monthly stock counts. He accepted the evidence by the Respondent, which was supported by the evidence of DW3, that the problems and shortages in Retail Shops were caused by the failure of Management to provide transport to facilitate regular stock counts. On this basis, the learned trial Judge found that the demotion of the Respondent was not based on any rational ground. He

also found that the rules of natural justice were not followed, in that the Respondent was punished for an offence without being given an opportunity to be heard. On the Appellant's disciplinary rules which did not make any provision for charging an erring employee, the Judge observed "I do not see why the Defendant does not want to implement the disciplinary and grievance procedure code for non represented employees which the Plaintiff claims is applicable.

...The Defendant prefers to use the disciplinary rules which are vague and unintelligible just to exploit workers". The trial Judge found on the totality of evidence before him that the Respondent had proved his case on a balance of probabilities and held that the Respondent's demotion was wrongful. He ordered that the Respondent should be re-instated to his former Grade of ZC7 and to be paid the attendant benefits from the date of demotion.

In this appeal, the Appellant had advanced four grounds of appeal namely:

1. that the learned trial Judge was wrong to find that the demotion of the Respondent was not based on any rational grounds when evidence was led to show that since he was appointed as Assistant Manager Marketing in 1999, the Respondent had shown deficiency and on more than 2 occasions, he was written to by the Deputy

Manager (HR) and the Chief Accountant asking him to improve upon his duties;

2. that the question of formal exculpation only applies to termination of employment and not demotion due to incompetence.
3. that the order of re-instatement of the Respondent to Scale ZC7 from ZC5 was erroneous in a contract of service in that under the law of master and servant, there cannot be specific performance; and
4. that in disciplinary cases of master and servant, where the conditions of demotion or dismissal are not ruled out by any statutory provision as to the manner of demotion/dismissal, a wrongful demotion/dismissal ought to be final over the employment position, but it may give rise to damages for wrongful demotion/dismissal.

In support of the first ground of appeal, Mr. Sinkende, in his written heads of argument, augmented by oral submissions, stated that in the Appellant Company, the position of Assistant Manager is a very senior position. The Assistant Manager manages property of the Company and impliedly supervises

juniors and ensures that the Company lives up to a high level of production to stay afloat. Mr. Sinkende submitted that there is evidence on record to show that in the 2 years that the Respondent was Assistant Manager, Marketing, he failed to exercise that degree of skill and care which he expressly and impliedly held himself to possess. He went on to state that it was exhibited in the Court below that on two occasions, the Respondent was reminded that his performance was slackening. He referred to the evidence of DW1 and DW2 and to two letters, copies of which appear on pages 222 and 223 of the record.

The letter on page 222 dated 11th November 1999 is from the Acting Deputy General Manager, Mr. Albert Chifita (DW1) in which he is asking the Respondent to avail himself to the Disciplinary Ad-hoc Committee looking into cases of losses at the Warehouse and Kabwe Retail Shop. The letter on page 223 dated 15th November 2000 is from the Chief Accountant, Mr. Jiang Gong (DW2) which states in part:

"Reference is made to the meeting held yesterday, 14th November 2000 between Finance Department Staff and Marketing Section Personnel over the management and operations of our retail shops.

As discussed, management is unhappy with the current situation at the shops. A number of problems continue to exist with no sign of abating. As Assistant General Manager, you have both the responsibility and authority to correct the situation. To-date,

this has not been done. As a result, management has now decided to impose a penalty of 20% of your basic salary to be deducted from your salary for the month of November 2000."

Mr. Sinkende submitted that up to the time of his demotion and the two letters, the Respondent continued to fail to manage the shops and caused the Company great losses. Mr. Sinkende argued that even if other officers were not demoted, it did not mean that the Appellant had done nothing wrong. He was in charge. The Appellant invoked clause 20 of the applicable conditions of service which states:

" Demotion will only be applied where in the opinion of the company an employee is incompetent in the job. The employee will not be demoted to a grade or position lower than his previous substantive pay rate. Demoted employees shall physically stop operating in a particularly substantive position as

soon as pronouncement is made and his emoluments shall be adjusted accordingly."

Mr. Sinkende asked this Court to find that an employee may be demoted for failing to exercise that degree of skill and that the learned trial Judge erred when he did not take into account the evidence that a person qualified in Marketing as the Respondent ought to have exhibited that degree of competence.

In reply to the Appellant's submission on the first ground of appeal, Mr. Mukuka stated that there was no evidence before the lower Court to suggest that there was any professional failure at all on the part of the Respondent as a person qualified in Marketing. He stated further that the evidence revealed that losses occurred at various shops because the whole system of checking on the workers running the shops and the stocks to avoid stealing and other irregularities failed in the Company. He pointed out that the shops in question were at distant places like Mpika, Solwezi, Mpulungu and Kitwe. The evidence established that there was no transport which could be used to get to those shops. According to Mr. Mukuka, even public transport could not work if someone is continuously on the move. He urged the Court to dismiss this ground of appeal.

We have considered the arguments of Counsel and the issues raised on the first ground of appeal.. It is quite apparent from the evidence on record that while the Appellant's position is that the Respondent was incompetent and unable to perform his functions, the Respondent maintained that he performed his functions well and that any shortcomings were caused by the inadequate facilities, at his disposal, especially transport to enable him access the shops in other towns.

From the letter of 5th June 2001, it is clear to us that the events at the Mpika Retail Shop sparked the Respondent's demotion. Our attention was drawn to the Report on the Mpika Retail Shop Stock Count as at 23rd September 2000 authored by a Mr. Julius Mwiinga. This report alludes to shortages and states that these were due to short packing in bales and returned damages which were not quickly returned. Observations made in the report were that:

- (i) Display of material is good.**
- (ii) Daily stock count is being done and records are well kept.**
- (iii) Shop personnel is so co-operative.**
- (iv) There is a clean separation between the shop stock count and the back storeroom by the use of Bin Cards.**

- (v) **Each bale has a card with details either of status, balances and movements."**

It recommends that "**Daily, Weekly and Monthly**" Stock Count should continue; Display of materials should be according to designs; and that stock records should continue to be kept well.

This report appears to have been disputed by the Respondent because he scribbled on the report:

"Contrary to the report.

- (1) the records are not up to date.**
- (2) Daily stock count neglected"**

These remarks were addressed to "D.M.C", which we assume is the Deputy Manager Commercial. As the learned trial Judge pointed out, this was before the loss which led to the demotion of the Respondent. However, the Deputy Manager Commercial, who was called as DW3 in the Court Below testified that records for July, September, October and November showed that the Mpika Shop was doing well. He stated that the Respondent did not tell him that this shop was not doing well. The veracity of this denial is difficult to accept

in view of the Respondent's endorsement on the Report that not all was well, more so that the Respondent's remarks were directed at him.

Our attention was also drawn to the Internal Memo authored by the Respondent on 28th August 2000 addressed to the Deputy Manager Commercial. The Memo is on shortages at the Kamwala Shop. At the end, the Respondent made various recommendations to address the problem of losses. Some of these were that shops should be randomly checked in a month and stock counts were to be carried on monthly basis on each shop. He even observed that in trying to save traveling costs, the Company may be losing millions of Kwacha through unscrupulous practices.

DW1, who is the Deputy General Manager claimed not to have been aware of the Respondent's recommendations. The Appellant's witnesses conceded in the Court below that they did not have an adequate fleet of vehicles to enable a monthly check of shops. The letter by DW2 to the Respondent to which Mr. Sinkende referred us, in which the Respondent's shortcomings were pointed out is dated November 2000. This is after the disputed report of 23rd September 2000 and the Respondent's memo of 28th August 2000.

On these facts, it cannot seriously be argued that the Respondent did not exhibit a degree of professional skill. He pointed out to the Appellant in September 2000 that not all was well at Mpika. He recommended regular

checks, which advice was ignored. The losses complained of were after the advice had been rendered. We cannot therefore fault the learned trial Judge for having found that the Respondent discharged his responsibilities well. The first ground of appeal therefore fails.

In support of the second ground of appeal, Mr. Sinkende submitted that the question of formal exculpation under Section 26 A of the Employment Act¹ is procedural and cannot render a demotion unlawful. He referred us to the case **Ridge vs Baldwin¹** and specifically to the statement of Lord Reid when he said that **"...the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence, it depends on whether the facts emerging at the trial prove a breach of contract..."**

Mr. Sinkende argued that under clause 20 of the applicable conditions, demotion is provided for. He maintained that the Appellant experienced heavy losses and it has shown that the Respondent poorly performed his job and was

incompetent. He argued that the Judge in the Court below ought to have taken into account the evidence adduced by the Appellant on the performance of the Respondent. He went on to state that at appeal, the Appellant's case was heard de novo and witnesses were called and submitted that the learned trial Judge did not take this into consideration. Instead, he relied on conditions of service which had not been implemented.

Mr. Mukuka's response to the submissions on the second ground of appeal is that the question of exculpation applies both to termination of employment and demotion due to incompetence. He stated further that an employee cannot be demoted on a mere opinion that he is incompetent. Mr. Mukuka argued that Section 26 A of the Employment Act is irrelevant because it deals only with dismissals. He stated further that Clause 6.0 of the Conditions of Service on which the Appellant relied was not in conflict with Section 26 A of the Employment Act. He went on to state that when specific reasons are given for taking certain disciplinary steps, the Court can overrule or nullify the decision if the reasons for the decision turn out to be false. Mr. Mukuka submitted that in this case, the trial Judge did not ignore the agreed Conditions of Service. He argued that the letter of demotion did not even cite any Condition of Service which was alleged to have been contravened. He urged us to dismiss the second ground of appeal.

We have considered the arguments of Counsel on the second ground of appeal. Looking at the Judgment of the Court below, we find that the provisions of Section 26 A of the Employment Act were not invoked by the trial Judge. We also find that the learned trial Judge never made a finding or reach a conclusion that the Respondent ought to have been charged and heard in his defence. After alluding to the fact that those Conditions of Service which were being relied upon by the Respondent provided for the charging of an erring employee with a right to exculpate himself; and that the conditions invoked by the Appellant had no such provision, the Judge observed **"No wonder the Defendant prefers using these vague regulations instead of the ones the Plaintiff relied on."** We do not get an impression from this statement that the learned trial Judge relied on the Conditions of Service relied upon by the Respondent. Instead, the Judge considered the specific allegation of the loss at Mpika and concluded on the basis of the evidence which was before him, that the demotion of the Respondent was not based on any rational ground.

Be that as it may, demotion , just like a termination of employment is an adverse action against an employee. If reasons for a demotion turn out to be false or cannot be sustained, it follows that such termination or demotion is unfair and or/wrongful. 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. The Appellant Company is a Public Company and as we stated in the case of **Zambia Consolidated Copper Mines Limited vs Matale²**, "the old fashioned language of master and servant is out of place in many of the employment situations nowadays; certainly in large conglomerates or public companies. In many cases, the terms governing the employment indicate that there is a right to natural justice and a right not to be thrown out of work except on some rationale grounds; some explicable basis which is reasonable in the circumstances". In our view, the second ground of appeal cannot be upheld either.

The third and fourth grounds of appeal were argued together. They attack the learned Judge's Order to reinstate the Respondent to his former grade of ZC7. The Appellant has argued that the reinstatement of the Respondent was erroneous and tantamount to ordering specific performance. His remedy lay in damages for wrongful demotion. Mr. Sinkende referred us to the case of **Vidyodayo University of Ceylon vs Silva³** in which Lord Morris Borhy Gest stated that **"....if the master wrongfully ends the contract; then the servant can pursue a claim for damages."** Mr. Sinkende argued that this being a case of ordinary master and servant, the Court below should not have

ordered reinstatement. Relying on the case of **Frances vs The Municipal Council of Kula Lumpur⁴**, Mr. Sinkende argued that a declaration to the effect that a contract of service still subsist will rarely be made. He also referred us to our Judgment in the case of **Raine Engineering Company vs Baker [1972] ZR 156** in which Doyle, CJ, observed that **"In an ordinary case of master and servant, where the conditions of dismissal are not ruled by any statutory provisions as to the manner of dismissal, wrongful dismissal terminates employment but gives rise to damages for wrongful dismissal...."** He argued that having failed to perform, the Appellant was at his own liberty to demote the Respondent.

In reply, Mr. Mukuka argued that the Court is at liberty, in a proper case to order reinstatement. He submitted that the Appellant has relied on old authorities when current cases do show that Courts can order reinstatement. He referred us to the case of **Zambia Airways Corporation Ltd vs Gershom B. Mubanga⁶** where the Court ordered reinstatement.

We agree with Mr. Mukuka that the general principle that a contract of service cannot be specifically enforced is not without exceptions. The Employment Act¹ and a number of authorities reflect a changing trend especially when it comes to public companies. We have already referred to our decision in

the Matala case in which we stated that when it comes to Public Companies or big conglomerates, the notion of pure master and servant is out of place. A reasonable rationale basis must be shown to support an adverse action. In this case, the reasons given could not be sustained and the trial Judge, in our view, properly found that there were no rational grounds to support the demotion of the Respondent. The third and fourth grounds of appeal also fails.

From the forgoing, we find that this whole appeal is without merit and it is dismissed. The Respondent will have his costs in this Court and in the Court below, to be taxed in default of agreement.

D. K. Chirwa
JUDGE SUPREME COURT

I. C. Mambilima
JUDGE SUPREME COURT

S. S. Silomba
JUDGE SUPREME COURT