IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 106/2002

B E T W E E N:

ZAMBIA BOTTLERS LIMITED APPELLANT

AND

ENOCK NJOVU RESPONDENT

CORAM: LEWANIKA DCJ., MAMBILIMA, SILOMBA JJS
On 24th April, 2003 and 30th September, 2004

For the Appellant: N.K. MUBONDA of D.H. Kemp & Co.
For the Respondent: E.B. MWANSA of E.B.M. Chambers

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. CONTRACT HAULAGE VS MUMBUWA KAMAYOYO, 1982 Z.R. 13
2. GERALD MUSONDA LUMPA VS MAAMBA COLLIERIES, SCZ JUDGMENT NO. 29 OF 1989
3. ZAMBIA SUGAR COMPANY VS WINCHO GUMBO, SCZ NO. 69 OF 1996

This is an appeal against the decision of a Judge of the High Court awarding the Respondent damages equivalent to one year's salary plus other perks for wrongful dismissal.

The brief facts of the case were that the Respondent was employed as an Assistant Engineer by the Appellant from 1969 to 1987. On 1st

September 1987 he went on leave and reported for work on 2nd October, 1987 when he was served with a letter terminating his employment. The letter of termination was couched in the following terms:-

> ***"Re: <u>TERMINATION OF EMPLOYMENT</u>***
>
> ***It is with much regret to inform you that, under Section 22 of our Collective Agreement, your services with the company are terminated with effect from today the 2nd October, 1987.***
>
> ***However, you will receive all the monies due to you plus one month wages in lieu of notice. But the company will recover money from your dues equivalent to 320 rolls of toilet tissues which went missing from the production store under your custody."***

The learned trial Judge found that the Respondent was not given an opportunity to exculpate himself before his employment was terminated and that this was against the rules of natural justice and awarded damages to the Respondent. It is against this finding that this appeal was made.

Counsel for the Appellant has filed five grounds of appeal, and the first and second grounds were argued together and they were as follows:

1. **that the learned trial Judge misdirected herself in law by holding that the termination of the Respondent's employment was wrongful as the rules of natural justice were not followed;**

2. **that the learned trial Judge erred in law in holding that the Respondent was unjustifiably and wrongfully dismissed.**

In arguing these grounds, Counsel for the Appellant said that from 1969 to 1987 the Respondent was employed as a production worker. The

relationship between the Appellant and the Respondent as employer and employee was governed by a Collective Agreement dated 20th November, 1986 signed by the Appellant and the National Union of Commercial and Industrial Workers of whom the Respondent was a member. Counsel referred us to pages 65 and 66 of the record relating to Clause 22 of the Collective Agreement which provides as follows:-

> "***Termination of Employment***
>
> ***Except in the case of summary dismissal and employees on probationary period, termination of employment shall be subject to written notice of one month by party terminating the contract or paying a sum equivalent to the basic wages of one month in lieu of notice. In all cases of termination the company will honour any entitlements due to the employee and the employee shall pay to the company any monies owing by him."***

Counsel said that in exercise of its contractual rights under the said Clause 22, the Appellant wrote to the Respondent on 2nd October, 1987 and terminated his employment. Further that the Respondent had admitted in cross examination that he was paid his salary in lieu of notice.

He said that as the law stood on 2nd October, 1987, an employer was entitled on the facts of this case to terminate the employment of an employee by giving notice or paying salary in lieu of notice. Such termination could be for a reason or none. If a reason was given, it was not necessary, legally,

to substantiate it as it was the giving of notice or pay in lieu of that terminated the employment.

He further said that neither the said Clause 22 of the Collective Agreement nor the law as it stood at 2nd October, 1987 stipulated that the rules of natural justice be followed, namely that the employee be heard before a termination clause could be invoked by the employer. Moreover, he said that the issue of natural justice raised by the learned trial Judge was not pleaded at all in the statement of claim by the Respondent. That in the circumstances, the learned trial Judge ought to have given effect to the said Clause 22 of the Collective Agreement and also followed the decision of this court in the case of GERALD MUSONDA LUMPA VS MAAMBA COLLERIES LIMITED (2) and that failure to do so was a misdirection. He referred us to a passage in which we said the following:-

> ***"In view of the fact that, as we have said, the Clause providing for termination of employment by notice or pay in lieu of notice, is not excluded in any way, we are satisfied that, as we said in the case of CONTRACT HAULAGE LTD VS KAMAYOYO, 1982 Z.R. 13., the relationship between the parties was that of ordinary master and servant. Although the Collective Agreement had the force of law under the Industrial Relations Act, the code did not apply in this case and the giving of notice to terminate under Clause 44 was a perfectly proper way of terminating the Plaintiff's employment. In our view, it made no difference that the employment was terminated because of the alleged use of abusive language. The employer, in this case the Respondent, was perfectly entitled to give notice for no reason whatsover. In this respect we disagree with the learned trial Commissioner that, if a reason is given for termination of***

employment, that reason must be substantiated, that is not the law. It is the giving of notice or pay in lieu of notice that terminates the employment. A reason is only necessary to justify summary dismissal without notice or pay in lieu."

Counsel for the Respondent in reply to the two grounds of appeal said that the learned trial Judge was on firm ground when she held that the rules of natural justice were not followed because the Respondent was not heard on the issue of the 320 rolls of toilet tissue that allegedly went missing whilst in the custody of the Respondent. He said further that the Respondent was not charged and referred us to the case of ZAMBIA SUGAR COMPANY VS WINCHO GUMBOH (3). Counsel said that the learned trial Judge was on firm ground when she held that the Appellant wanted to hide under Clause 22 which allows them to terminate.

Counsel for the Respondent also maintained that despite the assertions by Counsel for the Appellant, the Respondent was not paid one month's salary in lieu of notice and that the case of LUMPA VS MAAMBA COLLIERIES (2) was not applicable.

We intend to deal with grounds one and two of the Appellant's appeal and if need be, we shall consider the other grounds of appeal. It is common cause that the Appellant employed the Respondent and that his conditions of service were governed by a Collective Agreement entered into by the Appellant and the National Union of Commercial and Industrial Workers of