REDRILZA LIMITED
v
ABUID NKAZI AND OTHERS

SUPREME COURT
SAKALA, C.J., MWANAMWAMBWA, AND MUYOVWE, JJS.,
7th DECEMBER, 2010 and 8th APRIL, 2011.
(S.C.Z. Judgment No. 7 of 2011)

[1] Employment Law - Dismissal and termination - Distinction thereof

This was an appeal against the judgment of the Industrial Relations Court. In the complaint before the Industrial Relations Court, the respondents whose contracts of employment were terminated by notice claimed, amongst other things, their salary for the unexpired term of their contracts.

The Industrial Relations Court found in favour of the respondents, on the basis that the appellant invoked the termination clause in the respondent's contract of employment in bad faith, and consequently ordered that they be paid six months salary as damages. Hence the appeal.

Held:

1. There is a difference between dismissal and termination. Dismissal involves loss of employment arising from disciplinary action. While termination allows the employer to terminate the contract of employment without invoking disciplinary action.

2. The terms “dismissal” and “termination,” should not be used interchangeably.

3. The Industrial Relations Court is empowered to delve into the reasons for terminating a contract of employment. But that should not be done in every instance, or case.

4. While the Industrial Relations Court is empowered to pierce the veil, the power must be exercised judiciously, and in specific cases where it is apparent that the employer is invoking the termination clause out of malice.

5. On the facts of this case, there was no evidence of malice on the part of the appellants.

Cases referred to:

1. Zambia Airways v Mubanga (1990 - 1992) Z.R. 149
2. Zambia Consolidated Copper Mines v Matale (1995-1997) Z.R. 144
3. Barclays Bank Zambia Limited v Chola and Another (1995-1997) Z.R. 212
4. Zulu and Another v Barclays Bank Zambia Limited (2003) Z.R. 127

5. Southern Water and Sewerage Company Limited v Mweene appeal Number 14 of 2007 (unreported)

Legislation referred to:

1. Employment Act, cap. 268

MUYOVWE, J.S.: delivered judgment of the Court. This appeal is against the judgment of the Industrial Relations Court at Ndola. In their complaint in the Court below, the respondents, whose contracts of employment were terminated by notice, claimed, amongst other things, their salary for the unexpired term of their contracts. The Court found in favour of the respondents on the basis that the appellant invoked the termination clause in the respondents' contracts of employment in bad faith and consequently ordered, that they be paid six months salary as damages.

The undisputed facts brought out in the judgment of the Court below are that the respondents were initially employed by AAC Mining Executors and joined the appellant in 2006. They each signed one year renewable contracts with the appellant. On 6th October, 2008, there was a work stoppage in which workers who included the respondents, cited various grievances in relation to their conditions of service. Some members of management then met with the workers to resolve the issues which were subsequently reduced to writing and submitted to the Management. On 12th November, 2008, the respondents received notices of termination of employment, in accordance with clause 19.3 of their contracts of employment, and management maintained that they were entitled to invoke this clause.

According to the respondents, they were shocked that, only the 5 of them out of the number of workers, who had submitted their grievances, had their employment terminated. The respondents believed that this was because they were considered to be ring leaders. The respondents' contracts were to run up to September, 2009.

After summarizing the undisputed facts, the lower Court asked the question: “Was the appellant entitled to terminate the contracts without giving reasons?” The lower Court then addressed its mind to its purpose, which is to deliver to all parties substantial justice, unfettered by legal technicalities. The Court relied on the case of Zambia Consolidated Copper Mines v Matale (2), (hereinafter called the Matale case). The lower Court acknowledged the fact that the respondents were part of the group that agitated for better conditions of service and had participated in the work stoppage. The lower Court also acknowledged that, after termination of the respondents' contracts of employment, they were replaced shortly thereafter.

In the judgment of the lower Court, while recognizing the right of the employer to terminate without giving reasons, it felt that the separation clause was used in bad faith. The lower Court found that, looking into the circumstances of the case, the real reason for the terminations of the respondents' contracts of employment was that they were considered the ring leaders of a group, who presented their grievances to the appellant, hence the decision for the separation. In arriving at this conclusion, the Court considered our decision in the Matale case (2), where we said:

"The mandate of subsection 5, which requires that substantial justice be done, does not in any way suggest that the Industrial Relations Court should fetter itself with technicalities or rules. In the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into the reasons given for termination in order to redress any real injustices discovered: such as the termination on notice or payment in lieu of pensionable employment in a parastatal on a supervisor's whim without any rational reason at all as in this case."

The lower Court also considered the case of Barclays Bank Zambia Limited v Chole and Another (3), and Southern Water and Sewerage Company v Mweene (5). The Court then proceeded to ask the question: "What was the real ground for dismissal?" In the words of the lower Court, "the respondents were mute of malice on this point and chose to hide……..behind the separation clause which provided for notice." The lower Court decided to 'pierce the veil' in the interest of justice. The Court was convinced that, there was a connection, between the meeting with management where the workers aired their grievances and the subsequent termination of employment. In the Court's view, there appeared to be 'something sinister in the sequence of events and in the subsequent replacement of the Complainants'. The Court examined the facts and found that the use of the termination clause was not sincere and that it was used as a shortcut to avoid disciplinary action. Consequently, the Court found that the dismissal was unfair and the appellant was ordered to pay 6 months salary in damages.

At the hearing of this appeal, counsel for the appellant made no appearance but had on 24th November, 2010, filed their heads of arguments.

In the Notice of appeal filed herein, learned counsel for the appellant, specifically indicated the part of the judgment of the lower Court being appealed against and this is where the Court said:

a) In as much as an employer is entitled not to give reasons for termination, we as a Court in discharging our mandate of dispensing substantial justice find that the separation clause used in this case was not in good faith, it was in bad faith.

b) The appellants pay the sum of six months pay to each Complainant for unfair termination.

Learned counsel for the appellant filed written heads of arguments in which he advanced three grounds of appeal as follows:

Ground 1

That the Court below erred in finding that the appellant's termination by option of notice clause provided for in the contracts was in bad faith and unfair and thereby ordering that the respondents are entitled to payment of salaries up to the time when the contracts should have come to an end.

Ground 2

That there was no injustice which was demonstrated to have been or would have been caused to the respondents by the appellant terminating by notice.

Ground 3

That the authorities cited by the Court below could be distinguished from the case in casu in the sense that the present case did not involve dismissal and also the fact that in the present case no reasons were given for termination and further that termination occurred one month after the event illegal work stoppage. Learned counsel combined his arguments on grounds 1 and 2. He submitted inter alia, that the law by which an employer can exercise the option of terminating employment of an employee by notice is well settled. counsel conceded that the Industrial Relations Court, unlike the High Court, has power to delve into the reasons for the termination. He submitted, however, that the Industrial Relations Court cannot invoke this power in every case where an employer uses the option, simply because the employee has not been furnished reasons for the separation and is unhappy. He submitted that, in this case, the respondents were terminated by notice and paid all their dues under their respective contracts.

He submitted that the lower Court's question as to what the real reason for dismissal was, blurred the difference between consideration of issues involved in termination by notice and dismissal. He submitted that the question "Was management entitled to terminate the contracts without giving reasons?" posed by the lower Court is a legal question. He argued that the trial Court's observation that "the mode of termination was not sincere and used as shortcut to avoid disciplinary action" flew in the teeth of the law. He submitted that, this Court, has upheld the right of an employer to terminate by notice even where disciplinary action should have been instituted. He cited the case of Zulu and Another v Barclays Bank Zambia Ltd (4), where we said:

"The respondent opted to use the Notice Clause in the Agreement, which was an option to them. The lower Court was of the view that the respondent had sufficient material from which they could have given in terminating employment instead of the Notice Clause. This was a misdirection as we have already stated. The respondent had a number of options open to them, they could have had the appellants prosecuted; put on disciplinary charges or opt to give them notice required under the conditions of service, or pay the amount in cash in lieu of notice. The respondent opted for the last option of paying a month's salary in lieu of notice".

Citing Zambia Airways v Mubanga (1), counsel submitted that the order of the Court for the appellant to pay the respondents' salaries up to the end of their contracts way after their termination, was made in error.

In relation to ground three, he submitted that, the authorities relied on by the trial Court, are inapplicable and distinguishable. He argued that the Matale case (2), cannot be comparable to the present case, where the respondents were serving on one year renewable contracts for three years, while in the Matale case (2), the respondent was on contract but on permanent and pensionable conditions.

He argued further, that in Matale Case (2), there was evidence from the employer, about the real reason for the termination by notice. Referring to the case of Barclays Bank Zambia Ltd v Chola and Another (3), he argued that, it is also distinguishable from the present case. He pointed out that the

respondents in that case, were dismissed following an illegal strike. He submitted that, in the Barclays Bank Zambia Ltd. v Chola and Another (3), it was accepted that, the 1st respondent had been sick and that the 2nd respondent had not been given an opportunity to be heard. He also submitted that, the case of Southern Water and Sewerage Company Ltd v Mweene (5), was misapplied by the lower Court as it is distinguishable from the present case. He urged us to reverse the judgment of the lower Court, and uphold this appeal.

In response to this appeal, the respondents, who appeared in person, submitted that the judgment of the lower Court should be upheld. They submitted that they were 26 employees, but only the five of them were terminated and referred to the Employment Act. They argued that a contract cannot be terminated without an employee being heard, and in their case they were not charged and they were not heard. We have considered the evidence on record and the judgment appealed against, as well as the submissions by learned counsel, and the respondents.

We shall deal with the three grounds of appeal together since they are inter-related. In the 1st and 2nd grounds, counsel's argument is that the lower Court erred when it found that the appellant's termination by option of the termination clause was in bad faith, and unfair and that there was no injustice done which was demonstrated to have been caused to the respondents. Further, that the Court should not have ordered the appellant to pay the respondents salaries up to the end of their contracts. He also argued that the authorities relied by the Court were inapplicable, and distinguishable.

It was common cause that the respondents' employment was terminated by way of notice which provided no reasons as per the contract between the parties. We agree with learned counsel that the question: “What was the real reason for dismissal?” blurs the difference between considerations of issues involved in termination by notice, and dismissal. Indeed, there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account, vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the employer to terminate the contract of employment without invoking disciplinary action. In fact, we note that in its judgment, the lower Court concluded that it found the respondents' dismissals to have been unfair. It is apparent, that the Court, in its judgment used the term 'dismissal' and 'termination' interchangeably. This should not have been so, especially that the respondents were not dismissed from employment, but their services were terminated by way of notice.

In our view, the starting point in this case, for the lower Court should have been the terms of the contract between the parties instead of rushing into questioning the reasons for the termination. In arguing his grounds of appeal, learned counsel for the appellant quite rightly submitted that the Industrial Relations Court is empowered to delve into the reasons for termination of employment but that, it should not be so in every case. We agree with him. The Court below in deciding to delve into the reasons for the termination relied on the Matale case (2), and in particular where we said:

“In the process of doing substantial justice, there is nothing in the Act to stop the Industrial Relations Court from delving behind or into the reasons given for termination in order to redress any real injustices discovered: such as the termination on notice or payment in lieu of pensionable

employment in a parastatal on a supervisor's whim without any rational reason at all as in this case."

It is clear, that the lower Court relied on the Matale case (2), to explain its reasons for delving into the reasons for the termination of the respondents' employment by the appellant. We do not agree with learned counsel's arguments in ground 3, that the authorities relied by the lower Court are inapplicable. While it is correct that the cases are distinguishable, our view is that they are applicable, especially when they are considered in the light of the context within which the lower Court cited them. We must point out, that there is no rule that for a case to be applicable, it must be on all fours with the one at hand. In this case, it is evident, from the judgment, that the lower Court cited the case of Barclays Bank Zambia Limited v Chola and Another (3), and Southern Water and Sewerage Company Limited v Mweene (5), to show that this Court has not departed from its decision in the Matale Case (2). We must hasten to point out, that while the Industrial Relations Court is empowered to pierce the veil, this must be exercised judiciously and in specific cases, where it is apparent that the employer is invoking the termination clause out of malice. Looking at the facts of this case, we do not find any evidence of malice on the part of the appellants. The arguments put forward by the respondents that they were singled out, that they were not heard, and that their termination was contrary to the Employment Act, cannot be sustained. In its judgment, the lower Court decided to pierce the veil after finding that the respondents were terminated because of their involvement in the work stoppage a month before. In our view, the fact that the termination clause in the contract was invoked after the settlement of the work stoppage issues, cannot bar the appellants from exercising their right to terminate under the contract. This also cannot justify the Industrial Relations Court to 'pierce the veil'. In Zulu and Another v Barclays Bank Zambia Limited (4), where the appellants were actually on suspension, before termination of their employment we said that:

"The respondent had a number of options open to them: they could have had the appellants prosecuted; put on disciplinary charges or opt to give them notice required under the conditions of service or pay the amount in cash in lieu of notice. The respondent opted for the last option of paying a month's salary in lieu of notice."

In this case, the appellant was within its right, to terminate by notice as provided in the contract. If the appellant had terminated outside the contract, our views would have been different. After considering the facts, the judgment of the lower Court, and learned counsels' submissions, our finding is that the Court misdirected itself in holding that the appellant acted in bad faith and unfairly, when it terminated the respondents' employment by notice. It follows therefore that the respondents are not entitled to any damages as their termination was lawful. The appeal is allowed and the decision of the Court below is set aside. Costs in this Court and in the Court below shall be for the appellant to be taxed in default of agreement.

Appeal allowed.