Appeal No. 167/2013

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

ROBERT OWEN HARRIS **APPELLANT**

AND

MOPANI COPPER MINES PLC **RESPONDENT**

Coram: Phiri, Muyovwe and Kabuka, JJJS
On the 5th of April, 2016 and 29th November, 2016.

For the Appellant: **Mr. C. Chileshe of Messrs Lloyd Jones and Collins**

For the Respondent: **Mr. A. Imonda of Messrs Imonda and Company**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Zambia Airways Corporation vs. Gershom Mubanga (1990-1992) Z.R. 149**
2. **Zambia Consolidated Copper Mines Limited vs. James Matale (1995-1997) Z.R. 144**
3. **Tolani Zulu and Musa Hamwala vs. Barclays Bank Zambia Limited (2003) Z.R. 127**

4. **Swarp Spinning Mills Plc vs. Sebastian Chileshe and Others (2002) Z.R. 23.**
5. **Attorney-General vs. Mpundu (1984) Z.R. 8**
6. **Miyanda vs. Attorney-General (1985) Z.R. 185**
7. **Mc Call vs. Abelesz (1976) 1 QBD 585**
8. **George Chishimba vs. Zambia Consolidated Copper Mines Limited (1999) Z.R. 198**

This is an appeal against the judgment of the Industrial Relations Court which awarded the Appellant damages for wrongful and unlawful termination of employment and rejected the Appellant's other claims for damages for humiliation, distress, mental anguish, torture and injury to his professional reputation. The damages the Appellant was awarded were equivalent to one month's salary plus the Employee Royalty Bonus of 12 weeks, less four weeks forfeited to employer; the Respondent. The gist of the Appellant's four grounds of appeal is that the awarded damages were inadequate in the circumstances of this case.

The background of this appeal is this: the Appellant was employed as a Senior Rock Mechanics Engineer on 28th June, 2006 on a two year contract of service terminable by either party giving not less than 2 months written notice or payment of basic pay in lieu thereof, on the post-probation period of service in accordance

with Clause 1.3 of the Contract of Service. The contract was renewable and had been renewed on 2 successive occasions.

At the time of termination, the Appellant was on his 3rd contract of employment which commenced on the 1st of January, 2010 and was to expire on the 31st of December, 2011. However, on the 25th of March, 2011, the Respondent invoked the provisions of Clause 1.3 of the contract of employment and served the Appellant a notice of termination. The notice instructed the Appellant to hand over his office and the Company cellular phone handset, under Mine Police supervision. At the end of the episode the Respondent gave the Appellant a favourable and non-contentious reference letter. Four to five weeks later, the Appellant was employed by KCM Limited. He later migrated to Egypt and Canada where he secured subsequent contracts of employment.

The Appellant filed a law suit claiming damages for unjust, malicious, wrongful and unfair termination of his employment. He also claimed that the termination amounted to constructive dismissal contrary to the rules of natural justice. At the hearing, the trial Court received both oral and documentary evidence of

communication exchanged between the Appellant, his line supervisor the Chief Mining Officer (RW2), the Manager Administration (RW3) and the Human Resource Manager (RW1). In particular, the Court considered the contents of the letter addressed to the Appellant on the 25th January 2011 by the Chief Mining Officer; which letter mentioned the Appellant's unsatisfactory performance and the need to take guidance in areas that required improving. The trial Court concluded that the real reason for the Appellant's termination was the alleged poor performance. The trial Court found as a fact that the allegation of poor performance was not brought to the Appellant's attention, and that there really was no performance assessment.

The trial Court found that the Respondent did not observe the rules of natural Justice and equity; and that the Notice Clause was invoked for purposes of effecting the dismissal, without establishing the real reason through the proper disciplinary process.

The trial Court took counsel from our decision in the case of **Zambia Airways Corporation vs. Gershom B. B. Mubanga**[1] which it distinguished from the present case by stating that unlike the

Gershom B. B. Mumba case[1], the charge of poor performance was not even preferred or communicated to the Appellant. The trial Court also cited the case of **Zambia Consolidated Copper Mines Limited vs. James Matale**[2] where this Court stated that the Industrial Relations Court as a Court of substantial justice is not fettered by any technicalities or rules and that:

> **"In the process of doing substantial justice, there is nothing in the (Industrial and Labour Relations) Act to stop the Industrial Relations Court from delving behind or into reasons given for termination in order to redress any real injustice 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 trial Court took further counsel in a passage from our judgment in the case of **Tolani Zulu and Musa Hamwala vs. Barclays Bank Zambia Limited**[3] where, in dealing with interpretation of **Section 26A of the Employment Act, Chapter 266 of the Laws of Zambia and Article 7 of the International Labour Organization Convention No. 158,** we stated that:

> **"The gist of these two provisions is that the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard and this has nothing to do with the Notice Clause that may be in the contract. Neither do these provisions call for reasons to be given for terminating employment. In other words, the employee is notified of his questionable conduct related to his work and he is given an**

opportunity to explain and it is then up to the employer to decide. The provisions do not set any standard or proof, they merely emphasize on the employee being given an opportunity to defend himself. It follows, therefore, that in the present case, the Court below founded its findings that the failure by the Respondent to give reasons was a mere technicality, hence the terminations were wrongful and illegal and therefore, null and void. The lower Court's findings were further strengthened on its misdirection that the above provisions require reasons for termination of employment to be given. That is not the Law".

On the basis of the foregoing reasoning, the trial Court found in favour of the Appellant. This notwithstanding, the Appellant was dissatisfied with the manner some parts of his claims were discounted and appealed to this Court citing 4 grounds of appeal as shown in the Memorandum of Appeal contained in the record of Appeal. Before we proceed any further, we must state that we are unable to recast the 1st and 3rd grounds of appeal in the lengthy format in which they are framed. It is apparent that these two grounds of the appeal are not properly set out. Each one of them is meandering, repetitive and contains arguments and narrative directed at portions of the judgment of the trial Court. Clearly, grounds 1 and 3 of the appeal lack observance of the provisions of **Rule 58 (2) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia,** which obligates that:

"The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively".

At the hearing of the appeal, Mr. Imonda raised a preliminary issue objecting to the manner and style of the Appellant's grounds of appeal. He argued, correctly so, that the Memorandum of Appeal violated the provisions of Rule 58(2) of the Supreme Court Rules. Mr. Chileshe, on behalf of the Appellant, conceded. We agree, and we find that this failure only affects grounds 1 and 3 of the appeal; whereas grounds 2 and 4 are fairly framed, concise and communicate the areas of dissatisfaction with the judgment of the trial Court.

For the reasons we have given, grounds 1 and 3 of the appeal have failed the prescribed test and must be dismissed for being improperly before us. The corresponding written heads of argument which equally violate the provisions of **Section 58(7) of the Rules of the Supreme Court, Cap 25 of the Laws of Zambia** are also disallowed.

This leaves us with grounds 2 and 4 of the appeal to consider. Ground 2 assails the trial Court's failure to make an award for mental anguish and distress caused by the Respondent's conduct towards the Appellant, having found as a fact that the Appellant suffered mentally when his employment was terminated on unsubstantiated allegations. Ground 4 assails the trial Court's decision to reduce the costs payable to the Appellant by 50% on the ground that he "managed to succeed in only about half of the reliefs sought". Both parties entirely relied on their written heads of argument.

In support of ground 2 of the appeal, the summary of the Appellant's submission is that having found that the Appellant suffered mentally when he was dismissed on unsubstantiated allegations, the trial Court should have proceeded to make an award specifically for distress and mental suffering. In support of this proposition, Counsel cited the case of **Swarp Spinning Mills Plc vs. Sebastian Chileshe and Others**[4] in which this Court stated that:

> **"The normal measure of damages is departed from where the circumstances and the justice of the case so demands. For**

instance, the termination may have been inflicted in a traumatic fashion which causes undue distress and mental suffering; or in any other situation where it is permissible to depart from the rule in Addis vs. Gramophone Company (1909) AC 488,.....".

In response to ground 2 of the appeal, the learned Counsel for the Respondent submitted that in declining the award of damages for mental distress, the trial Court gave a fair and reasonable explanation by stating at page 37 of the record of the appeal (Lines 1-8) that:

"We note, however, that we have already awarded damages to the complainant for procedural unfairness arising from the failure by the Respondent to substantiate the allegations of poor performance. We are of the view that the complainant has been sufficiently compensated and that to award further damages for mental suffering arising from the same facts would be to unjustly enrich him. We will accordingly make no award under this head".

We have considered the arguments made by the learned Counsel for the parties with regard to ground 2 of the appeal. We note that the primary reason for the trial Court to reject the claim for damages for mental suffering and distress was that the Appellant had been sufficiently compensated by the award of damages already decided. The trial Court's narration of its findings on the circumstances of the Appellant's dismissal is summarized at pages J30 (Lines 22-25) of the judgment as follows:

"We do not doubt in the circumstances that the complainant suffered mentally arising from having his employment terminated on an unsubstantiated allegations.....'.

In justifying the rejection of the Appellant's claim for damages for mental distress, this is what the trial Court also stated at page J31 (Lines 14-18) of the judgment:

"Our view of the presence of the Mine Police was that there was heavy handedness on the part of the Respondent but this was within the terms of the Employment Agreement and cannot therefore, be the basis for the claim of damages for injury to the complainant's feelings".

In our considered view, the lower Court's reasoning on mental anguish and distress was a clear misdirection. We say so because it is a well settled principle of law that a claim for mental distress or anguish is a separate head which the trial Court is obliged to consider, when pleaded. In the case of **Swarp Spinning Mills Plc vs. Sebastian Chileshe and Others**[4] this Court, following the *ratio decidendi* in the earlier cases of the **Attorney-General vs. Mpundu**[5] **and Miyanda vs. Attorney-General**[6], stated that:

"In this country, we too have recognized this kind of additional damages in cases like, the Attorney-general vs. Mpundu (1984) Z.R. 8, Miyanda vs. Attorney-General (1985) Z.R. 185.....We do agree that there should be compensation over and above the contractual terminal benefits already paid.....".

In stating the above, this Court followed the assertion by Lord Denning MR. in the English case of **Mc Call vs. Abelesz**[7], that:

> **"It is now settled that the Court can give damages for mental upset and distress caused by the defendant's conduct in breach of contract".**

Having found that mental anguish and distress was caused to the Appellant by the Respondent's conduct in the manner his contract of employment was terminated, the trial Court should have proceeded to consider damages. Therefore, we set aside its rejection of the award of damages for mental anguish and distress and order an award of an extra month's salary for mental anguish and distress in addition to the compensation already ordered in the Court below. The judgment sum shall attract interest at the average of the short term Bank deposit rate per annum from the date of the cause of action to the date of judgment.

Ground 4 of the appeal attacks the trial Court's decision to reduce the Appellant's costs to 50% of the sum agreed or taxed. The decision was founded on the trial Court's view that the Appellant managed to succeed in only about half of the reliefs sought. The Appellant's argument is that this was a misdirection as

he was a successful litigant. The Respondent's response is simply that the trial Court's explanation was valid.

Regarding costs, we have stated on many occasions that although the Court has discretion in the award of costs, as a general rule, costs follow the event. A successful litigant will get his costs unless the Court orders otherwise for very good reasons. In the case of **George Chishimba vs. Zambia Consolidated Copper Mines Limited**[8], we specifically stated that:

> **"A successful litigant is always entitled to his costs unless it is shown that he is guilty of improper conduct in the prosecution of his claim".**

In the present case, there is absolutely no evidence to show that the Appellant committed any improper conduct in the prosecution of his claim. To the contrary, he proved his case against the Respondent and was entitled to judgment. The smaller collateral claims which were discounted by the trial Court do not take away the fact that the Appellant was a successful litigant. We are strongly of the view that the trial Court's decision to limit the Appellant's costs was a misdirection. We accordingly quash that portion of the judgment and order that the Appellant be paid his

full costs both here and in the Court below, to be agreed or taxed; less the portion already paid (if any).

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE