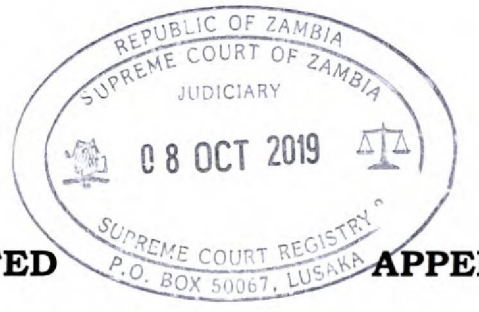
IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 142/2016

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

STANBIC BANK ZAMBIA LIMITED **APPELLANT**

AND

YVONNE MWANAKASALE **RESPONDENT**

CORAM: Hamaundu, Malila and Kabuka, JJS.

On 4th June, 2019 and 8th October, 2019.

FOR THE APPELLANT: Mr. N. Nchito, SC, Messrs. Nchito & Nchito.

FOR THE RESPONDENT: Mr. C. Chilufya, Messrs. Derrick Mulenga & Co.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Redrilza Limited v Abiud Nkazi and Others SCZ Judgment No.7 of 2011.
2. Tolani Zulu & Musa Hamwala v Barclays Bank Zambia Limited SCZ No.17 of 2003.
3. Zambia Consolidated Copper Mines Limited v James Matale (1995-1997) ZR 144 (SC).
4. Yambayamba v The Attorney General and National Assembly of Zambia SCZ No.26 of 2015.
5. Chilanga Cement v Kasote Singogo (2009) ZR 122 (SC).
6. Zambia Postal Services Corporation v Prisca Bowa and Caristo Mukonka SCZ No. 72 of 2009.
7. Mwangala Nyambe v Price Waterhouse Coopers Limited SCZ No. 155 of 2014.
8. Gerald Musonda Lumpa v Maamba Collieries Ltd (1988-1989) ZR 21 (SC).

Legislation and other works referred to:

1. The Employment Act Cap. 268 SS. 26A; 36 (1) (c).
2. The Industrial and Labour Relations Act Cap. 269 SS. 85 (4), (5); 108.
3. Bowers on Employment Law, Blackstone Press Limited, 1st Edition, 1990, pp. 255-257.

Introduction

1. This appeal by the appellant is against a judgment of the Industrial Relations Division of the High Court "IRC" dated 15th March, 2016.

2. In that judgment, the IRC pursuant to its mandate to do substantial justice, delved behind the termination of the respondent's employment by notice and found her position had in fact been rendered redundant. The court further found that, the appellant invoked the termination clause to avoid the huge expense of paying the respondent redundancy benefits. The respondent was accordingly, deemed to have been declared redundant and the appellant was ordered to pay her redundancy benefits.

3. The appellant has now come to this Court on appeal contending that, the termination clause was a contractual term which it was entitled to invoke at any time. The appellant further contends that, as the respondent's position was never declared redundant, she is not entitled to payment of the redundancy benefits ordered by the trial court.

Background

4. The record of appeal shows that, the respondent was employed by the appellant as a Bank Clerk in June of 1985 on permanent and pensionable terms. Over a period spanning twenty-nine

years and eight months of service, she rose through the ranks to the position of Officer-Operations Control. The appellant had annual performance appraisals for its employees and in the annual performance appraisal for the period January-December, 2014 the respondent was assessed as a non-performer by her line manager.

5. Aggrieved with that rating, the respondent appealed to have the assessment re-considered by a moderation team. Whilst the respondent believed her appeal to be pending determination, her contract of employment was by letter dated 27th February, 2015 terminated with immediate effect, on payment of three months' salary in lieu of notice.

6. The appellant's position on its alleged failure to hear the appeal was that, an employee could appeal an appraisal rating by a line manager within 3-5 days, but the respondent submitted her appeal after that period had expired. In the meantime, following termination of her employment by notice, she was on 29th February, 2015 in line with her mode of exit, paid all her entitlements. These were her accrued leave days, an ex-gratia

12 months' salary in the sum of K214, 593. 96, which was taxed at 35% and her pension benefits.

7. On 1st March, 2015 which was three days after termination of the respondent's employment, the appellant introduced revised conditions of service for its employees which now incorporated a redundancy clause.

Complaint, Answer and Evidence before the Industrial Relations Court

8. That development, was one amongst many that prompted the respondent to go and file a notice of complaint in the IRC in which she was seeking: (i) *a declaration that the termination of her employment by a purported notice was wrongful, unlawful and or unfair; (ii) that she be deemed to have been declared redundant and paid two months' salary per each year served. In the alternative, (iii) that she be paid damages for wrongful, unlawful or unfair and /discriminatory dismissal for termination of employment.*

9. In her affidavit in support of the complaint, the respondent contended that she was employed on permanent and pensionable terms, with only four years remaining to her

retirement. That the appellant had earlier, following upon a structural audit by their auditors, been advised to downsize its' workforce and an appraisal conducted shortly thereafter, rated her as a poor performer and she appealed that rating. Her contract of employment was however, terminated before the appeal could be determined.

10. The respondent further contended that, she was given a meagre exit package despite her long period of service. She referred to two other employees that had worked for shorter periods than herself but were afforded meetings to negotiate better exit packages than the payment she received. The evidence on record shows that, one of the employees referred to, a Mr. Freeze Mpilipili, had begun communicating with the appellant on his imminent redundancy from July, 2014 until October of the same year when it was effected. He had worked for the appellant bank for seven years, and was paid a redundancy package of two months' salary for each year served, on pro-rata basis, taxed at 10 %. Mr. Martin Ng'onga, was the other employee. He had seventeen years of service to his credit and signed a settlement and release deed with the appellant in

which he was awarded a gross separation package of K800,000.00 with tax paid at 10%.

11. In response to those allegations, the appellant maintained, it had the right to terminate the contract by virtue of a termination clause that allowed either party to give three months' notice of intention to do so or payment in lieu thereof. That the respondent was pursuant to that clause, paid three months' salary in lieu of notice.

12. Regarding the two employees the respondent had referred to in demonstrating how she was discriminated against or unfairly treated, the appellant contended that, the circumstances of the respondent were different from those of her two colleagues. According to the appellant, one of the two had his position rendered redundant due to restructuring in the department where he worked, whilst the other, voluntarily requested a mutual separation.

13. Those averments notwithstanding, the appellant admitted that there were no provisions in the contracts of the said respondent's colleagues for their said modes of exit. The

appellant also confirmed that, the respondent had not met its expectations of the moderated performance ratio for the 2014/2015 cycle, and she was assessed as a low performer, as a result.

14. The appellant maintained that the respondent could have appealed against the assessment but did not do so until the appeal period had lapsed. It also asserted that, it was at liberty to decide separation packages outside the conditions of service. That it is the mode of exit and not an employee's length of service which has a bearing on their terminal benefits.

Consideration of the matter and decision of the trial court

15. After hearing evidence, as earlier outlined in paragraphs 9-14 of this judgment, the trial court considered the respondent's contention that the termination of her contract by payment of three months' salary in lieu of notice was done in bad faith, as she was in fact rendered redundant. That she was discriminated against in the manner she was treated in comparison to two colleagues referred to in paragraphs 10,11, and 13; denied the opportunity to discuss her exit package; her employment was

terminated before her appeal on her poor performance assessment could be heard; and higher rate of tax at 35% was applied to her terminal benefits, as opposed to 10% availed to her two colleagues.

16. In dealing with those allegations, the trial court observed that a contract of employment is a voluntary relationship from which either party can divorce itself. That this position is also reflected in the **Employment Act, Chapter 268 section 36 (1) (c).** The trial court further referred to **section 85 (5)** which mandates the IRC to do substantial justice and the holding of this Court in **Redrilza Limited v Abiud Nkazi and Others**[1] that, where an employer is found to have invoked termination by notice, in bad faith or maliciously, the IRC in deserving cases, is entitled to displace such termination.

17. The finding of the trial court on the termination of the respondent's employment was that, the circumstances were deserving of the exercise of its power provided by **section 85 (5)** to delve behind the notice clause. In the trial court's view, it was apparent from the facts of the case, that the appellant had used

the notice clause to hide the real reasons for the termination, resulting in an injustice being caused to the respondent.

18. In light of uncontested evidence that a late appeal against assessment had previously been entertained, the trial court rejected, as an afterthought, the refusal by the appellant to hear the respondent's appeal against her assessment as a non-performer, on the basis that her appeal was submitted late.

19. The trial court further found that, although **section 26A of the Employment Act, Cap. 268** applies to oral contracts and the respondent who was serving on a written contract of employment could not rely on it; the appellant was still obliged to comply with the rules of natural justice envisaged by the section and should have heard the respondent on her appeal.

20. On the uncontested evidence of a recommendation by the auditors, for a restructuring to take place at the appellant bank, which did not spare the Operations Business Unit in which the respondent was working; the trial court found that, the respondent's role, like the position of Freeze Mpilipili, had in effect been rendered redundant. That it was to avoid paying

redundancy benefits, which considering her long period of service, would have been substantial that the respondent's employment was terminated by way of notice. The court also considered it odd, that Mpilipili was declared redundant when the redundancy provision was only introduced on 1st March, 2015 after both the respondent and Mpilipili had left the appellant bank.

21. Informed by those considerations, the trial court determined that termination of the respondent's employment was wrongful, as the notice clause was invoked by the appellant in bad faith and with ulterior motives. Accordingly, the respondent was deemed to have been declared redundant. She was awarded a redundancy package of two months' salary per each completed year of service from the date of her employment on 1st June, 1985 to the date of her dismissal on 27th February, 2015. Interest on the amount due was granted at the ruling Bank of Zambia lending rate, from date of filing the complaint to the date of payment.

Grounds of appeal and the Parties' arguments and submissions

22. The appellant has appealed against that judgment, advancing three grounds, of appeal, stated as follows:

> 1. **The court below erred in law and fact when it found that termination of the respondent's employment by invoking the notice clause was wrongful and done in bad faith;**
> 2. **The court below erred in law and fact when it found that the respondent's position had become redundant and as such, the respondent was entitled to redundancy benefits when there was no evidence on record to support such finding;**
> 3. **Further and in the alternative, the court below erred in law and fact when in awarding the respondent redundancy benefits of two months' pay for each year served, it failed to consider the respondent's own evidence that she had received twelve months pay which should have been deducted from the redundancy benefits.**

Written skeleton arguments in support of and against the appeal were filed by learned counsel for the parties.

23. The appellant in ground one, argued that, the trial court's finding that the termination of the respondent's employment by invoking the notice clause, whilst her appeal against her appraisal was pending, was made in bad faith and with ulterior motives, is not supported by the evidence on record and has no legal basis.

24. The submission was that, there is no bar as to when an employer can invoke a notice clause embodied in a contract of service and the appellant was at liberty to invoke it, as it did, even when the respondent had appealed her performance rating. The High Court decision in **Tolani Zulu & Musa Hamwala v Barclays Bank Zambia Limited**[2], was relied upon for the submission. The further submission was that, the respondent's performance rating was actually dealt with by the moderation team and that the court erred in holding otherwise.

25. In ground two, the argument was that, the trial court misapprehended the facts by failing to take into account the difference in circumstances between Freeze Mpilipili and the respondent. That the former, was in Corporate and Investment Banking Department which was undergoing a restructuring and his position of Sales Support Staff, was actually declared redundant. Counsel's submission in that regard was that, the respondent's position of Officer-Operations Control was not declared redundant and there was no evidence, at all, to that effect. According to counsel, the only available evidence is the

auditor's recommendation, for the work force to be reduced and that, certain roles at Team Leader level be combined or removed, to entrench efficiencies at that level.

26. Ground three, which was argued in the alternative to ground two, was to the effect that, should this Court accept that the respondent was deemed redundant and to prevent any unjust enrichment, the 12 months' ex-gratia payment already received by herself should be deducted from the trial court's award of two months' pay for each year served.

27. Learned counsel for the respondent in his response to ground one, argued that, there is legal basis for finding that the termination although made by notice, was made in bad faith and was malicious. The case of **Zambia Consolidated Copper Mines Limited v Matale[3],** was relied upon as decided that, in order to do substantial justice between the parties, the IRC can delve behind the reasons given for termination. Relying on our decision in **Yambayamba v The Attorney General and National Assembly of Zambia[4]** the submission was that, for the IRC to delve behind a termination by notice there must be

sufficient evidence led, suggesting that the termination of the contract was motivated by other considerations.

28. We were accordingly urged to distinguish the facts of the appeal in *casu* from those of **Tolani Zulu**[2] relied upon by the appellant, on the basis that, the former case involved allegations of very serious fraud, while the respondent in this appeal, only protested her assessment rating, that she was a poor performer. The submission was that, the trial court made several findings of fact based on the evidence adduced; which confirmed that in invoking the notice clause, there was malice and bad faith on the part of the appellant in this appeal.

29. In ground two, counsel submitted that, the respondent adduced sufficient evidence to warrant the trial court's finding that her position had become redundant which entitled her to redundancy benefits. According to counsel, this was particularly so, in view of her long period of service. The learned author of: **Bowers on Employment Law, Blackstone Press Limited, 1st Edition, 1990, at pp. 255-257,** was quoted as

stating that:

> *"an employee with long standing employment is recognised as having an accrued right which gains value, such that if their job is shutdown, they are entitled to compensation for loss of a job and this is considered a redundancy payment."*

30. Counsel concluded his submissions with ground three and contended that, payment of three months' salary in lieu of notice and the twelve months' salary ex-gratia payment, were the only exit payments that were made to the respondent. Counsel referred to the respondent's evidence, where she stated that had she retired at the age of 55 and not 51, she would have been entitled to the whole of her pension benefits; and an ex-gratia block amount relative to the threshold of years served, as prescribed in her conditions of service. Learned counsel for the respondent left the determination of the amount due, upon those considerations, to this Court.

Consideration of the matter by this Court and decision

31. We have considered the heads of arguments and submissions, case law and other authorities to which we were referred and for which we are indebted to learned counsel for the parties on

both sides. Grounds two and three of the appeal relate to the same issue. For convenience, before considering ground one, we propose to first deal with these two grounds together, particularly that the outcome of ground three is anchored on the success of ground two and the two grounds will stand or fall together.

32. In ground two of the appeal, the appellant faults the finding made by the trial court, that the respondent's position had become redundant. The trial court in coming to that conclusion gave reasons appearing in paragraphs 3 and 4 of its judgment at page 26 of the record of appeal which read as follows:

> *"There is evidence on record that there was a recommendation by the respondent's (appellant in this appeal) auditors to restructure the institution. In the respondent's Organisation Review dated 3 July, 2014 the auditors recommended that certain roles had become redundant and could be removed. The recommendation also affected Operations Business Unit where the complainant (respondent in this appeal) worked as conceded by RW (appellant's witness) in cross-examination.*
>
> *Coming to the issue of restructuring of the bank and whether the complainant's position was declared redundant, the respondent has denied that the respondent's position was phased out. However, after critically analysing the evidence before us, we are satisfied that the complainant's (respondent in this appeal) position*

> *like Freeze Mpilipili's, was one of the positions or roles that had become redundant and was removed from the respondent bank's structure in accordance with the auditor's recommendation."*

33. In considering the above quoted observations, we cannot turn a blind eye to the position that, the auditor's report or Organisation Review, dated 3 July, 2014 referred to, merely made recommendations. These recommendations addressed structural adjustments that could be considered by the appellant in its quest to apparently, improve efficiencies and reduce operational costs. The recommendations included: (i) phasing out some positions or alternatively (ii) merging certain functions or roles at team leadership level, only.

34. We have, for our part, combed the evidence on record particularly that of the respondent as the party that made the allegation that her position had been rendered redundant and as such, had the burden of proving the said allegation. We have found nothing whatsoever, to support the finding made by the trial court that the position of Officer-Operations Control was phased out or removed from the bank structure or was indeed downgraded, as happened to some of the positions (*see*

Jacqueline Chipasha Mutale v Stanbic Bank Zambia Limited Appeal No.189/2016). Neither is there any evidence of the respondent's role having been at the level of team leader whose functions were merged with any other role or position.

35. To the contrary, the same witness whose evidence in cross-examination, was heavily relied upon by the trial court, did clarify in re-examination (at page 258 lines 3-6 of the record) that, the auditors' Organisation Review Report in issue, dated 3 July, 2014 at page 88, states that: *"**No roles were declared redundant in Operations as a result of the recommendation.** The complainant (respondent in this appeal) was Operations Control Officer. It's not the same as Team Leader."*

36. That evidence, the first sentence of which was drawn from the audit report itself, does not support the finding made by the trial court, that the position of the respondent, like that of Mr. Mpilipili was indeed phased out. And, predicated on that finding, that the respondent was thereby rendered redundant and entitled to be paid the same redundancy package which

was extended to Freeze Mpilipili, of two months' pay for each completed year of service.

37. It is for those reasons that we do not accept submissions made by learned counsel for the respondent, that the respondent adduced sufficient evidence to warrant the trial court's finding that her position had become redundant which entitled her to redundancy benefits. In our view, the respondent could have easily led evidence to show that the position was no longer existing on the appellant's establishment, was downgraded or that no other person was performing the functions of her former position since her termination.

38. As held by this Court in various past decisions, some of which were earlier in this judgment referred to, including the case of **Yambayamba**[4]; for the IRC to peer behind a termination provision there must be sufficient evidence led, suggesting that the termination of the contract was motivated by malice, bad faith or other considerations. In the absence of such evidence and on the basis of the appellant's uncontested evidence on record, that the respondent's position is still in existence, the

finding of redundancy made by the trial court could only have been premised on a misapprehension of the facts, as it is clearly not supported by the evidence which is on record.

39. We find merit in ground two of the appeal and accordingly, set aside the finding that there was a redundancy. As a result of setting aside that finding, the award of redundancy benefits, which was anchored on it, and is now subject of attack in ground three of the appeal, is left with no leg to stand on and must equally fail. Grounds two and three of the appeal succeed for those reasons.

40. We will now revert to ground one of the appeal which substantially faults the trial court for having found that the respondent's termination by notice was wrongful as she should have been heard on her appeal against the poor performance rating.

41. On the issue of the claimed wrongful termination by notice, in **Chilanga Cement v Kasote Singogo**[5], as indeed in numerous other past decisions, this Court has consistently maintained the

principle of freedom of contract by holding that, payment in lieu of notice is a proper and lawful way of terminating a contract of employment, since every contract of service is terminable by reasonable notice.

42. That holding found statutory support in **section 36 (1) (c) of the Employment Act,** as it existed at all the material times, relating to this case. The section as it stood then, permitted termination of a contract of employment upon expiration of the term for which it is expressed to be made, death of the employee or in any other lawful way. The section thus, did not exclude contractual termination by notice, or payment in lieu of giving such notice.

43. **Section 85 (5) of the Industrial and Labour Relations Act** apparently, in deserving cases, offers what we would 'loosely' refer to as some 'guarded exceptions' to the contracting parties' right to terminate by notice. This is to the extent that, the section gives the IRC a special mandate to discharge what is referred to as 'substantial justice'. In the case of **James**

Matale,[3] we construed substantial justice to include questioning termination by notice when we said that:

> **"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 the termination in order to redress any real injustices discovered."**

44. In **Abuid Nkazi**[1], however, the IRC was cautioned in the use of that power, in the following words:

> **"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."**

45. In the case of **Yambayamba**[4], relied upon by learned counsel for the respondent, this court went even further and held that, in order to peer behind the termination by notice, there must be sufficient evidence led suggesting that the termination of the contract of employment in question, was motivated by other considerations.

46. The case **Zambia Postal Services Corporation v Prisca Bowa and Caristo Mukonka**[6] aptly demonstrates what could

constitute 'other considerations'. The respondents' superior terminated the respondents' respective contracts of employment by notice. The respondents challenged the termination on the basis that it was prompted by other considerations. In her evidence, one of the 1st respondent's allegations, was that, she had rejected the said superior's advances seeking to have an intimate relationship with her. The second appellant also led evidence alleging that the same superior had expressed disdain that the respondents had reported some of his alleged misdeeds to the Permanent Secretary in the Ministry of Communications. As the respondents' said evidence was not rebutted by their superior, the trial court upheld their claims, that the real reason for their terminations was activated by malice or other considerations.

47. In the appeal in *casu* we have already said in ground two, paragraph 38 of this judgment, that there was no evidence of the respondent's position having been rendered redundant. The question then, is whether an employer is required to hear an employee prior to effecting termination of employment by notice?

48. This Court had occasion to consider that issue in a number of previous decisions and the most recent is the case of **Mwangala Nyambe v Price Waterhouse Coopers Limited**[7]. Our holding was that, as the appellant's contract of employment under Clause 13(a) provided for termination by giving a month's notice or payment of one month's salary in lieu thereof, there was no requirement under that clause for the respondent to hear the appellant.

49. That was the same position that we took in the earlier case of **Kasote Singogo**[5] referred to in paragraph 40 of this judgment, where we held that, every contract of employment is terminable by reasonable notice and payment in lieu of notice is a proper and lawful way of terminating employment. We reiterated that holding in **Gerald Musonda Mumpa v Maamba Collieries Limited**[8], amongst many others, where we said that, it is the giving of notice or payment in lieu thereof, that terminates employment. That whether a reason given has not been substantiated is irrelevant and has no effect on the validity of the termination made pursuant to a notice clause.

50. The evidence in *casu*, discloses that the appellant had a procedure allowing for employees to appeal against appraisals. In essence, this afforded them a chance to challenge appraisals and constituted a right to be heard on a disputed appraisal. Contrary to State Counsel's submission that the respondent's appeal on her disputed appraisal was determined by the moderation team, the evidence on record from the appellant's own witness was that, the respondent's appeal was not entertained as it was lodged after the period allowed for such appeals had lapsed. This evidence which was not challenged by the respondent, in our view, only goes to confirm that the opportunity to appeal and hence, the right to be heard on a disputed appraisal, was provided for in the appellant's grievance procedure.

51. The respondent who did not use the available opportunity to submit her appeal within the period allowed, cannot justifiably claim that she was denied a hearing on appeal, and that, the termination of her employment was wrongful on account of the alleged procedural flaw. The fact that a late appeal may have

been entertained in the past for reasons that were not disclosed before the trial court, did not, in our view, give the respondent or any other employee for that matter, a blanket cheque to abrogate the appeal procedure and to submit appeals at their own convenience. The finding made by the trial court, to the effect that the respondent should have been heard on her late appeal is accordingly reversed. Ground one succeeds for the reasons given.

All the three grounds of appeal having succeeded, we hereby uphold the appeal.

Conclusion

52. Having rejected the respondent's claims that, there was a redundancy and lack of opportunity to be heard on the disputed appraisal, there is no other consideration apparent from the evidence on record. All in all, it appears to us that there was in this case insufficient evidence adduced by the respondent to have justified the trial court's delving behind her termination of employment by notice.

53. In the event, what determined the respondent's entitlements as correctly argued by State Counsel, was not the length of service, but her mode of exit, which was pursuant to a termination clause, specifically clause 22, in her conditions of service. That mode of exit was not the same as those of the two colleagues against whom the respondent was comparing herself. One of the two was in fact declared redundant, while the other, exited by way of mutual separation.

54. As this matter emanated from the IRC, in the absence of evidence on record to justify condemning the respondent to costs of the appeal in terms of **Rule 44 (1) of the Industrial and Labour Relations Rules,** we order each party to bear their own costs, both here and in the court below.

Appeal allowed.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE