IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 220/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ATTORNEY GENERAL	**APPELLANT**
AND	
PAUL CHILOSHA	**RESPONDENT**

Coram : **Musonda DCJ, Kabuka and Mutuna JJS**

On 3rd December 2019 and 6th December 2019

For the Appellant : **Mr. F. K. Mwale and Mr. C. Mulonda of the Attorney General's Chambers**

For the Respondent : **Mr. R. Ngulube of Messrs Tembo Ngulube and Company**

J U D G M E N T

MUTUNA, JS. delivered the judgment of the court.

Cases referred to:

1) **Zambia Airways Corporation Ltd v Gershom Mubanga (1990-1992) 149**
2) **Bank of Zambia v Kasonde (1995-1997) ZR 238**

3) **Harrison Fwalo Chikasa v Chantele Mining Services Ltd Comp/10 of 2016 (Unreported)**
4) **National Breweries Limited v Phillip Mwenya (2002) ZR 118**

Legislation referred to:

1) **Industrial and Labour Relations Act, Cap 269**
2) **Employment Act, Cap 268**
3) **Employment (Amendment) Act, number 15 of 2015**
4) **The Employment Code, Act number 3 of 2019**

Introduction

1) This appeal is against the decision by Musona J. declaring the terminations of the Respondent's employment by the Appellant as being wrongful, unfair and unlawful and the order of reinstatement.

2) The appeal challenges the decision of the Judge on the ground that it was a misdirection having regard to his finding that there were valid reasons for the termination of the Respondent's contract of service.

Background

3) The Respondent was employed by the Judiciary as a registry clerk and subsequently elevated to the position of clerk of court.

4) During his tenure of employment, the Respondent was a member of the Judiciary and Allied Workers Union (the Union) by virtue of his ranking in the Judiciary. He was active in the activities of the union leading to his being elected to provincial chairperson of the union.

5) The Respondent's responsibilities as provincial chairperson were the coordination of union activities on the Copperbelt and liaising with the national executive committee of the union.

6) Sometime in 2015, the management of the Judiciary was engaged in negotiations with the union to review conditions of service for its unionized employees. The Respondent was part of the negotiating team of the union.

7) As the negotiations went on, there was a point at which an impasse was reached prompting the union to declare a dispute and entertain strike action. To avert the union's intention, the Judiciary applied to the Court below for an injunction restraining the union from going on strike.

8) The order of injunction was initially granted *ex parte* and later confirmed, following an *inter partes* hearing. As a result of this, the national executive committee of the union directed its branch chairpersons throughout the country to explain the effect of the Court order to the union members. The Respondent addressed members of the union based at Ndola sometime in January, 2016, and in his address he made comments on the order of the Court, operations of the Judiciary and statements that bordered on political comments. The address was reported in one of the tabloids, The Post Newspaper, on 12th January, 2016.

9) Subsequently, on 13th January 2016 the Judiciary terminated the Respondent's employment in accordance with his terms and conditions of employment.

10) As a consequence of the termination of his employment the Respondent took out an action against the Appellant in the Court below.

The Respondent's claim and Appellant's defence and evidence in the Court below

11) The Respondent took out an action against the Appellant by way of a notice of complaint pursuant to Section 85(4) of the ***Industrial and Labour Relations Act***. His claim was that the termination of his employment amounted to a dismissal on account of his membership to and activities in the union contrary to Section 3 of the ***Industrial and Labour Relations Act***, Section 36 of the ***Employment Act*** and the international labour standards prescribed by the International Labour Organisation (ILO). The Respondent also contended that the actions of the Appellant were calculated at undermining the activities of the union nationwide. Lastly, that his dismissal was unfair because he was not afforded an opportunity to be heard before the termination of employment was effected.

12) In terms of the relief, the Respondent claimed:

12.1 That the termination of his employment amounted constructive dismissal;

12.2 For an order that the dismissal was unfair, wrongful and illegal;

12.3 For an order that the dismissal was in breach of the law and international standards to which Zambia is a party especially at the ILO level;

12.4 For an order of reinstatement with full benefits;

12.5 Damages for unfair, wrongful and illegal dismissal;

12.6 Damages for mental torment, anguish, embarrassment and shock;

12.7 Costs;

12.8 Interest on all monetary awards;

12.9 Any other relief the Court may deem fit.

13) In its answer the Appellant denied the Respondent's claim in its entirety and contended that the termination of his employment was pursuant to his terms and conditions of service prescribed by the Public Service Commission.

14) The evidence led by the parties at the trial was in affidavit form and *viva voce*. The Respondent testified on his own behalf and in doing so he set out the background leading to the termination of his employment and his contention that the termination was motivated by his union activities.

15) The Respondent also testified that the meetings he had held with the union members were reported in The Post newspaper and that he felt that that was the reason for the termination of his employment.

16) The Appellants' affidavit evidence was by Mathews Likuba Zulu, a Registrar of the High Court while the *viva voce* evidence was by Patrick Malama, acting deputy director human resources. The evidence rebutted the contentions by the Respondent and alleged that the statement made by the Respondent when he addressed the union members had the effect of undermining the court system and that they were politically charged. For this reason, the Judiciary decided to exercise its right to terminate the Respondent's employment.

Consideration by the Court and decision

17) In adjudicating upon the matter, the Judge sat alone. He considered the pleadings and evidence before him and noted that unions are mediums through which employers and employees engage each other. That they are not

mediums through which persons can disparage the court system. He found that the statement attributed to the Respondent, which he did not deny, alleging, among other things, that the ruling of the Court granting the injunction was bad, was discourteous and discredited the court system. That if the Respondent was unhappy with the ruling he ought to have exercised his right of appeal.

18) The Judge also examined the other portions of the Respondent's statement which called on the Republican President to intervene in the dispute between the parties or else the ruling Patriotic Front party would not get the support of his members. He found this statement to be politically charged.

19) After making the foregoing findings, the Judge determined each relief sought by the Respondent. He dismissed the first relief of an order that the termination of his employment amounted constructive dismissal on the ground that the Respondent did not resign or stay away from work alleging that the conditions under which he worked were unbearable.

20) The Judge upheld the second relief sought of unfair dismissal because the evidence revealed that the termination of employment was as a result of the utterances of the Respondent. He held that since the termination was due to the Respondent's conduct he should have been charged, given an opportunity to exculpate himself and invited to a disciplinary hearing.

21) The finding by the Judge on wrongful dismissal was also in favour of the Respondent on the ground that the allegation upon which the Respondent was dismissed was not proven. He found that the failure to hold a disciplinary hearing, at which the charges against the Respondent would have been proved, amounted to a breach of the rules of natural justice.

22) Under illegal dismissal, the Judge likened the relief sought to unlawful dismissal and said it occurs when an employer breaches a statutory provision when dismissing an employee. He found that the dismissal was unlawful because there was no reason given by the Appellant for terminating the Respondent's employment in the

termination letter in accordance with Section 5(a) of the ***Employment (Amendment) Act***, number 15 of 2015. The Judge stated that this particular Act was assented to on 26th November 2015, therefore, it was in force at the time of the Respondent's termination of employment on 13th January 2016.

23) In addition the Judge found that in accordance with the Act the reasons for the termination must be valid to justify the employer's actions and must not relate to the conduct of the employee. He concluded by discussing at length the effect of the ILO Convention 158 on the labour law in the country and determined the third relief accordingly, which he said prompted the amendment of the ***Employment Act*** in Zambia in 1997 to introduce Section 26A into the ***Employment Act***. He stated that by that section as well, an employer was barred from terminating the services of an employee based on his conduct without availing him an opportunity to be heard.

24) Turning to the fifth claim, the Judge set out the law in regard to the relief of reinstatement. He said that it is an

alternative to an award of damages and should be granted sparingly in accordance with our decisions in the cases of ***Zambia Airways Corporation Limited v Gershom Mubanga***[1] and ***Bank of Zambia v Kasonde***[2]. He then discussed the decision of his Court in the case of ***Harrison Fwalo Chikasa v Chantele Mining Services Limited***[3] which the Appellant urged him to follow. In that case, the Court found that the termination of the complaint's employment was actually a dismissal and went on to award damages and refused to order reinstatement. He said the basis upon which reinstatement was refused was that: the complainant was in senior management and the relationship between himself and other managers resulted in an unconducive working relationship; and, the Respondent organization in that case was a small mining company where the relationship between management and its employees was at a personal level.

25) In distinguishing the facts in the case with which we are confronted with those in the ***Chikasa***[3] case, the Judge

found that the Judiciary is a large conglomerate with offices in almost every district of Zambia. Thus, the relationship between the Respondent and management of the Judiciary was not at a personal level and the Respondent could be transferred to any part of Zambia and still enjoy a good working environment. Having taken note of these special circumstances, the Judge found that there was a compelling case for reinstatement of the Respondent in his original position and he so ordered.

26) The Judge declined to award damaged for unfair, wrongful and unlawful dismissal on the ground that the reinstatement was sufficient recompense. He also declined to award damages for mental torture, anguish, embarrassment and shock on the ground that the Respondent did not lead evidence to prove the claims.

27) The Judge also awarded the Respondent costs and interest on all sums due to the Respondent from the Appellant at the Bank of Zambia rate, from 20th January 2016, being the date of commencement of the action. He declined to award the last relief sought, as the Court

deemed fit, on the ground that he did not deem it fit to award such a relief.

Grounds of appeal to this Court and arguments by the parties

28) The Appellant is aggrieved by the decision of the Judge and has launched this appeal on two grounds as follows:

28.1 The Judge in the Court below erred in law when he sat and decided the matter as a single judge without members;

28.2 The Court below erred in law and in fact by ordering re-instatement of the Respondent despite finding that the Respondent strayed into politics.

29) Prior to the hearing, counsel for the Appellant filed heads of argument which they relied upon at the hearing. They however, abandoned ground 1 of the appeal on the ground that the issue raised in the ground had been pronounced upon with finality by the Constitutional Court. In doing so, counsel conceded that the ground of appeal had no merit and did not see the need to pursue it. We commend counsel for their magnanimity which spared us the inconvenience of expending our time on an obviously unmeritorious ground of appeal.

30) Counsel for the Respondent sought an adjournment to enable him file heads of argument. In doing so he conceded that the Appellant had served the record of appeal and Appellant's heads of argument upon his firm well in advance of the hearing but that the same had, inadvertently, not been brought to his attention by the assistants in his firm. We reluctantly granted a short adjournment to the afternoon to enable counsel prepare for the hearing. When the matter resumed, counsel for the Respondent indicated that he would rely on the final submissions filed in the Court below.

31) In arguing the sole surviving ground of appeal, counsel for the Appellant, Mr. Mwale and Mr. Mulonda, contended that since the Court below found the activities of the Respondent unjustified as they were politically motivated and beyond the scope of his union activities, it ought not to have found in his favour and granted him the remedy of reinstatement. They argued that although the Judiciary did not comply with the requirement of Section 5(a) of the ***Employment (Amendment) Act***, there

were sufficient grounds in the conduct of the Respondent upon which the Appellant was justified in dismissing the Respondent. He drew our attention to our decision in the case of ***National Breweries Limited v Phillip Mwenya***[4] in which we held as follows:

> **"(1) Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.**
> **(2) Having been properly dismissed, the respondent cannot be deemed to have been retired and he is not entitled to any retirement benefits."**

They argued further that, even if the Respondent had been given an opportunity to defend himself he would still have been found to have committed a dismissible offence.

32) Concluding arguments, counsel for the Appellant dealt with the order of reinstatement by the Court below. They reviewed various decisions by this Court which speak to the need for such remedy to be granted sparingly and

only where special circumstances exist. That no such special circumstances had been proved by way of evidence led by the Respondent to warrant the award by the Court below.

33) In the *viva voce* arguments, Mr. Mwale re-emphasized the fact that having found the Respondent's conduct wanting, the Judge should not have found his termination to amount to wrongful, unfair and unlawful dismissal. He also clarified that when the Court below exercises its jurisdiction to look behind the real reasons for the termination of an employee's employment it does so for the benefit of both parties to the contract of employment because it is a Court of substantial justice.

34) We were urged to allow the appeal.

35) In the relevant portions of the written arguments by counsel for the Respondent, Mr. Ngulube interpreted the provisions of Section 36(3) of the ***Employment Act*** (as amended) as mandating an employer to give reasons for terminating an employee's employment if the reasons relate to conduct of the employee. He went on to interpret

the effect of the section in relation to the termination of the Respondent's employment by the Appellant. We have not set out these arguments in detail because Mr. Ngulube conceded that the proper interpretation to be given to the section was in line with our decision in this case as expressed in the later part of this judgment. He also conceded that there was merit in the appeal. We commend Mr. Ngulube for conceding.

Consideration by this Court and decision

36) We have considered the record of appeal and arguments by counsel. Lying at the heart of this appeal is the interpretation to be given to Section 36(3) of the ***Employment Act (as amended)*** which was brought into effect by ***The Employment (Amendment) Act, number 15 of 2015***. This is the section which the Judge and counsel for the Appellant referred to as Section 5 of Act No. 15 of 2015, arising from it being number 5 in the Act.

37) It is important that we state at an early stage that section 26A of the ***Employment Act*** which the Judge referred to

and relied upon in finding that the Respondent's dismissal was unlawful was a misdirection, because the section is only applicable to oral and not written contracts. The Respondent served under a written contract of service, the relevant section is 36(3).

38) We would like to clarify further that we are alive to the fact that the ***Employment Act*** has been repealed and replaced by the ***Employment Code, Act number 3 of 2019*** which came into effect early this year. For purposes of determining this appeal, the old Act is what is relevant because it was the one in force at the material time.

39) Having clarified as we have done in the preceding two paragraphs, we now turn to consider the effect of Section 36(3) of the ***Employment Act (as amended)***. The full text of the section is as follows: .....

> **"The contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking."**

To recap, in considering the claim for unfair dismissal the Judge found that the Appellant misdirected itself when it terminated the Respondent's employment without giving the Respondent an opportunity to defend himself. This finding was based on the testimony of the Appellant's witness which revealed that the termination of the Respondent's employment was based on his conduct and the fact that his contract of service was terminated soon after the Post Newspaper reported his statements.

40) The Judge went on to find that where the termination of an employee's services is based on misconduct, it ceases to be termination but dismissal. He therefore, held that the Appellant was required to charge the Respondent and give him an opportunity to be heard before an impartial tribunal prior to terminating his services. Having failed to do so, the dismissal was unfair.

41) The Judge applied the same principle in finding that the dismissal was wrongful. He found, in this regard, that there *"... were glaring allegations of misconduct by the*

[Respondent] but the [Appellant] did not charge the [Respondent]. No disciplinary hearing was held yet the [Appellant] proceeded to separate the [Respondent] from employment ..." He then went on to consider the claim for unlawful dismissal and found that the failure to comply with the provisions of Section 36(3), was a breach of contract which amounted to unlawful dismissal.

42) According to the Judge, the failure by the Appellant to state the reason for terminating the Respondent's employment amounted to a breach because Section 36(3) required an employer to give reasons for the termination. Further, such reasons should be valid and must not relate to conduct or work performance of the employee because if it relates to conduct or performance it ceases to be termination.

43) We have had occasion to consider the effect of Section 36(3) of the ***Employment Act*** (as amended). Our understanding is that while it recognized the employer's right to terminate an employee's contract of service by giving the requisite notice; it compelled the employer to

give reasons for such termination. In addition, the reasons for the termination must be valid or in other words, justify the actions of the employer. These reasons, ranged from: the conduct of the employee; his/her capacity in the institution; and, the operational requirements of the institution. For this reason, we do not accept the finding by the Judge that the reasons were not be connected to the conduct of the employee or that if the reasons were connected to the conduct, the action ceased to be a termination and became a dismissal. The section recognized a termination of employment to be valid as long as reasons for the termination were given and they were justifiable. Counsels for both parties were in agreement with the foregoing interpretation after questions were posed by the Court at the hearing.

44) The net result is that where the provisions of Section 36(3) were invoked by an employer, the recourse which an employee had was to institute proceedings challenging the validity of the reasons. If the Court found, as the Judge found, the reasons to be justifiable, it was obliged

to dismiss the claim. If, however, it found the reasons unjustifiable, it upheld the claim and found the termination to amount to unlawful dismissal for want of compliance with the statutory provision requiring the employer to provide valid reasons.

45) In the case with which we are engaged, the Respondent did not challenge the termination on the basis that the reasons were invalid because none were given. He challenged it on the ground that it was wrongful, unfair and unlawful because no reasons were given for the termination and yet the coincidence of the events leading to the termination suggested that it was linked to his union activities. He, therefore, invited the Judge to look behind the termination to ascertain the real reason for the termination of the Respondent's employment. The Judge, sitting in a Court of substantial justice, looked behind the reason for the termination and, with the aid of the Appellant's witness, quite rightly found that the termination was prompted by the Respondent's actions in relation to the public statements he made. The Judge

went on to find that the Respondent's actions did infact amount to misconduct and were serious offences. In effect, the finding by the Judge amounted to a determination that, indeed *"... there [were] valid reasons[s] for the termination connected with the ... conduct of the employee ..."*

46) The findings by the Judge which are at pages 12 and 13 of the record of appeal are, as follows: ***"However, attacking the Court or the Court system is not within the auspices of Trade Unionism. A Trade Union is a medium for open discussion between employees and their employer. It is not the medium to harangue the Court system. The Post Newspaper edition of 12th January, 2016 quoted the complainant as follows:***

> ***"To start with, this ruling has frustrated the works. The ruling is bad ...***
> ***The Complainant has not disputed the above quote ..."***

And

> **"As reported in the Post Newspaper edition of 12th January 2016, the Complainant further said,**

"The clock is ticking toward August"

The complainant was further quoted [as] saying,

> **"President Edgar Lungu must intervene in this matter, it's our salaries and welfare we are talking about here. We have elections in August and with this kind of behaviour, PF will get zero on the Copperbelt. There will be chaos and President Lungu will not have it easy ... The Complainant through his out bursts was making threats and attacks on the President and the Patriotic Front Government"**

The Respondent made no effort whatsoever to disassociate himself from these statements he is reported to have made.

47) The position we have taken is that, after the Judge made these findings the matter was closed because he found that a valid reason existed, based on conduct, for the termination of the Respondent's contract of service. He ought, in the circumstance, to have found that the termination of the Respondent's contract of service did not amount to wrongful, unfair or unlawful dismissal.

Conclusion

48) The conclusion we have reached is that the appeal has merit and we uphold it. In doing so, we set aside the judgment of the Court below and hold that the termination of the Respondent's contract of service did not amount to wrongful, unfair or unlawful dismissal. The termination accordingly, stands.

49) As for the costs, the nature of this appeal is such that it is only fair and just that we order that the parties bear their respective costs and we so order.

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M. MUSONDA
DEPUTY CHIEF JUSTICE

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J. K. KABUKA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE