IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 72 OF 2010

(Civil Jurisdiction)

B E T W E E N:

ZESCO LIMITED APPELLANT

AND

JOSEPH KAMWENDO RESPONDENT

CORAM: **SAKALA, CJ., CHIBESAKUNDA AND WANKI, JJS.**
On 1st March, 2011 and 8th June, 2011

For the Appellant: Mr. M.V. Chiwale, Acting Legal Officer

For the Respondent: Mr. D.E. Ndhlovu, of Luso Chambers

J U D G M E N T

WANKI, JS, delivered the judgment of the Court.

Cases referred to:

1. **Khalid Mohammed -Vs- The Attorney General (1982) ZR 49.**
2. **Wilson Masauso Zulu -Vs- Avondale Housing Project Limited (1982) ZR 172.**
3. **Simon Kapwepwe -Vs- Zambia Publishing Company Limited, (1978) ZR15.**
4. **Phillip Mhango -Vs- Dorothy Ngulube and Others, (1983) ZR 61.**
5. **Attorney General -Vs- Marcus Kampumba Achiume, (1983) ZR 1.**
6. **Chimba -Vs- Attorney General, (1972) ZR 165.**

Legislation Referred To:

1. **Employment (Amendment) Act No. 15 of 1987.**

In this appeal, the Appellants, who were the Defendants in the High Court, are challenging the judgment of the High Court delivered at Kitwe on 26th February, 2010, which was in favour of the Respondent who was the Plaintiff.

The facts leading to this appeal are that the Respondent, then Plaintiff, took out an action against the Appellant, then Defendant, by way of a Writ of Summons in the Kitwe High Court claiming for the following:-

(a) A declaration that his summary dismissal was null and void for non compliance with **Act No. 15 of 1997**;

(b) Further or in the alternative damages for wrongful dismissal;

(c) Special damages in respect of 96 accrued leave days, 199 overtime hours worked and repatriation allowance;

(d) Exemplary damages arising from the Defendant's contumelious disregard of Plaintiff's rights by continuing to treat the Plaintiff as a casual worker even after rendering over four years continuous service, and for paying his monthly salary at the end of every two months;

(e) Interest at the rate of 30 per centum per annum on all monies found due from the date of the Writ up to the date of payment and;

(f) Costs.

In support of the Writ of Summons, the Respondent filed a Statement of Claim wherein the Respondent stated that he was employed by the Defendant on 8th July, 2002, as a general worker at Chingola and he was summarily dismissed without notice on 30th January, 2007, after being accused of having stolen a cell phone from the office of the Human Resources Manager. In the Statement

of Claim the Respondent repeated the claims outlined in the Writ of Summons.

The Appellant filed a Memorandum of Appearance and a Defence disputing the claim.

At the hearing of the claim the Appellant gave evidence in support of his claim. In his evidence, the Appellant stated that he was employed by the Defendant as Office Orderly on 8th July, 2002. On 17th January, 2007, as he was cleaning the Account's Office, A Nokia cell phone dropped and its battery came out. After he finished cleaning he took the cell phone into the kitchen.

He further stated that at about 07.45 hours when the Accountant asked him whether he had seen the cell phone, he told her that he had seen the cell phone and gave it to her.

He said the Accountant called Bana Chanda started shouting at him and accused him of having wanted to steal the cell phone. He stated that the keys for the office were taken away from him and he was told that the keys would be given to a lady. He said that the Human Resources Manager in the company of Security Personnel told him that they would go by the decision which the Accountant would come up with as he was suspected to have wanted to steal the cell phone and on the 1st February, 2007, he received a termination letter. He said he was not charged with any offence.

He contended that he had accrued 90 days leave and over 6 months overtime. He wanted the Court to declare that the termination of his employment was not properly done and to award him all the claims in his Statement of Claim.

When he was cross-examined, he admitted that he was on a temporary 6 months duration contract of employment with a one day notice of termination and that is what he agreed to. He said he was on contract which was being terminated every 6 months. He admitted that the termination of his employment on the last contract was not because of the cell phone, according to the letter of termination.

When he was re-examined, he stated that he was not being stopped to work in between the termination of contracts and the signing of new contracts.

He further said he connected the termination of his employment to the cell phone because he was told that the owner of the cell phone was furious and her decision would be followed.

The Appellant called one witness in defence. D.W.1 testified that he knew the Plaintiff as a temporary employee of the Defendant. In January, 2007, the Defendant Management decided to reduce its labour force and the Plaintiff was one of those whose labour was not required and he was laid off on one day notice according to his contract of employment. He further stated that the laying off affected many other employees in other regions. Finally, D.W.1 referred to various documents in the Defendant's bundle of documents.

Under cross-examination, D.W.1 stated that the termination of the Plaintiff's employment was with immediate effect. He was not aware that the Plaintiff had an issue with Mrs. Chanda's phone and

he was not aware that the Plaintiff's employment was terminated because of the cell phone issue.

Under re-examination, D.W.1 stated that there was no communication from Chingola to indicate that the Plaintiff's employment was terminated because of the cell phone. He said the Plaintiff never complained about the cell phone allegation against him.

The Trial Court considered the pleadings, and the evidence before it and considered various authorities. He found that the Defendant used the contract of employment provisions as an escape goat to get rid of the Plaintiff, and this was not even stated in the termination letter and that the termination of the Plaintiff's employment with the Defendant was wrongful and he is entitled to damages.

The Trial Court proceeded to award the Plaintiff 18 months salary as damages for wrongful termination of his employment and K2,400,000.00 as an award for exemplary damages and interest at the rate of 12 percent per annum from the date of the writ to the date of judgment and 18 percent per annum thereafter.

The Appellant has, in its Memorandum of Appeal that was filed on 20th May, 2010, advanced four grounds of Appeal, that:

1. **The learned trial Judge misdirected himself when he held that the Appellant used the contractual provision to circumvent the real reason to terminate the contract as the termination clause did not provide for giving of reasons for termination.**

2. **The learned trial Judge misdirected himself when he deemed the Respondent to have been on permanent employment contrary to the evidence on record and in any event the deeming is unlawful.**

3. **The learned trial Judge erred in awarding the sum of 18 months salaries for a casual worker whose contractual notice was notice for one day.**

4. **The learned trial Judge erred in law and fact in awarding the exemplary damages as there were no particulars and facts warranting this award.**

Further, the Appellant on 14th February, 2011, filed Appellant's Heads of Argument. The Appellant in the said Heads of Argument indicated that it had abandoned ground three of the grounds of Appeal and that the Appellant will argue ground one separately and grounds two and four will be argued together.

In support of ground one, it was argued that the learned trial Judge's reasoning that the Respondent succeeded in his claim for damages for wrongful dismissal because the Appellant failed to call certain witnesses whom he (learned trial Judge) expected to rebut, the Respondent's evidence was faulty at law. The Respondent needed to prove his case that he was dismissed because of the cell phone. This he did not.

In support, the Court was referred to its holding in the case of ***KHALID MOHAMMED -VS- THE ATTORNEY GENERAL***. (1)

It was submitted that the Respondent's evidence for alleging that he was dismissed because of the cell phone issue was founded on hearsay as can be seen at page 120 lines 19 to 25 of the Record of Appeal.

It was submitted that it was a misdirection for the Court below to rely on the same as proof that he was dismissed because of the

cell phone issue, and that there was therefore no proof that the Respondent was dismissed because of the cell phone issue.

In support, the Court was referred to the case of ***WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED***. (2)

In support of grounds two and four, it was argued that it was misdirection on the part of the learned trial Judge to deem the Respondent as a permanent employee without any legal authority to justify the same; and that it was clear from the evidence on Record that the Respondent was not a casual employee but a fixed contractual temporary employee.

It was submitted that in the premises, the Court below misdirected itself in law and fact to state that the Respondent was being treated as a casual employee and thus to deem him as a permanent employee, when the evidence on Record clearly showed that he was not a casual employee, but a fixed contract temporary employee; that the Respondent did not fall in the definition of a casual employee under Section 3 of the Employment (Amendment) Act, 1997 and that even in a situation where a casual employee has worked for a period of more than 6 months, there was no law which stated that such an employee should be regarded as a permanent employee.

The Court was referred to its holding in the case of ***SIMON KAPWEPWE -VS- ZAMBIA PUBLISHING COMPANY LIMITED***. (3)

It was submitted that there was no evidence on record to show that the Appellant contumeliously disregarded the Respondent's rights, that even the Respondent's rights which were alleged to have

been contumeliously disregarded by the Appellant were not disclosed at the trial and that the Respondent was at all material times not regarded as a casual employee; but as a temporary employee in accordance with the various fixed temporary contracts of employment entered into by the parties herein.

It was finally submitted that in the premises, this appeal be allowed with costs to the Appellant.

The learned Counsel further submitted that the Respondent's had relied on **Section 26B of the Employment Act**. That the Section deals with oral contracts. This contract was written.

The Respondent on 31st August, 2010 filed Respondent's Heads of Argument.

In the Respondent's Heads of Argument it was argued that the trial Judge based his judgment on his interpretation of the **Employment (Amendment) Act, No. 15 of 1997** and that a perusal of the two grounds of appeal, which appear on page 5 of the Record of Appeal, showed that those two grounds of appeal are against findings of fact only.

The Court was referred to the case of ***WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED*** (2) in which this Court refused to reverse the findings of fact and dismissed the appeal.

The Court was further referred to the case of ***PHILIP MHANGO -VS- DOROTHY NGULUBE AND OTHERS*** (4) in which this Court after quoting from the case of ***WILSON MASAUSO ZULU -VS-***

AVONDALE HOUSING PROJECT (2) refused to reverse finding of the trial Judge and dismissed the appeal.

The Court was further referred to the case of ***ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME.*** (5)

It was further submitted that on page J4 lines 5 to 8, page 10 of the Record of Appeal the trial Judge addressed his mind to what Respondent's witness said, namely that Respondent was terminated because Respondent was reducing its labour force. The Court did not believe this witness; but believed the Respondent when he said that he was terminated because of the allegation of theft of a cell phone.

It was pointed out that even assuming for argument's sake that Appellant had terminated the employment of the Respondent because of a reduction in labour force requirement, that would still have made the termination wrongful; that **Section 26B (1) (b) of the Employment (Amendment) Act, No. 15 of 1997** says that the contract of service of an employee shall be deemed to have been terminated by reason of reduction, if the termination is due to reducing the labour force.

The Act then sets out the steps which the employer is required to follow when using that mode of termination. Appellant did not comply with any of the requirements stated in Section 26B.

It was further submitted that the trial Judge at J6 lines 14 to 16 (page 12 of the Record of Appeal) gave reasons why he believed the Respondent's version. At page J7 lines 8 to 10 (page 13 of the Record of Appeal) the trial Judge gave reasons why he did not

believe Appellant's witness when he said Respondent was terminated in line with his contract of employment.

It was finally submitted that this is not a proper case in which to reverse the findings of a trial Judge.

In response to ground four, the Court was referred to ***SIMON KAPWEPWE -VS- ZAMBIA PUBLISHING COMPANY LIMITED***, (3) and the case of ***CHIMBA -VS- ATTORNEY GENERAL***. (6)

It was submitted that the authorities cited above have, identified the major purpose which exemplary damages serve, namely:

(a) To bring home to the wrongful doer the error of his ways;

(b) Where the defendant is liable due to the wrong actions of its employees, to induce the employer to discipline those employees whose actions led to the Court case, and

(c) Exemplary damages should be in such an amount as would compel the employer to give directions that there should be no repetition.

The Court was invited to take judicial notice of the notorious fact that the influx of foreign investors into Zambia since the advent of the Third Republic in 1991, there was an outcry of the treatment of workers in Zambia. In response to this outcry the Government developed a policy to protect workers. This policy was implemented through the Minimum Wages and Conditions of Employment (General) Order, Statutory Instrument No. 119 of 1997; Statutory Instrument No. 2 of 2002 and the Minimum Wages and Conditions of Service (General) Order, Statutory Instrument No. 57 of 2006 among others. The Court was referred to Clause 11 of Statutory Instrument No.119 of 1997 which was repeated in Statutory

Instrument No. 2 of 2002 and Clause 12 of Statutory Instrument No. 57 of 2006.

It was submitted that this was Government policy on how employees should be treated by their employers. The Appellant, as a Parastal Company, was supposed to follow Government policy.

It was contended that by its own admission at the trial, Appellant terminated the employment of the Respondent because it wanted to reduce its labour force. That **Act No. 15 of 1997** deems such mode of termination to be redundancy.

The Statutory Instruments cited above provide that under such termination the employee is entitled to one month notice as opposed to the 24 hours notice which the Appellant gave the Respondent. All the said Statutory Instruments also say that an employee terminated in the manner in which Respondent was terminated, was entitled to two month's salary for each completed year of service. Respondent completed four years of service out of which he was by law, entitled to eight month's salary, but Appellant gave him nothing.

As a Government Parastal Company, ZESCO Limited was supposed to implement Government policy in the manner summarized above. It was also required to comply with the Government policy contained in Section 3 of the Employment (Amendment) Act, No. 15 of 1997 which states that any employee who has served for 6 months or more ceased to be a casual worker.

It was further submitted that the exemplary damages awarded by the learned trial Judge was warranted in view of the

circumstances stated above. It was argued that as a matter of fact, a much higher figure should have been awarded to compel the Appellant to change its ways and start dealing with workers in line with Government policy.

It was finally prayed that the appeal should be dismissed with costs as it lacks merit.

On 1st March, 2011 following leave of the Court the Respondent filed Additional Respondent's Heads of Argument, which are in addition to those filed on 31st August, 2010 and necessitated by the late receipt of Appellant's Heads of argument.

In response to ground one, it was argued that there is no merit in this ground for the following reasons:-

(a) This is an appeal against findings of fact. The very case of ***MASAUSO ZULU*** which the Appellant has quoted prohibits an appeal against findings of fact (at page 178 lines 7 to 18);

(b) What made the Respondent to succeed was not Appellant's failure to call its witnesses, but the interpretation of the law in Act No. 15 of 1997 which stated that after serving for over six months, an employee ceases to be a casual worker;

(c) The words concerning the suspicion that Respondent has stolen a cell phone were uttered in the presence of the Respondent. At the trial he repeated the words which he heard with his own ears; so that cannot be hearsay;

(d) There was ample evidence before Court to prove Respondent's case. Page 31 of the Record shows that Respondent was terminated on 30th January, 2006. And page 37 shows that Respondent was terminated on 30th January, 2007. Respondent had completed one month of the first half of his contract for 2007. Page 119 (lines 20 to 22) of the Record shows that the allegation of the theft of cell phone was made on 17 or 18th January, 2007. The actual allegation appears on page 120 lines 10 to 13. Twelve days later, Respondent's employment was terminated. If Respondent had not been terminated because of

> the theft allegation, his employment would have ended on 31st December, 2006 when his previous contract ended.

In response to ground two, it was submitted that it was not the trial Judge who deemed the Respondent to have been on permanent employment. It was **Act No. 15 of 1997** which says that a person who is employed for a period of over 6 months ceases to be a casual worker (Section 3). At page 119 of the Record, Respondent told the Court that he was employed by the Appellant on 8th July, 2002, (line 20) page 37 of the Record shows that Respondent was terminated on 30th January, 2007.

This means that he had rendered continuous service for 4 years 6 months. It is this period to which the learned Judge applied **Section 3 of Act No. 15 of 1997**.

In response to ground four, it was submitted that exemplary damages were justified in this case. Appellant is a Parastal Company of the Government of the Republic of Zambia. The Government of Zambia in **Act No. 15 of 1997** enacted a law to prohibit casualization of labour in Zambia. Being a quasi-Government organ, Appellant should have been in the forefront to implement the law which prohibited casualization of labour.

It was further submitted that the Respondent's gave account of how he was accused of having no respect for his Superior Officer, how he was accused of having stolen some plain papers before and how he was now being accused of stealing a cell phone. The Appellant was not a one man private company, where an employee can be terminated at the whims of the owner of the business

concern. That the Appellant was a big nationwide quasi-Government company. As such, its officials had levied certain charges against Respondent, they never charged him. The failure to charge Respondent before terminating him; and treating Respondent as a temporary employee after rendering unbroken service for 4½ years amounted to conduct which is reprehensible on the part of an employer, let alone a Parastal Company employer.

The authorities contained in the heads filed on 31st August, 2010 show why it was proper to award exemplary damages. It was further submitted that perusal of the last contract which Respondent signed, which appears on page 31 of the Record of Appeal show that it is captioned: TEMPORARY/VACATIONAL/CASUAL EMPLOYMENT.

This heading in the contract had put temporary and casual employment at the same level. For this reason, temporary and casual should be taken to mean the same thing as used by the Appellant in the treatment of its workers.

It was finally submitted that there was no merit in this appeal, and should be dismissed with costs.

We have considered the grounds of appeal and the Heads of Argument and we have examined the judgment of the Trial Court that has been appealed against.

The first ground is couched as follows:-

"The learned trial Judge misdirected himself when he held that the Appellant used the contract provisions to circumvent the real reason to terminate the contract as the termination clause did not provide for giving reasons for termination."

In the first ground, the Appellant has attacked the Trial Court for holding as it did.

We have considered the arguments in support of the first ground and against.

We have found that the holding by the Trial Court that the Defendant used the contract of employment provisions as an escape goat in getting rid of the Plaintiff was not supported by the evidence that was adduced before the Trial Court.

The evidence that was not in dispute was to the effect that the termination of the contract of employment was made within the Respondent's contract of employment by giving him a one day's notice.

Therefore, the cell phone issue was just brought up by the Respondent and he did not even prove it on a balance of probabilities as required.

The fact that the Appellant did not call any of the witnesses who witnessed the alleged theft of the cell phone or evidence to prove the reduction of labour cannot be used as proof that the Respondent proved that his alleged dismissal was wrongful.

In the circumstances, we have found merits in ground one and it is accordingly allowed.

The second ground is couched as follows:-

"The learned trial Judge misdirected himself when he deemed the Respondent to have been on permanent employment contrary to the evidence on record and in any event the deeming is unlawful."

We have considered the arguments in support and against the second ground.

The evidence that was adduced before the Trial Court showed that the Respondent was employed as a temporal employee on six months renewable contract. The evidence further showed that the six months contracts were being terminated and renewed every six months.

The Trial Court's finding that the Respondent was employed as a casual worker and deeming the Respondent to have been on permanent employment was against the weight of evidence on record and a misdirection.

In the circumstances, we have found that there are merits in the second ground. We accordingly allow the second ground.

The fourth ground is that:-

> **"The trial Judge erred in law and in fact in awarding exemplary damages as there were no particulars and facts warranting this award."**

We have considered the arguments in support and against ground four.

In awarding the K2,400,000.00 exemplary damages, the Trial Court did not give any reasons for awarding the damages.

The Trial Court simply stated that:-

> "Also take cognizance of what was stated in the case of ***ATTORNEY GENERAL -VS- MUSONDA AND OTHERS***. I will award the Plaintiff K2,400,000=00 as an award for exemplary damages."

The Trial Court did not state the facts and particulars that warranted the awarding of the exemplary damages.

In the circumstances, we have found that the award of exemplary damages had no basis and was a misdirection on the part of the Trial Court. We have, therefore, found that ground four has merits and is accordingly allowed.

The three grounds of appeal having been allowed, we have found that the appeal has succeeded and it is, accordingly, allowed.

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E. L. Sakala,

CHIEF JUSTICE

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L. P. Chibesakunda,

SUPREME COURT JUDGE

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M. E. Wanki,

SUPREME COURT JUDGE