

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRC/SL/12/2018

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT NDOLA

(LABOUR JURISDICTION)

BETWEEN:

BRIAN SICHULA

AND

SOLWEZI CITY MALL LIMITED



COMPLAINANT

RESPONDENT

Before: The Honourable Mr. Justice D. Mulenga this 27th day of July, 2018.

For the Complainant : Mr. M.Mwachilenga and Mr. M.Benwa of
Messrs Mumba Malila and Partners

For the Respondent : Mr. M.J.Kawana of Messrs Corpus Globe
Legal Practitioners

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172
2. Collins Chongo v Status Hi-Tech Zambia Limited Comp No. IRD/ND/49/2107
3. Chansa v Barclays Barclays Bank Zambia PLC SCZ/8/128/2011

Legislation referred to:

1. Section 36 of the Employment Act Chapter 268 of the Laws of Zambia as amended by Act No. 15 of 2015

Other works referred to:

1. Protection Against Unjustified Dismissal: International Labour Conference-82nd Session 1995 at page 36.

The Complainant filed his Notice of Complaint and Affidavit in Support on 4th June, 2018, on the grounds that he was employed by the Respondent as Centre Manager on 13th June, 2016, on permanent and pensionable basis. However, on 30th April, 2018 he was given a notice of termination of employment by the Respondent without a reason being given for the said termination. According to the Complainant, the Respondent's conduct has caused him great hardship and inconvenience, therefore, he seeks the following relief:-

- (a) An order that his employment was unlawfully terminated by the Respondent
- (b) 36 months' salary or such higher amount as the Court may deem fit as damages for loss of employment
- (c) Interest on all sums found due
- (d) Any other relief the Court may deem fit
- (e) Costs of and incidental to this action

The Complainant's evidence was that he was employed by the Respondent as Centre Manager on 13th June, 2016 and his duties included taking care of the Respondent's mall and ensuring that the said mall was secure, clean and conducive for business. The Complainant averred that he carried out his duties diligently and with efficiency. Surprisingly, by letter dated 30th April, 2018, he was given a notice to the effect that his employment contract would terminate on 31st May, 2018, however no reason was advanced for the said termination(Ref to exhibit "BS2").

According to the Complainant, after receiving the said notice, he sent an e-mail to the Respondent requesting to be given two more months so that he could complete the acquisition of bringing in two more tenants to the mall, as he had worked tirelessly to acquire certain prospective tenants. The Respondent, however, declined to grant that request.

The Complainant averred that the allegations in paragraph 9 of the Respondent's Affidavit that he did not carry out his duties effectively were unfounded. The reason is that the incident being referred to therein of delaying to drop off the Respondent's staff from South Africa at the airport, was not part of his duties as he was not employed as a driver. The Complainant further averred that the allegations of corruption in the Respondent's affidavit were never brought to his attention while he was employed and the person who wrote the email to the Respondent alleging corruption on the Complainant's part was a contractor who wanted him ousted out of his position as Centre Manager so that he could be replaced by another person as indicated in exhibit "SBH2".

The Complainant further testified that depositions in the Respondents Affidavit to the effect that he deceived the Respondent by informing them that approval had been obtained from Solwezi Municipal Council for the construction of a bus terminus at the mall and that the Respondent was not informed when one of its tenants vacated the mall were incorrect. The correct position was that he did in fact obtain approval from the Council and had informed the Respondent about the tenant through its lease manager one Patrick Nsama, the person responsible for the lease.

The Complaint is opposed and to that effect the Respondent filed an Answer and affidavit in support of the same, on 17th July, 2018. In its Answer, the Respondent contends that the termination of the Complainant's employment was lawful as he was given and was well aware of the reasons for the said termination.

To buttress its defence, in an affidavit sworn by one Steven Bernard Herring, a Director in the Respondent Company, the Respondent deposed that the Complainant was advised about the reasons for termination of employment as the employment relationship between the two parties had broken down irretrievably due to failure on the Complainant's part to carry out his duties effectively.

The Respondent deposed that the Complainant was corrupt as he demanded for payment of certain percentages from contractors who were given work at the Respondent's mall. Further that the Complainant deceived the Respondent about obtaining approval from Solwezi Municipal Council for the construction of a bus terminus when no approval had actually been granted, thereby making the Respondent incur a lot of costs.

It was also deposed by the Respondent that the Complainant did not follow standard procedure when one of the tenant's vacated the mall as he did not inform his supervisor, hence the Respondent could not reasonably have been expected to retain the Complainant when he could not carry out his duties diligently.

The Respondent called two witnesses. The first witness was Godfrey Shawa, whose only evidence was to state that each time he worked at the Respondent's mall as a contractor, the Complainant demanded a cut from his payment. This prompted him to write to the Respondent to inform them about the same and

also use that platform as a way to push for a payment for works he had done, but the Respondent had delayed to pay.

The second witness was Tiveshnee Govender whose testimony did not depart from the evidence in the Respondent's affidavit in support of answer. The gist of her testimony however was that the Respondent had performance and conduct issues with the Complainant which were brought to his attention. She averred that the Complainant's employment was terminated as there was an erosion of trust. In cross-examination, she confirmed that the Complainant was not subjected to any disciplinary hearing and no reason was given for termination in the letter of notice to terminate employment.

Clearly, from the evidence and facts adduced by both parties herein, this Court is called upon to ascertain and determine whether the termination of the Complainant's employment by the Respondent was unlawful.

I am alive to the Supreme Court's guidance in its holding in the case of **Wilson Masausto Zulu v Avondale Housing Project Limited**¹, that:-

Where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to a judgment whatever may be said of the opponent's case.

The import of the above precedent is that the Complainant has a duty to prove on the balance of probabilities his complaint against the Respondent. However, being mindful that the law as shall be demonstrated hereinafter places a duty on the employer to give a valid reason for termination of an employee's employment, invariably there is evidential onus on the Respondent to show that it gave a valid reason for termination of employment.

I find as a fact that the Complainant herein was employed by the Respondent as Centre Manager on 13th June, 2016. On 30th April, 2018, he was given one month notice of termination of employment, however no valid reason has been stated in the letter of notice of termination.

The Respondent's contention is that the reasons for termination were made known to the Complainant. I have observed that the Respondent in its affidavit and through its witnesses on the stand brought up allegations of poor performance, corruption and misconduct at the instance of the Complainant. I must hasten to state here that the provisions of section 36(1) as amended by the **Employment(Amendment) Act No. 15 of 2015 of the Employment Act, Chapter 268 of the Laws of Zambia** are very clear as it provides that:-

36(1) A written contract of service shall be terminated-

*(a) by the expiry of the term for which it is expressed to be made; or
(b) by the death of the employee before such expiry; or
(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise except that where termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment.*

(3) 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.

In determining whether or not the Respondent complied with the provisions of the Employment Act aforecited, in the manner it terminated the Complainant's employment, I find it imperative to state that prior to the amendment of the said section 36 (1) by Employment(Amendment) Act No.15 of 2015, an employer was legally allowed to terminate an employee's contract of

employment by invoking a notice clause or payment in lieu of notice and without forwarding any reason.

However, as this Court observed in its earlier unreported case of **Collins Chongo v Status Hi-Tech Zambia Limited**² that:-

This Court in exercise of its inherent jurisdiction of doing substantial justice was empowered to lift the notice veil. It is this Court's considered position that the amendment of section 36 of the Employment Act was intended to remedy the mischief of abuse of termination by notice, whereby employers terminated employees' contracts on unreasonable, invalid reasons or no reason at all or for reasons which they should have allowed the employee an opportunity to be heard.

In the matter in casu, the reasons for termination of the Complainant's employment were only advanced during the court proceedings herein and the said reasons bordered on grave allegations of poor performance, corruption and professional misconduct. I draw some comfort in the International Labour Standards on the **Protection against Unjustified Dismissal: International Labour Conference-82nd Session 1995** at page 36 which provide that :

Valid reasons for termination of employment must be connected with the capacity or conduct of the worker, or be based on the operational requirements of the undertaking, establishment or service. Depending on the reason invoked, the applicable provisions of legislation or collective agreements, both substantive and procedural, may differ. For example, incompetence or unsatisfactory performance, which may be caused by a lack of skills or natural ability, constitutes a reason for termination connected with the capacity of the worker; on the other hand, if the employer invokes professional misconduct, such as the worker's bad faith or negligence in his work, the classification of the termination of employment will usually change. Instead of termination of employment on the grounds of the capacity of the worker, it will be based on the conduct of the worker and may lead to disciplinary action.(Underlined for Court emphasis only)

The import of the aforecited international labour standards is that if the reason given for termination of employment relates to professional misconduct like an employee's bad faith and not mere incompetence, then disciplinary action has to be invoked. The Complainant herein was not charged or subjected to any disciplinary hearing for the grave allegations that were levelled against him during trial.

It is my considered position that the requirement of sections 36(1)(c) and 36(3) of Employment(Amendment) Act No. 15 of 2015 of the Employment Act Chapter 269 of the Laws of Zambia aforecited is that a valid reason for termination should be availed to the employee on termination and not at the hearing before Court. Further, termination by invoking a termination clause without valid reasons is proscribed by law and is to that effect unlawful. Invariably, it is difficult for this Court to believe the Respondents averments that the Complainant's contract of employment was terminated due to his alleged poor performance, corruption and professional misconduct as the Complainant was not charged and heard on any disciplinary offences.

It is my conclusion, therefore that the Respondent did not give the Complainant a valid reason for termination of his contract of employment contrary to sections 36(1)(c) and 36(3) as amended by Act No. 15 of 2015 of the Employment Act, Chapter 268 of the Laws of Zambia . I henceforth find and hold that the Complainant has proved on the balance of probabilities that his employment was unlawfully terminated by the Respondent.

In ascertaining the measure of damages for unlawful termination of employment, I am alive to the Supreme Court's guidance in the case of **Chansa v Barclays Bank Zambia PLC**³ where it was stated that:-

The rationale is that as global economies deteriorate, the chances of finding employment even by graduates are dimmer. There should be a progressive upward increase in damages, as it is bound to take longer to find a job in the current domestic and global economic environment.


I am also mindful that the Complainant was on a permanent and pensionable contract which would have invariably gone on for a long time before the Respondent cut it short. It is very difficult to find employment in this day and era considering the managerial position held by the Complainant, to that effect, he was still unemployed at the date of trial. I therefore, award the Complainant twenty-four (24) months' salary as damages for unlawful termination of employment.

The said award shall attract interest at short term commercial deposit rate as approved by the Bank of Zambia from the date of complaint to full payment.

Costs to the Complainant to be taxed in default of agreement.

Informed of Right of appeal to the Court of Appeal within thirty (30) days from the date hereof.

Delivered at Solwezi this **27th** day of **July, 2018**.


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Hon. Justice D. Mulenga
JUDGE