

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRC/ND/108/2017

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT NDOLA

(LABOUR JURISDICTION)

BETWEEN:

WILLIAM MUSONDA

COMPLAINANT

AND

THENDELIAN LIMITED

RESPONDENT



Before: The Honourable Mr. Justice D. Mulenga this 1st day of August, 2018.

For the Complainant : In person

For the Respondent : Mr. E. Chulu of Messrs Enias Chulu Legal Practitioners

JUDGMENT

Cases referred to:

1. *Wilson Masautso Zulu v Avondale Housing Project* (1982) ZR 172
2. *Yeta v African Banking Corporation ABC(Zambia) Limited* SCZ Appeal No. 117 of 2013
3. *Zambia Privatisation Agency v James Matale* SCZ Judgment No.9 of 1996

Legislation referred to:

1. *Section 36 of the Employment (Amendment) Act No. 15 of 2015*
2. *Section 20(2)(c) of the Employment Act Chapter 268 of the Laws of Zambia*

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 with an affidavit in support of the same on 28th September, 2017. The grounds upon which the Complaint is presented are that the Complainant was unlawfully dismissed from employment by the Respondent. The Complainant therefore seeks an order for damages for unlawful and unfair dismissal, interest and costs.

The Complainant via his Affidavit in Support of Notice of Complaint deposed that he was employed by the Respondent as Lodge Manager on 19th June, 2017. He was placed on six months' probation during which period his performance was to be assessed. The letter of employment (exhibit "WM1") was couched as herein below:-

19th June, 2017

*William Musonda
NDOLA*

Dear Mr. Musonda,

RE: OFFER OF EMPLOYMENT

We refer to your application for employment and subsequent interviews held and are pleased to inform you that you have been offered a job as Lodge Manager with effect from 19 June 2017. You will be responsible for the overall day to day running and marketing of Njele Country Park and will be answerable to the Board of Directors.

Your basic monthly salary has been fixed at K4,300 plus housing and transport allowances calculated at 25% and 15% of the basic pay respectively.

You will be entitled to two days leave for each month of completed service. You will be required to work a minimum of 48 hours per week but as manager, you will be required to work extended hours if there is need. The Board will in due course set performance targets that will result in bonus pay of up to K6,000 per quarter if the set targets are achieved.

Your principal responsibility will be to aggressively market Njele Country Park and put it on the map among the top places of choice for both local and international visitors. You will work closely with the Hospitality and Guest Services Coordinator ensuring that all services are provided at our facilities meet the required standards to generate and sustain business. You are also expected to be instrumental in creating systems that enhance efficiency, accountability and internal controls in all operations.

You will serve a 6 month probationary period during which your performance will be assessed and if satisfactory, you will be confirmed and given a contract. The Board will also consider revising your conditions of service.

The position of Lodge Manager is cardinal for the success and growth of the organization. It is the hope of the Board that you will apply total commitment, diligence, loyalty and ingenuity as you discharge your duties.

On behalf of the Board of Directors, I would like to welcome you to the team and wish you well.

Yours sincerely

THENDELIAN LIMITED...

The Complainant further deposed that his employment with the Respondent was terminated on 31st July, 2017 on grounds that his ability to relate with other employees left much to be desired. The said letter of termination is exhibit "WM2". He stated that the Respondent did not give him any notice prior

to terminating his contract, when his letter of employment stipulated that his performance would only be assessed after six months

The Complainant also deposed that he introduced a lot of changes to the Respondent's business and its income was increased just within a short period. Therefore, he was not clear as to what criteria was used by the Respondent in terminating his services just after a month of being employed. The Complainant stated that the Respondent did not follow procedure when terminating his employment hence the termination was unlawful and unfair.

In his oral testimony, the Complainant averred that when he joined the Respondent he made a lot of progressive changes to the business as he is a professional in the hotel industry. Among the changes he introduced were a point of sale machine and a faster front office system. According to him, these changes enticed a lot of clients to visit the Respondent's lodge and thereby generating a lot of income for the Respondent.

The Complainant averred that surprisingly, one of the Respondent's Directors Mr. Sichinga, informed him that the Respondent did not have money to pay him hence he should consider being placed on commission instead of the salary that he was on. According to the Complainant, he declined that proposal and because of that, his employment was terminated by the Respondent without giving him any warning or notice.

In cross-examination, the Complainant confirmed that he was on probation when his services were terminated, however, he still wanted the Respondent to give him notice before the termination as his understanding of the letter of employment was that his performance was only supposed to be assessed after six months.

The Complaint is opposed and to that effect the Respondent filed an Answer and affidavit in support on 16th January, 2018. In answer to the Complaint, the Respondent contends that the Complainant's services were properly terminated during the probation period.

The Respondent in its Affidavit sworn by one of its Directors John Sichinga, deposed that the Complainant was under probation and he was given the requisite notice applicable to employees on probation before terminating his services.

The Respondent further deposed that the Complainant's assertion that he was only supposed to be assessed after six months was not correct. To the contrary, the Complainant was an irresponsible employee who within a month of being employed would invite his companions to the Respondent's lodge and give them free beverages and food. It was further deposed that the Complainant had a bad working relationship with other members of staff.

The Respondent called one witness Mr. John Sichinga, one of its Directors (hereinafter referred to only as RW1). The evidence of RW1 is not different from the Affidavit evidence except to add that the Complainant was verbally cautioned by the Respondent about his bad working relationship with other employees and the giving of free food to his companions. According to RW1, the Complainant did not change his behavior, hence the termination of the contract of employment.

Clearly from the pleadings and the evidence adduced in this case, the Court is called upon to determine whether or not the Respondent's termination of the Complainant's employment was unlawful and/or unfair considering that it was terminated before the expiry of the probation period.

I am alive to the Supreme Court's guidance in its holding in the case of **Wilson Masautso 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.

It is uncontroverted in this case that the Complainant was employed as lodge manager by the Respondent on 19th June, 2017 and he was on probation for six months.

It is a fact that while the Complainant was still on probation, on 31st July, 2017 his employment was terminated with immediate effect and the reasons given in the letter of termination were that his managerial skills did not meet the expectations of the Respondent.

In considering the issue for determination, I am mindful that a probation period is used to assess the suitability of an employee for a job position as was echoed by the Supreme Court in the case of **Yeta v African Banking Corporation ABC (Zambia) Limited**² where it was held that:-

A probation period is a work test period for both parties. The employer assesses whether the employee is suitable for the position and the employee has the opportunity to decide whether to take up the job permanently.

In the matter in casu, the Complainant's letter of employment clearly stipulated that during the six months' probation, the Respondent would assess the Complainant's performance. I therefore do not agree with the Complainant's

argument that his performance was only supposed to be assessed after completion of the six months' probation, as such a position will not only be absurd and against the main rationale for probationary period but also that irreparable damage may be caused to the employer's property or reputation.

It is my considered view that the Respondent was within its right when it found the Complainant unsuitable for the position of lodge manager just after about a month of employing him as the Complainant was on assessment for the position he was offered.

The above notwithstanding, there is need to address the reason advanced by the Respondent for its action, as this is the requirement of the employment law under section 36 of the Employment (Amendment) Act, No. 15 of 2015. The reason given by the Respondent for the termination of the Complainant's employment is one that relates to his capacity to manage a lodge. I draw some comfort from the International Labour Standards on the **Protection against Unjustified Dismissal** which provide as follows:

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.

The import of the aforecited law and international labour standards is that, if the reason given for termination relates to capacity of an employee for instance mere incompetence or unsatisfactory performance, then an employee does not need to be charged with any disciplinary offence but his contract can merely be terminated by notice or payment in lieu of notice. In the matter in casu, the Respondent observed that the Complainant did not have managerial skills and that, is in my considered view a reason relating to the capacity of the Complainant to manage a lodge. The Respondent was not at law therefore, required to charge the Complainant with any disciplinary offence but to exercise its right to terminate his employment in the manner it did. Further, I find that the Respondent gave a valid reason for termination of the Complainant's employment.

I therefore find and hold that the Complainant has not proved on a balance of probabilities his claim for unlawful and or unfair termination of employment. The said claim is accordingly dismissed for lack of merit.

However, I do note that the Complainant's employment was terminated without notice or payment in lieu of notice. The letter of offer of employment given to the Complainant did not have express provision of a notice period. Nevertheless, the Respondent's letter terminating the Complainant's employment stated that the termination was with immediate effect.

I am mindful of the fact that in the absence of an express notice period in a contract, reasonable notice or payment in lieu of notice is supposed to be given to an employee before his services are terminated. I am further guided by the Supreme Court in the case of **Zambia Privatisation Agency v James Matale**³ where it was held that:-

Payment in lieu of notice was a proper and lawful way of terminating the respondent's on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice.

I also apply my mind to the provisions of section 20 of the **Employment Act Chapter 268 of the Laws of Zambia** which stipulate that:-

20(2) In the absence of any agreement providing for a period of notice of longer duration, the length of such notice shall be-

(c) thirty days where the contract is for a period of one week or more.

Having found that the Respondent did not give the Complainant requisite notice for termination of employment, and considering the foregoing provision of the law, I hereby order that the Respondent should pay the Complainant one month salary in lieu of notice. The said amount shall attract interest at the short term commercial deposit rate as approved by the Bank of Zambia, from the date of Complaint until full payment.

I make no order as to costs.

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

Delivered at Ndola this **1st** day of **August, 2018**.

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Hon. Justice D. Mulenga
JUDGE

