IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 02/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

VICTORIA CHILESHE SAKALA **APPELLANT**

AND

SPECTRA OIL CORPORATION LIMITED **RESPONDENT**

CORAM: Hamaundu, Kaoma and Kabuka, JJS.

On 4th September, 2018 and 7th September, 2018.

FOR THE APPELLANT : In Person.

FOR THE RESPONDENT : Mr. Linyama, Messrs. Eric Silwamba, Jalasi & Linyama, Legal Practitioners.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Chilanga Cement Plc v Kasote Singogo (2009) ZR 122 (SC).
2. Kabwe v BP (Zambia) Limited (1995 – 1997) ZR 218.
3. Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise (1999) ZR 27.
4. Zambia Privatisation Agency v James Matale (1995-1997) ZR 157.
5. Redrilza Limited v Abuid Nkazi and Others (SCZ Judgment No. 7 of 2011).

6. Contract Haulage Limited v Mumbuwa Kamayoyo (1982) ZR 13. (SC).
7. Mumba (Musonda Gerald) v Maamba Collieries Ltd (1989) ZR (SC).
8. Barclays Bank PLC v Zambia Union of Financial Institution and Allied Workers SCZ 12 of 2007.
9. Shamwana and 7 Others v The People (1985) ZR 41 (SC).

Legislature and Other Works referred to:

1. The Employment Act, Cap. 268, SS.26A, 26B, 36.
1. Employment (Amendment) Act No. 15 of 2015
2. The Minimum Wages and Conditions of Employment (General) Order, 2011, S.I No.2 of 2011
3. The Industrial and Labour Relations Act, Cap 269, SS. 63(1);108 (1).
4. Pension Regulations Act No. 28 of 1996.
5. Halsbury's Laws of England 4th Edition, Volume 16, paragraphs 572 and 607.

By a judgment delivered on 11th September, 2015 the High Court dismissed the appellant's claim that she was terminated by reason of redundancy and entitled to redundancy benefits. The court found that in terminating the appellant, the respondent properly invoked the termination clause in her contract of employment, by paying the appellant three months' salary in lieu of notice. Aggrieved by that finding, the appellant has now appealed to this Court.

The relevant facts of the matter are that on 20th June, 1998 the appellant was offered employment as secretary to the respondent's Deputy Managing Director. The conditions of service were set out on a one paged document attached to the offer letter and provided for a salary of K1,050.00 rebased inclusive of all allowances; thirty leave days per calendar year; and three months' termination notice by either side. There was no provision for early retirement or redundancy. The appellant indicated her acceptance of employment on those terms, by appending her signature on the said document. Some ten years later, on 1st May, 2008 the respondent enhanced the conditions of service for all its employees, by introducing pension benefits managed by the Saturnia Regina Pension Trust.

After working as secretary to the Deputy Managing Director for thirteen years, the latter passed away on 6th November, 2011. Following his death, the appellant was re-assigned to work as secretary for the Chief Accountant. On 30th January, 2012 whilst the appellant was working for the Chief Accountant, her contract of employment was terminated with effect from 31st January, 2012. The letter of termination advised the appellant that she would be paid three months' salary in lieu of notice; her January,

2012 salary; the cash equivalent of her accrued leave days, less tax and monies owed to the respondent in respect of advances and loans. The appellant was further advised that she would be paid her pension entitlements from Saturnia Regina Pension Trust, in accordance with the Trust rules.

The record shows that in her evidence given at the trial of the matter, the appellant admitted that she was paid a pension of K44,000.00 by Saturnia Regina Pension Trust. Although the appellant was paid all terminal benefits in line with what the respondent believed was due to her, it was still her contention that she had been terminated by reason of redundancy; and underpaid her benefits in the sum of K192,780.45 rebased. The appellant also claimed she was entitled to payment of a long service monetary award given to all the respondents' employees upon clocking ten years of service, as provided for in the respondent's Manual on General Conditions of Service.

In pursuit of her claims, the appellant issued a Writ of Summons from the High Court against the respondent, seeking an order that her employment was terminated due to a redundancy after the death of the Deputy Managing Director; and

was entitled to the sum of K192,780.45 redundancy monies underpaid to her for the 13 years that she worked for the respondent; a long service award; repatriation allowance; interest on the sums found due and costs.

The respondent in defence, denied the appellant was entitled to her said claims and contended that, it merely exercised its right to terminate her services in line with her conditions of service which provided for termination by either party giving the other three months' notice. The respondent also denied that the appellant was terminated due to redundancy on the basis of the demise of the Deputy Managing Director, as after his death, she was re-assigned to work as secretary for the Chief Accountant for about three months before her said termination. The underpayment claim was also denied on the ground that, the appellant was only entitled to refund of her employers and her own pension contributions from the Pension Fund. The respondent further denied the appellant's claim of entitlement to a long service award, on the basis that it had nothing to do with the termination of her employment.

The respondent however, confirmed that the appellant was employed on a permanent and pensionable basis and was entitled to certain allowances that accrued when need arose, such as working out of her station or when attending training workshops. The respondent also confirmed that the appellant's basic salary was inclusive of housing and other allowances.

After hearing evidence, the trial court considered the arguments by the appellant, that in terminating her employment the respondent did not comply with the redundancy procedural requirements of **section 26B of the Employment Act Cap 268**. Numerous authorities from other jurisdictions were cited by the appellant, which set out the test to be used by the courts in determining whether or not there was a redundancy.

The learned judge observed that the responsibility of discharging the burden of proving her claims, on a balance of probabilities, was that of the appellant. In this regard, she noted that the only conditions of service filed on record relating to the appellant's contract of employment were those contained in the document attached to her offer letter. In terms of her said conditions and the evidence adduced, the court found the

appellant was paid three months' salary in lieu of notice; other accrued entitlements as well as her pension benefits.

The court however, found the main thrust of the appellant's case was that she had been rendered redundant on account of the death of the Deputy Managing Director, following which according to her, that position was abolished. On that evidence, the finding of the trial judge was that, even if it were accepted that the position of Deputy Managing Director had indeed been abolished, that fact alone did not automatically render the appellant redundant.

The trial judge referred to the case of **Chilanga Cement Plc v Kasote Singogo**[1] where this Court held that **section 26B of the Employment Act** providing for redundancy did not apply to written contracts but was intended to safeguard the interests of those employees who were on oral contracts of service. As this was the section which the appellant had sought to rely on, the trial judge found it did not apply to her situation. In the absence of any evidence produced by the appellant to show that in terms of her substantive conditions of service, her termination was due to redundancy, the trial judge found that the respondent had

simply exercised its right to terminate the appellant's employment by ordinary notice, pursuant to **section 36 of the Employment Act,** which is a lawful way of terminating a contract of employment.

The learned judge further considered the respondent's defence, that the appellant had been paid all that was due to her which the appellant did not counter by producing any evidence to prove that her pension contributions were indeed underpaid. Accordingly, the trial judge found the appellant had failed to prove her claims of entitlement to redundancy benefits and dismissed her action. Dissatisfied with those findings, the appellant has brought her grievance to this Court on appeal, citing four grounds which are couched in the following terms:

1. **the trial judge misdirected herself in fact and law by not determining the termination of employment as a redundancy in the face of overwhelming evidence;**
2. **the trial judge misdirected herself in law and fact by holding that the employment was contractual when this was not so;**
3. **the trial judge misdirected herself in law and fact in finding that there were conditions of service inclusive of a pension scheme in existence;**
4. **the trial judge misdirected herself in fact and law in finding that the termination of employment was lawful, against the laws of natural justice.**

In the heads of argument filed in support of her grounds of appeal, the appellant in grounds one and four, anchored her arguments on the premise that she was rendered redundant by reason of the death of her immediate boss, the Deputy Managing Director. She also argued that the respondent in dismissing her had contravened the rules of natural justice. She relied on the case of **Kabwe v B.P. Zambia Limited**[2] which prohibits the termination of an employee's contract on grounds related to conduct or performance, without affording the employee with an opportunity to be heard. From those arguments, it appears the appellant's contention is premised on unfair termination on the basis that, she was not charged with any offence and neither was she afforded a hearing prior to her said termination. In the event, that the learned judge erred in her finding that her contract had been terminated lawfully and on the basis of which she did not award her any compensation.

The appellant further argued that, the judge erred in law and fact when she did not consider the Minimum Wages and Conditions of Service, **Statutory Instrument No. 2 of 2011** and thereby failed to find that the respondent was in contravention of

sections 63(1) and 108 (1) of the Industrial and Labour Relations Act. We are at a loss to appreciate this argument.

In grounds two and three, the appellant faults the trial judge for referring to the **Singogo**[1] case. The argument here, was that there was a formal contract of employment in that case, which was not there in her case. That as the appellant was serving on 'permanent terms' of employment, there could be no lawful termination of her employment before she attained the then, statutory retirement age of 55 years. The appellant's submission on the point was that, the trial judge erred in finding she had conditions of service when the document in issue, upon which the judge relied was not even authenticated by the Labour Commissioner.

The appellant went on to argue that, the judge also failed to consider that she was wrongly paid her pension by Saturnia Regina Pension Trust as the said entity was not duly registered and licenced as required by law. The submission was that, the learned judge ought to have taken judicial notice of a Notice issued by the Pensions Insurance Authority listing the registered pension managers in accordance with the **Pension Regulations Act No. 28 of 1996.** That as the respondents' Pension Fund was

not so listed, the sum of K16,190.22 rebased, withholding tax, was unlawfully deducted from her pension benefits and ought to be paid back to her.

In their response, the gist of the argument by counsel for the respondent was that grounds one, three and four of the appellant's appeal essentially raise the same issues: (i) that the judge did not consider redundancy as a reason for termination; (ii) she concluded that there were conditions of service when there were none; and that, (iii) the rules of natural justice were not observed.

The respondent submitted that, the test for redundancy is essentially that the employee's work must not be available, at all, and that this was not the case with the appellant's situation as the respondent was still in the same business and the work force had not been reduced. What the respondent simply chose to do, was to exercise its right to terminate the existing relationship and the onus was on the appellant to prove, based on her contract of service, that she was terminated by reason of redundancy.

Counsel argued that, the appellant cannot rely on **section 26B of the Employment Act** which applies to oral contracts, as she was employed on the basis of a written contract. The case of

Singogo[1], amongst others, was cited in support of the respondent's submission that, the appellant's claims should be disregarded for not being supported by any law. That it was also misleading for the appellant to now contend that there were no conditions of service when in her evidence given at the trial she admitted her conditions of employment were attached to the letter of offer.

On the appellant's assertions that the learned judge should have taken judicial notice of a public notice issued by the Pensions Insurance Authority, the respondent's position was that the appellant was now seeking to adduce fresh evidence she did not present before the trial court. Various authorities including **Mususu Kalenga v Building Limited and Another v Richman's Money Lenders Enterprise[3]** were cited in support of the principle that, where an issue is not raised for adjudication before the trial court, it cannot be relied upon on appeal. It was further argued that the said notice could, in any event, not apply to her case as it was only released in January, 2015 long after the appellant was terminated, on 30th January, 2012.

The respondent's submission was that, as her termination was purely based on payment made in lieu of notice pursuant to

section 36 of the Employment Act, the purported requirement to hear the appellant did not even arise. The respondent cited several English cases, and some from our jurisdiction, in arguing the point that, the appellant was bound by the contractual terms contained in her appointment letter whose acceptance she confirmed by appending her signature to the attached document containing the conditions of service. It was further submitted that, in a pure master servant relationship such as the appellant's, the respondent had lawfully exercised its right to terminate the employment contract and the learned judge could not be faulted on her findings.

On ground two, the respondent's observation was that, this ground as presented by the appellant was incompetent, incoherent and misleading. That the appellant cannot claim that there was no contract of employment when there clearly was one, clause 3 of which allowed either party to terminate by giving the other, three months' notice. The respondent submitted that, it is based on the written contract that it exercised its right to lawfully terminate the appellant's employment by paying her three months' salary, in lieu of notice. We were accordingly urged to dismiss the appellant's appeal for lack of merit.

At the hearing of the appeal, both parties indicated to the Court that they would entirely rely on their written heads of argument filed on record. We further granted the appellant leave to file her written reply to the respondent's heads of argument and submissions.

We have considered the evidence on record, the heads of argument filed by the appellant in person and those by counsel for the respondent. In our view, the only question arising for determination in this appeal on which all the grounds and arguments will stand or fall, is whether the appellant's employment was lawfully terminated in accordance with her contract of employment.

The relevant facts in determining that question as earlier highlighted, show the appellant was employed on 22nd June, 1998. Her offer letter dated 12th June, 1998 at pages 32 – 33 of the record, refers to her conditions of service, appearing on page 34. The said conditions of service provided for her responsibilities; commencement date of her employment; conditions of service relating to her salary; leave days; probation period; and termination of employment by either side giving three months' notice to the other. Through a letter dated 30th January,

2012 the respondent chose to terminate the appellant's employment without notice by paying her three months' salary, instead.

The appellant's grievance is hinged on the fact that, no reasons were given for the termination of her employment. Suffice in this regard to state that, parties to a contact are always at liberty to terminate it. This is a trite legal position, which obtains even at common law, that any contract of employment is terminable by the giving of reasonable notice. According to learned authors of **Halsbury's Laws of England 4th Edition, Volume 16 paragraph 572** every contract of employment however described, is terminable for a variety of reasons:

> **" In general, a contract of employment may be discharged by performance, mutual agreement, by impossibility of performance or by death of either the employer or employee."**

This Court has similarly restated that position of the law in past decisions including the case of **Zambia Privatisation Agency v Matale[4]** which was cited by the learned trial judge, that:

> **"The payment in lieu of notice was a proper and a lawful way of terminating the respondent's employment on the basis**

that, in the absence of express stipulation, every contract of employment is determinable by reasonable notice".

We have reinforced that position in various other decisions, including the case of **Redrilza Limited v Abuid Nkazi and Another**[5] where we stated that:

"In this case, the appellant was within its right, to terminate by notice as provided in the contract. If the appellant had terminated outside the contract, our views would have been different."

Further, the case of **Contract Haulage Limited v Mumbuwa Kamayoyo**[6] is authority for the proposition that in a pure master and servant relationship, an employer could terminate an employee's contract of employment for any reason or no reason at all, provided they complied with the notice period or paid the employee in lieu of giving such notice. In line with that reasoning, in a later case of **Gerald Musonda Mumba v Maamba Collieries Ltd**[7] we stressed the point that, it is the giving of notice or payment for the notice period which terminates a contract of employment, in the following words:

"The employer, in this case the respondent, was perfectly entitled to give notice for no reason whatsoever. In this respect, we disagree with the learned trial commissioner that, if a reason is given for termination of employment, that reason must be substantiated; that is not the law. It is the giving of notice or pay

> **in lieu that terminates the employment. A reason is only necessary to justify summary dismissal without notice or pay in lieu."** (underlining for emphasis only)

That position notwithstanding, we are alive to the fact that since the coming into effect of the **Employment (Amendment) Act No. 15 of 2015,** which amends **section 36 of the Employment Act, Cap 268,** an employer is now required to give a valid reason for termination of an employment contract. Unfortunately for the appellant, as the law does not generally apply retrospectively, she cannot rely on this change in the law as her termination was effected three years prior to the enactment of the said amendment. In the event, we are left with no legal basis for reversing the finding made by the trial judge, that the respondent was within its right to terminate her contract by payment in lieu of notice without giving any reasons, at all. The record shows the trial judge's finding had both the support of clause 3 of the appellant's contract of service as well as **section 36 of the Employment Act**, as it existed at the time.

Accordingly, our answer to the real question raised in this appeal of whether the appellant's employment was properly terminated by payment of three months' salary in lieu of notice, is in the affirmative.

We will now proceed to consider the four grounds of appeal and for convenience, will start with ground one, go on to ground four, after which we will tackle ground two and conclude with ground three.

Having determined that the appellant's contract was lawfully terminated by payment in lieu of notice, the issue of redundancy as the reason for termination, constituting ground one of the appeal falls away. Even assuming we were to consider the question whether the appellant's termination was infact a redundancy, there is no evidence whatsoever on record to support that proposition. In our view, the mere abolishing of the position of Deputy Managing Director did not mean abolishing the position of secretary in which the appellant was employed. To the contrary, evidence on record shows her position continued to exist as confirmed by her re-assigning to the Chief Accountant to whom she continued rendering the same secretarial services after the death of the Deputy Managing Director. The truth of the matter is that the appellant was never declared redundant; and her conditions of employment did not provide for redundancy. She could also not rely on **sections 26A** and **26B of the Employment Act, Cap 268** which only apply to oral contracts

when her contract was written. This was our decision in **Barclays Bank v Zambia Union of Financial Institution and Allied Workers[8].**

The same fate befalls ground four, in which the appellant alleges that she was not heard. Suffice to state that, when a contract is determined by notice, there is no obligation on the employer as the party terminating, to hear the employee.

Coming back to ground two which seems to suggest that there was no contract, counsel for the respondent has submitted that this ground is incompetent and incoherent. We agree. At the most, this is a misplaced argument and not a ground of appeal. The appellant herself in her evidence appearing at page 47 of the record of appeal admitted that, she "had a written contract of employment." Unless, of course, the appellant's argument is that the contract was not valid. If that be the case, there is still no evidence to support that proposition on record. The Minimum Wages and Conditions of Service **Statutory Instrument No. 2 of 2011** which the appellant sought to rely on in default of a valid contract, does not apply to employees serving on written contracts and we have already accepted the learned trial judge's finding on the evidence, that the appellant was serving under a

valid written contract of employment. **Section 63(1) of the Industrial and Labour Relations Act**, cited by the appellant also relates to collective agreements normally negotiated by Unions on behalf of Employees and provides for the registration of employers. **Section 108 (1)** provides restrictions on various modes of discriminations in employment. It is not clear how the appellant intended these sections to assist her in arguing her appeal. Both sections however, apply to matters commenced before the Industrial Relations Court and have no relevance whatsoever, to matters began in the High Court, where the appellant commenced her matter, subject of this appeal.

Lastly, on ground three of the appeal attacking the trial judge for not taking judicial notice of the fact that Saturnia Pension Trust was not a registered entity. Again, this is not a competent ground, as the matter was not raised before the trial court. It is also worth noting, that a party is not precluded from requesting the judge to take note of whatever the party wishes to bring to the court's attention by way of judicial notice. As we said in **Shamwana and 7 Others v The People[9]:**

> **" <u>Judicial notice refers to facts which a judge can be called upon to receive and to act upon</u> either from his general knowledge of them or from inquiries to be made by himself**

> **for his own information or from sources to which it is proper for him to refer"** (underlining for emphasis only)

Having indulgently addressed all the appellant's 'supposed' grounds of appeal and discounted them, we uphold the learned judge on his finding of fact, that the appellant's termination of employment by payment of three months' salary in lieu of notice was in accordance with her conditions of service and also supported by the relevant law as it stood at the time.

In sum, the evidence on record shows redundancy was not the reason for termination; the appellant had valid conditions of service; there was no evidence that Saturnia Regina Pensions Trust was not registered, in 2012 on the basis of which the court could have taken judicial notice that it was an unlawful entity; and the rules of natural justice did not apply for terminating a contract by payment in lieu of notice. It does not also assist the appellant to argue that she could not be terminated before attaining the age of 55 as she was employed on 'permanent terms,' as such an argument is not supported by the law. The learned authors of **Halsbury's Laws of England** aptly state that position in the following words:

> **"It seems that the employment offered to and accepted by**

an employee is described as "permanent employment" does not in itself normally create a promise of life employment or disentitle the employers from terminating the employee's contract on reasonable notice"

All in all, we find no merit, at all, in all the appellant's arguments raised in support of her four grounds of appeal and we dismiss it, in its entirety.

In passing, we wish to note that, it appears the appellant's real grievance is premised on allegations of unfair termination of employment after rendering 13 years of service and barely eight months away from reaching the retirement age of 55. There are also connotations of discrimination on the part of the respondent, as former employer. These grievances clearly fall within the mandate of the Industrial Relations Court (now Labour Division of the High Court). This is the only trial court mandated with powers to delve behind the surface of the matter and establish the real reasons behind the acts complained of, in order to dispense substantial justice to a complainant. The High Court in which the matter was commenced, does not have such powers.

In conclusion, on the issue of costs. In the circumstances of this matter we find an appropriate order on costs, is for each party to bear its own costs of the appeal and we so order.

Appeal dismissed.

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E. M. HAMAUNDU

SUPREME COURT JUDGE

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R. M. C. KAOMA

SUPREME COURT JUDGE

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J. K. KABUKA

SUPREME COURT JUDGE