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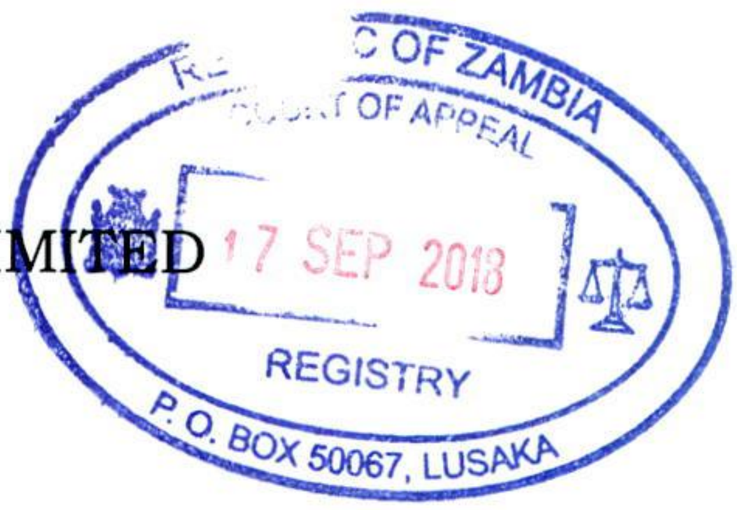
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO.18/2018

(Civil Jurisdiction)

BETWEEN:



SPECTRA OIL ZAMBIA LIMITED APPELLANT

AND

OLIVER CHINYAMA RESPONDENT

Coram: Mchenga DJP, Chishimba & Majula JJA
On 27th June, 2018 and August, 2018

For the Appellant: *Mr. C. Sianondo of Messrs Malambo & Co.*

For the Respondent: *Mr. B. Katebe of Kitwe Chambers*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Aristogerasimos Vangelatos and Others vs Metro Investment Limited and Others selected Judgment No.35 of 2016.*
2. *GDC Logistics Zambia Limited vs Joseph Kanyanta and 13 Others SJ No.17 of 2017.*
3. *Patmat Legal Practitioners (sued as a firm) vs Chip Zyambwaila Mudenda Ndele (Supreme Court Judgment No 62 of 2017).*
4. *Wilson Masauso Zulu vs Avondale Housing Project Ltd (1982) ZR 172.*

5. *Tom Chilambuka vs Mercy Joveh Mission International (Appeal No.171/2012).*
6. *Duncan Sichula and Muzi Transport Freight and Forwarding Limited vs Catherine Mulenga Chewe (married woman) SCZ Judgment No.8 of 2000.*
7. *National Milling Company Limited vs Grace Simataa and others SCZ Judgment No. 21 of 2000.*
8. *Zambia National Commercial Bank Plc vs Martin Musonda & 58 Others selected Judgment No.24 of 2018.*
9. *Barclays Bank Zambia Plc vs Weston Luwi and Suzyo Ngulube Appeal No.7 of 2012.*
10. *Swarp Spinning Mills Limited vs Sebastian Chileshe and Others (2002) ZR 23).*

Legislation referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia.*
2. *The Employment Act, Chapter 268 of the Laws of Zambia (as amended by Act 15 of 2015).*
3. *The Industrial and Labour Relations Act, Chapter 269*
4. *The Court of Appeal Act No. 7 of 2016.*
5. *The Court of Appeal Rules, SI No. 65 of 2016.*

This was an appeal against an award of 12 months' salary with interest as damages for wrongful dismissal.

The background of this appeal was that the respondent filed into the Industrial Relations Division of the High Court a complaint against the appellant alleging that the termination letter of employment by the respondent contravened **section 36 (c) (i) and**

36 (3) of the Employment Act. The respondent sought an order that the termination was null and void among other claims.

The respondent who was the complainant in the court below testified that he was employed by the appellant on 2nd January, 2003 as security guard. His appointment was subsequently confirmed on permanent and pensionable terms on 11th April, 2012. He was later promoted to the position of forklift driver on 1st June, 2012.

In 2013, he fought with a workmate and was given a final warning letter by the appellant for six months which he served until it expired. On 10th November, 2016, his employment was terminated by the respondent and no reason was given for the termination.

His duties as a forklift driver I ncluded loading and offloading goods in the appellant's warehouse. He stated that he was never charged for fraud by the appellant during his employment. He, however, confirmed having been paid all his dues by the appellant.

The witness for the appellant at trial testified that the conditions of service for the respondent provided for termination of employment by one month's notice or payment in lieu of notice. He narrated that the respondent was involved in a brawl on duty and was issued with a final warning.

The witness went on to testify that during the course of his employment, the respondent falsified overtime claims by inflating

figures and was also involved in fraudulent release of goods from the appellant's warehouse. That it is this conduct that led the appellant to terminate the respondent's contract. He was also not charged any offence involving fraud.

The second witness for the appellant was Mr. Isaac Nduli. His evidence was substantially similar to that of RW1. He however, stated that according to the appellant's Disciplinary Code, a final warning was only valid for six months and in the instant case, the final warning issued to the respondent was dated 3rd December, 2013.

The learned Judge in the court below considered the evidence before him as well as the parties' respective skeleton arguments and proceeded to make the following pronouncement.

The respondent's termination letter of employment by the appellant dated 10th November, 2016 contravened **section 36 (c) (i) and 36 (3) of the Employment Act** in that no reason was given for the termination of the contract. The court further found that the appellant breached the rules of natural justice by not according the respondent an opportunity to answer the allegations of fraudulent release of goods. The lower court concluded that the respondent's case was not properly investigated and was discharged on the basis of offences which were not proved against him. The court awarded damages to the respondent of 12 months' salary including all allowances and perquisites with interest thereon. He dismissed the

respondent's claims for redundancy benefits as well as damages for embarrassment, mental and physical torture.

It is against the aforestated judgment that the appellant has now appealed to this court. According to the grounds of appeal filed on 11th January, 2018, the appellant alleges as follows:

i) The court erred in law when it assumed jurisdiction of the matter when it was improperly constituted as there were no members during the hearing.

ii) The court erred in law in not determining the constitutionality of section 36(c) (i) and 36 (3) of the Employment Act, Chapter 268 as amended by Act No.15 of 2015 and consequently the court did not consider the appellant's right to invoke the notice clause.

iii) The court below erred both in law and in fact in holding that the appellant contravened section 36 (c) (i) and 36 (3) of the Employment Act, Chapter 268 as amended by Act No.15 of 2015 without considering the constitutionality of the said provision.

iv) The court erred both in law and in fact in granting the respondent 12 month's salary including all allowances and perquisites when the respondent had been paid the sum in lieu of notice and when the court also found as a fact that there was no embarrassment, inconvenience, mental and physical torture, the respondent suffered.

The appellant's argument in support of ground one was that although the issue of jurisdiction was not raised in the court below, can be raised at any stage of the case. To buttress this proposition, we were referred to the case of ***Aristogerasimos Vangelatos and Others vs Metro Investment Limited and Others.***[1] In this case, the Supreme Court restated the principle that a plea of want of jurisdiction can be raised on appeal, even where the issue was not raised in the court below as an exception to the general rule that an issue that has not been raised in the court below cannot be raised on appeal.

He referred the court to a number of authorities for the point that a single Judge of the Industrial Relations Division has no jurisdiction to adjudicate a matter involving a final determination without members. The authorities Counsel cited include the case of ***GDC Logistics Zambia Limited vs Joseph Kanyanta and 13 Others,***[2] ***Patmat Legal Practitioners (sued as a firm) vs Chip Zyambwaila Mudenda Ndele.***[3]

Counsel also cited **section 89(2) of the Industrial and Labour Relations Act** as well as **Rule 34 of the Industrial and Labour Relations Court Rules.**

Ground two and three were argued together as they both touched on the provisions of **section 36(c) (i) and 36 (3) of the Employment Act** as amended. It was argued that they were constitutional on the grounds of being discriminatory.

Counsel contended that the constitutionality of section 36 was never adjudicated upon by the lower court contrary to the directive of the Supreme Court in the case of ***Wilson Masauso Zulu vs Avondale Housing Project Ltd*** [4] where it was held inter alia that is the duty of trial courts to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality.

Counsel forcefully argued that the provisions in issue only obligates an employer to give reasons for termination but does not place the same requirement on an employee who desires to terminate to give reasons. He observed that this is unconstitutional and a breach of **Article 23 of the Constitution of Zambia.**

We were therefore urged to allow ground two and three of the appeal.

With regard to ground four, it was submitted that the lower court correctly found as a fact that the respondent did not suffer any embarrassment, inconvenience, mental and physical torture as a result of the termination of the employment contract. That, therefore, the normal measure of damages should have been a one months' salary which was already paid at the time of trial by the appellant. We were urged to follow the decision of the Supreme Court in the case of ***Tom Chilambuka vs Mercy Joveh Mission International*** [5] where it was held that unless the dismissal is very traumatic, the normal measure of damages is the salary for the

period for which notice should have been given. Counsel accordingly prayed that this ground of appeal should succeed.

The respondent field its response on 1st March, 2018.

In respect of ground one, it was contended on behalf of the respondent that the court below was on firm ground when it assumed jurisdiction of the matter without members sitting during the hearing. He quoted **Article 133 (2) of the Constitution of Zambia** which provides for the establishment of divisions of the High Court. Further reference was made to **Article 135 of the Constitution of Zambia** which provides as follows:

> *"The High Court shall be constituted by one Judge or such other number of Judges as the Chief Justice may determine."*

It was therefore the position of Counsel that with these new amendments in the Constitution, the requirement to sit with members in the Industrial Relations Court was done away with. It was thus contended that ground one of the appeal should be dismissed.

With regard to ground two and three, Counsel supported the holding of the court below when it held that the appellant breached the provisions of **section 36 (c) (1) and 36 (c) of the Employment Act**. It was vehemently argued that the issue of its constitutionality was never raised below either as a preliminary

issue or on any application to the court below. That the learned Judge was therefore in order not to determine its constitutionality.

In the alternative, Counsel submitted that constitutionality of **section 36 (c) (i) and 36(3) of the Employment Act** should be referred to the Constitutional Court in line with section **4(i) of the Court of Appeal Act and Order IV Rule 1 of the Court of Appeal Rules**. He however prayed that the appeal should not be stayed if the court were inclined to refer to that aspect.

The learned Counsel went on to **Article 23(3) of the Constitution,** on the meaning of the expression "discriminatory." Counsel stated that accordingly to the said Article, discrimination is prohibited on grounds of race, tribe, sex, place of origin, marital status, political opinions, colour of creed. He contended that there is no discrimination in **section 36 (c) (1) and 36 (3) of the Employment Act** based on any of the highlighted grounds. We were therefore called upon to dismiss grounds two and three.

Turning to ground four, the respondent contended that the court below was on firm ground when it awarded damages equivalent to 12 months salary including allowances and perquisites as a departure from the normal measure of damages. That this was necessitated by the harsh treatment and disregard of the rules of natural justice exhibited by the appellant. The case of ***Duncan Sichula and Muzi Transport Freight and Forwarding Limited vs Catherine Mulenga Chewe***[6] was cited for the principle that an appellate court should not interfere with an award unless it is clearly wrong in some way. Counsel accordingly prayed that the appeal be dismissed with costs.

On 14th February, 2018, the respondent filed a notice of cross appeal stating that he was partially dissatisfied with the judgment below and contended that the said judgment ought to be varied to the extent and in the manner and upon the ground that the respondent be deemed to have been declared retired or redundant on 15th November, 2016 and be paid terminal benefits when the appellant breached the employment contract.

In support of this ground of cross appeal, the respondent argued the court below, having found breach of contract by the appellant when it held that the respondent's employment was terminated on unsubstantiated allegations of fraud and overtime claims, this being a fundamental breach of contract it, should have deemed the respondent as retired or retrenched with effect from 11th November, 2016.

With the intention of persuading us on this point Counsel drew our attention to the case of ***National Milling Company Limited vs Grace Simataa and others***,[7] which held that:

> *"(i) if an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable."*

It was further submitted that the court below was empowered by virtue of **Section 85 A (c) of the Industrial and Labour**

Relations Act, to grant a remedy to deem the complainant as having been retrenched or retired as he had worked for the respondent for 13 years.

We now turn to consider the arguments before us suffice to state that we have taken into consideration all the evidence before us as well as the submissions by the respective parties.

This appeal focuses on the composition of the Industrial Relations Court following the amendment to the **Constitution of Zambia by Act No.2 of 2016** as well as the Employment (Amendment), Act No. 15 of 2015. These two pieces of legislation call for interrogation or interpretation. Before delving into each of the grounds we find it imperative to address our minds to the applicability of the Industrial Relations Court Rules.

APPLICABILITY OF THE IRC RULES OF 1974

The Constitutional Court when confronted with the question as to whether the Industrial **Relations Court Rules Statutory Instrument No. 206 of 1974** are still applicable to the Industrial Relations Division of the High Court pronounced itself in the case of ***Zambia National Commercial Bank Plc vs Martin Musonda & 58 Others***[8] where it held inter-alia that:

> *"A perusal of the Industrial Relations Court Rules shows that they give comprehensive guidance to an orderly conduct of court processes and procedure in that division of the High Court. Therefore, the commencement of actions in the Industrial Relations Court Division of the High Court is still governed by*

the Industrial Relations Court Rules until legislation is enacted to provide for the processes, procedures, jurisdiction, powers and sittings of the Industrial Relations Court Division in accordance with Article 120 (3) (a) and (b) of the Constitution as amended.

For avoidance of doubt, the Industrial Relations Court Rules promulgated under statutory instrument no. 206 of 1974 continue to govern the processes and procedures including the commencement of actions before the Industrial Court Division of the High Court by virtue of section 6(1) and 21 of the Constitution of Zambia Act No. 1 of 2016 and section 15 of the Interpretation and General Provisions Act.

Similarly, in the earlier case of ***GDC Logistics Zambia Limited vs Joseph Kanyanta & 13 Others,***[2] the Supreme Court reasoned in the same manner when they stated that:

> *"However, even though the IRC is now a division of the High Court, it is still guided by its own court rules……"*

In light of the foregoing, our hands are tied in that we are bound by the decisions of the Superior Courts. We are obliged to follow these decisions and there is as a matter of fact no reason for us to depart from them.

We adopt the decisions, in so doing, we are restating that the **Industrial Relation Court Rules of 1974** are still applicable

following the Constitutional Amendment of 2016. Put simply, the 1974 Industrial Relations Court Rules continue to govern the court.

COMPOSITION OF THE COURT

In ground one the appellant has argued that the court below erred when it assumed jurisdiction of the matter when it was improperly constituted.

This was on account of the fact that there were no members during the sitting. The appellant has conceded that although the jurisdiction of the court was not raised in the court below, they sought to raise it using the exception to the rule that when the jurisdiction of the court below is called into question, it can be raised at any stage before Judgment. The case of ***Aristogerasimos Vangelatos & Others vs Metro Investments Limited & Others.***[1]

We have no difficulty in the issue concerning the question of jurisdiction being raised at any stage before judgment is given. The issue being raised is the constitution of the Industrial Relations Court. The issue regarding the 1974 Rules having been settled which is that the Industrial Relations Court is guided by its own court Rules.

The bone of contention by the appellant is that section **89(2) of the Industrial Relations Court Act** provides for how the court shall be duly constituted.

It states as follows:

"The court when hearing any matter shall be duly constituted if it consists of three members or such an uneven number as the Chairman may direct."

In the case in *casu* the Judge did not sit in a panel in line with the above provision but sat alone without members and, according to the appellant, was as such improperly constituted.

The Constitution as amended established the Industrial Relations Court as a division of the High Court under Article 133 (2). It is clear from **section 89(2) of the Industrial Relations Court Act** that the composition of the Industrial Relations Court was the Chairman or Deputy Chairpersons sitting members. The question that arises is whether this is the position given the fact that the Industrial Relations Court is still governed by its own processes and procedures.

An examination of the Judgment by the Constitutional Court in the case of ***Zambia National Commercial Bank Plc vs Martin Musonda & 58 Others*** [8] reveals that they addressed themselves to this very issue. They guided that the Constitution, being the Supreme Law in Zambia, any other laws which are inconsistent with it are void to the extent of the inconsistency.

Article 133(2) of the Constitution established the division of the High Court, one of them being the Industrial Relations Court. The net effect of this being that the status of the Industrial Relations Court has been altered.

The Constitutional Court scrutinized **Article 120 (3) & (b) of the Constitution** which reads as follows:

"The following matters shall be prescribed:

(a) The processes and procedures of the courts;

(b) The jurisdiction, powers and sittings of the Industrial Relations Court, the Commercial Court, the Family Court and the Children's Court and other specialized Courts."

After critically analyzing the above provision, the court stated as follows:

"It will be observed that in terms of Article 120 (3) (b) of the Constitution as amended, the sittings of the Industrial Relations Court Division and other specialized courts are to be prescribed by Acts of Parliament. On the other hand, Article 135 of the Constitution as amended which provides for the sittings of the High Court stipulates that the High Court shall be constituted by one Judge or such other number of judges as the Chief Justice may determine. Legislation which will be enacted pursuant to Article 120 (3) (b) of the Constitution will have to take into account the provisions of Article 135 of the Constitution with regard to the sittings of the Industrial Relations Court Division and other specialized courts of the High Court. Article 135 of the Constitution therefore, settles the question of the composition of a division of the High Court when sitting to determine a matter before the court."

It follows, from the forgoing, that to the extent that **section 89(2) of the Industrial Relations Court Act** provides for the composition of the court to consist of three members or such uneven number is inconsistent with the Constitution and therefore void.

As explained in the case of ***Zambia National Commercial Bank vs Martin Musonda & 58 others***,[8] **article 135 of the Constitution** provides for sitting of the High Court. It lays to rest the composition of the Industrial Relations Court when sitting to determine a matter. That is it shall be constituted by one Judge or such other number of Judges as the Chief Justice may determine. The interpretation given by Mr. Sianondo regarding the ZANACO judgment is therefore incorrect.

On account of the foregoing, we find that the appellant's ground of appeal that the court below was improperly constituted as there were no members during the hearing to be bereft of merit and accordingly dismiss it.

CONSTITUTIONALITY OF SECTION 36 (C) (i) & 36 (C)

Grounds two and three are interrelated in that the appellant is contending that the court below did not determine the constitutionality of section **36 (c) (i) and 36 (c) of the Employment Act**.

We must at once point out that this issue was not raised by the respondent in the court below. The court did however, consider

the respondent's right to invoke the notice clause in light of the aforecited amendment.

The court held that the appellant contravened section 36 (c) (i) and 36 (c). It is our well considered view that the interpretation of the above provisions need to be laid to rest. Section 36(c) (i) and 36 (c) provides as follows:

> *"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 the provisions of this Act or otherwise except that where the termination is at the initiative of the employer, the employer shall give reasons to the employee for the termination of that employee's employment"; and*
>
> *(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."*

Our understanding of the above provisions is that there is an obligation placed on employers to give valid reasons to an employee when effecting a termination of the employment at the former's behest. The reasons given must be connected to the employee's

capacity, conduct or based on the operational undertaking of the employer. Therefore, it follows that if there is a failure by the employer to give valid reasons in accordance with the aforecited provisions of section 36 of the Act, the termination is rendered void.

Prior to the amendment of the **Employment Act**, an employer could have a notice clause in their contracts of employment and they could terminate an employee without specifying or citing any reason for the termination. With the coming into force of Act No. 15 of 2015, an employer cannot hide behind the notice clause and invoke it without giving any valid reason. The net effect of the foregoing is that to the extent that employment contracts have provisions for termination by notice without giving reasons, they are in contravention or in conflict with the provisions of section **36(1) and (3) of the Employment Act,** and the termination shall be unlawful.

Turning to the case before us, there is undisputed evidence that at termination the appellant relied on the notice clause and did not furnish the respondent with any valid reasons for the termination. It was only when the appellant was dragged to court that they put together a variety of offences which the respondent had allegedly committed. The Judge rightly so in our view dismissed these claims as they had come after the fact. The appellants' witness as well as the respondent were all in agreement that no reasons had been given in the letter of termination. This

therefore is in clear violation of the provisions of **section 36 of the Employment Act**.

For reasons articulated above, we find that the Judge in the Court below was on firm ground when he found that the appellants had contravened section 36 of the Act.

We therefore find grounds two and three devoid of merit and accordingly dismiss them.

AWARD OF DAMAGES

The appellant is aggrieved by the award of 12 months' salary including all allowances and perquisites.

There are a plethora of cases guiding on the measure of damages to be awarded. The case of ***Barclays Bank Zambia Plc vs Weston Luwi and Suzgo Ngulube*** [9] is quite insightful in this regard. The Supreme Court observed that:

> *At common law the measure of damages for wrongful termination of the contract of employment, is determined by the period of notice. The award is equivalent to the salary for the period of notice. However, there are exceptions. The case of* ***Swarp Spinning Mills Limited vs Sebastian Chileshe and Others***[10] *which Mr. Lukangaba's cited, clearly sets out what some for the exceptions to the normal measure of damages are. At this stage, we take the liberty to correct Mr. Lukangaba's assertion that mental anguish is the only exception. What we said in that case is that the normal measure of damages is departed from where the circumstances and justice of the case so demand." Therefore, termination inflicted in a traumatic*

fashion causing undue distress or mental suffering is but one example. Loss of employment opportunities is another."

Another illuminating case where the Supreme Court has guided is ***Duncan Sichula & Muzi Freight Transport and Forwarding vs Catherine Mulenga Chewe***[6] on the measure of damages and principle of calculation thereof, it was held that:

"An appellant court should not interfere with the award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misappropriated or because it is so inordinately high or so low that it is plainly a wrong estimate of the damages to which a claimant was entitled."

Therefore, in light of the foregoing it is our considered view that the award of 12 months salary to the respondent does not greet us with a sense of shock, notwithstanding the fact the court found that there was no embarrassment suffered by the respondent. We see no reason to interfere with the award, it is not inordinately high.

Costs follow the event to be taxed in default of agreement.

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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

.....
F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....
B.M. MAJULA
COURT OF APPEAL JUDGE