IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 149/2016

HOLDEN AT NDOLA SCZ/8/163/2016

(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
-10 JUN 2019
SUPREME COURT REGISTRY 2
P.O. BOX 50067, LUSAKA

BETWEEN:

FREDRICK MUKUKA APPELLANT

AND

ZCCM INVESTMENT HOLDINGS PLC RESPONDENT

Coram: Musonda, Ag DCJ and Kaoma and Kajimanga, JJS.
On 4th June, 2019 and 10th June, 2019

For the Appellant: Mr. B. Gondwe of Buta Gondwe and Associates

For the Respondent: Mr. B. Mbilima- In-House Counsel

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# J U D G M E N T

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Kaoma, JS, delivered the Judgment of the Court.

**Cases referred to**:

1. **Brandon Chikankatika and others v ZCCM Investments Holdings - Comp. No. 13/2011**
2. **Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others (2004) Z.R. 193**
3. **Swarp Spinning Mills Plc v Chileshe and others - SCZ Judgment No. 6 of 2002**
4. **Zambia Consolidated Copper Mines v Matale (1995-1997) Z.R. 144**
5. **Barclays Bank Zambia Limited v Chola and another - SCZ Judgment No. 8 of 1997**

**Legislation referred to:**

1. **Industrial and Labour Relations Act, Cap 269, section 85 (6)**
2. **Employment (Amendment) Act No. 15 of 2015, section 3(d) and 4(c)**

This appeal arises from a judgment of the Industrial Relations Court (IRC) delivered on 12th May, 2016 dismissing the appellant's claims against the respondent. The facts are easily ascertainable from the judgment and the settlement of issues and statement of agreed facts filed on 15th October, 2015.

The appellant was employed by the respondent in April, 2003 on permanent and pensionable conditions of service. On 1st June, 2008 he migrated to a renewable fixed term contract of three years when he was promoted to Financial Accountant. He was paid benefits on the basis of an *ex gratia* payment of one month's pay for each completed year of service for the 5 years and 2 months he served on permanent and pensionable terms.

On 30th May, 2011 the contract was renewed, to run from 1st June, 2011 to 31st May, 2014. On 6th September, 2011 he was appointed to act as Finance Manager effective 7th September, 2011 until advised further. He accepted the appointment by signing the letter. Clause 5.13.2 (a) of the Personnel Manual (Terms and Conditions of Service) which dealt with acting and responsibility allowances specified as follows:

> **"The maximum period for acting in a position shall be six months, on a continuous basis after which the employee shall be confirmed in the position or reverted to his substantive position."**

Now, the period of six months the appellant was required in terms of the above stipulation to act as Finance Manager ended on 5th March, 2012 but he was not confirmed in that position or reverted to his substantive position. On 20th April, 2012 he raised a grievance in writing pursuant to the respondent's Grievance Procedure Code on the basis that the acting period had exceeded the maximum period of six months.

According to the appellant, in terms of clause 3.2 of the Grievance Procedure Code, the respondent was required to deal with his grievance within five days but did not. On 11th May, 2012 he sent written reminders to the respondent to address his grievance but he received no response.

On 11th June, 2012 after acting for a period of over nine months, he filed a notice of complaint in the IRC seeking, inter alia, a declaration that the respondent's failure to confirm him in the position of Finance Manager amounted to unfair employment practice, was malicious and premised in bad faith; another declaration that he was duly confirmed as Finance Manager; payment of salary arrears; and general damages for mental torture.

A week later, on 18th June, 2012 he was reverted to his substantive position. In November, 2012 the parties asked the court to give them time to explore an *ex curia* settlement. During this intervening period, on 27th December, 2012 the respondent terminated the appellant's employment pursuant to clause 22.2 of his contract of employment by payment of three months' salary in lieu of notice. He was also entitled to accrued leave days and gratuity. No reasons were assigned for the termination.

On 26th April, 2013 the appellant filed an amended notice of complaint seeking, inter alia:

a. **A declaration that the respondent's action aforesaid amounted to unfair employment practices;**
b. **A further declaration that the appellant was duly confirmed in the position of Finance Manager upon the expiry of the mandatory six-month period and as such his separation package should be computed in accordance with this position;**
c. **Payment of salary arrears comprising the difference between the appellant's salary and Finance Manager's salary from the date of expiry of six months to the date of termination of the contract;**
d. **Payment of terminal benefits that were not paid to the appellant upon changing from permanent and pensionable employee through retirement to contractual conditions;**
e. **Damages for anguish and mental torture occasioned to the appellant;**
f. **Damages for loss of employment opportunities occasioned to the appellant because of the abrupt termination of employment;**
g. **Payment of emoluments for the remaining period of the contract up to 31st May, 2014 as the termination was effectively a constructive dismissal.**

On 19th June, 2013 the respondent also filed an amended answer and affidavit in opposition denying all of the above claims.

The matter first came up for trial before Judge Chanda. She heard the appellant's evidence and adjourned for the respondent's evidence. However, after her transfer to the High Court, the matter was dealt with by Judge Chisunka. No further oral evidence was received and the parties did not opt to rely on the oral evidence earlier adduced by the appellant.

Instead the appellant chose to rely on the amended notice of complaint and affidavit in support filed on 26th April, 2013 while the respondent relied on the amended answer filed on 19th June, 2013 and an amended affidavit filed on 4th August 2014 but which is not on the record of appeal. The court had earlier directed the parties to file agreed facts. They filed the Settlement of Issues and Statement of Agreed Facts. They also filed their respective submissions.

As can be seen from the issues settled by the parties, the court below was called upon to determine seven specific issues. We shall look at the issues in the order dealt with by the court.

The first issue the court was called upon to determine was whether the appellant should have been deemed to have been confirmed in the position of Finance Manager after acting for over six months.

The court noted that while clause 5.13.2 was couched in mandatory language in terms of the period for acting, it was silent on what should happen in the event that an employee was not confirmed or reverted to his position immediately after clocking six months of acting. The court accepted the respondent's argument that the clause did not provide for confirmation as a default course of action for acting in excess of six months nor did it have a deeming effect. The court concluded that the respondent acted properly when it reverted the appellant to his substantive position on 18th June, 2012.

For that reason, the second and third issues relating to salary arrears and balance on terminal package fell away.

However, in dealing with the first issue, the court also considered the appellant's argument that the terms and conditions of service formed part of the contract between the parties and the court must give effect to the provisions of the contract. The court further considered the agreed fact in paragraph 8 of the statement of agreed facts that in terms of clause 3.2 of the Disciplinary and Grievance Procedure Code the respondent was required to deal with and respond to the grievance raised by the appellant within ten days.

The court took the view that non-adherence to the provisions of the disciplinary code was a breach of contract provisions but this was not pleaded and did not form part of the issues to be determined by it. Thus, the court left the issue there.

The fourth issue the court considered was whether the appellant was similarly circumstanced with other employees in the case of **Brandon Chikankatika and others v ZCCM Investments Holdings**[1]. The complainants in that case were engaged on various dates in 2000 on month to month contracts which were determinable by either party giving a month's prior notice in writing. The respondent considered the complainants as consultants and not employees during their engagement. When their contracts were terminated in 2003, they were immediately offered longer term contracts as employees, doing the same work. The complainants demanded payment of accrued leave days and terminal benefits for the earlier period of 'service'. The respondent agreed to pay leave days but refused to pay terminal benefits on the ground that it had no provision in its conditions of service. The issue before the court was for the complainants to be declared employees for the earlier period of 'service', and therefore, be entitled to terminal benefits.

The court held that while the consultancy contracts did not provide for payment of leave days or gratuity upon termination, since a Mr. Mwiya and Mr. Phiri who were similarly placed as the complainants were paid terminal benefits, the complainants must also be paid gratuity of three months basic salary for each year of completed service and pro rata, while they served as consultants.

Coming to the present case, the court observed that the appellant was engaged on permanent and pensionable terms of employment and later migrated to fixed term contract and was paid *ex gratia* one month's pay for each year of service. Further, that his employment was continuing and was not terminated. The court did not see any similarities between the two cases.

The court went on to note that the Board resolution that put into effect the payment of the three months' pay for each completed year of service was passed in 2009 and backdated to July, 2008 while the appellant had migrated to a fixed contract on 1st June, 2008 meaning he could not benefit from the effect of that Board resolution.

Consequently, the court found and held that the appellant was not and could not be deemed to be similarly circumstanced as the employees in the **Brandon Chikankatika**[1] case.

The fifth issue the court dealt with was whether the appellant was entitled to damages for anguish and mental torture. The court did not see any basis upon which it could make a finding on this aspect and dismissed it.

The sixth issue dealt with was whether the appellant was entitled to damages for loss of employment opportunities occasioned to him as a consequence of the abrupt termination of employment. The court observed that in terms of clause 22 of the contract of employment, either party was at liberty to terminate the contract by giving three months' notice to the other; and the respondent exercised this right and terminated the employment by payment of three months' pay in lieu of notice. Accordingly, the court found that the termination was lawful.

The last issue the court considered related to payment of emoluments for the remaining period of the contract as the termination was effectively a constructive dismissal. The court found that since the appellant did not resign, there was no constructive dismissal. In short, all of the appellant's claims failed and were dismissed.

Aggrieved by this decision the appellant appealed to this Court advancing five grounds namely:

1. **The court below erred in law and in fact when it held that the appellant was not similarly circumstanced to the complainants in the case of Brandon Chikankatika and others v ZCCM Investments Holdings Plc.**

2. **The court erred in law and in fact by holding that the respondent, even though in breach of the contract of employment, was not liable to the appellant by way of damages for wrongful dismissal.**

3. **The court below misdirected itself in law by refusing to grant damages for unfair dismissal to the appellant despite finding that this was so but the same was not pleaded.**

4. **The court below erred in law and in fact by refusing to grant damages for mental torture and anguish to the appellant.**

5. **The court below erred in law and in fact when it held that the appellant should not have been deemed to be Financial Manager.**

Both parties filed heads of argument in support of their respective positions on which they relied. Counsel for the appellant also relied on the submissions filed in the court below which we shall not restate here but have been taken into account.

In respect of ground 1, counsel for the appellant argued in the heads of argument that under **section 85(6)** of the **Industrial and Labour Relations Act**, awards, decisions or judgments of the court bind both parties to the matter and those affected by it. Learned counsel contended that since it was not disputed that the appellant was an employee, at termination he was also entitled from the date of engagement up to his migration to fixed

contract to be paid similarly by way of gratuity as was done in the **Brandon Chikankatika**[1] case.

It was also submitted that the appellant never relied on the Board resolution but only on the above case which created the obligation under **section 85(6)**.

In response, learned counsel for the respondent submitted that the court below was on firm ground when it held that the appellant was not similarly circumstanced with the complainants in the **Brandon Chikankatika**[1] case because the court correctly took into consideration the employment status of the appellant which was different from the complainants in the other case.

It was also argued that the court properly directed itself in law and fact when it took cognizance of the fact that the appellant was on permanent and pensionable employment and migrated to a fixed term contract and there was no termination.

Counsel further submitted that the court could not be faulted in its reliance on the Board resolution that put into effect the payment of three months' pay for each year of service.

We have considered the above arguments. The issue raised by this ground is whether the appellant was similarly circumstanced with the complainants in the **Brandon**

**Chikankatika**[1] case. The appellant's argument is that since he was an employee, he was entitled at termination to be paid similarly, gratuity of three months' pay for each year served from date of engagement to date of migration to contractual position.

In determining this issue, the court below reviewed the earlier case and pointed out the differences in the two cases. We agree with the court below that the employment status of the complainants in the earlier case and that of the appellant in this case was different and we do not want to belabour the point.

Further, like we said in the case of **Zambia Consolidated Copper Mines v Jackson Munyika Siame and others**[2], the appellant was not terminated at the same time and in the same manner as the other complainants. Therefore, the court below was on firm ground when it found that the appellant was not similarly circumstanced with the complainants in the **Brandon Chikankatika**[1] case. Furthermore, we do not see anything wrong in the court referring to the Board resolution. Ground 1 must fail.

In ground 2, the court is faulted for not awarding the appellant damages for wrongful dismissal even though the respondent was in breach of the contract of employment. It was argued that the respondent not only breached the conditions of

employment vis-à-vis grievance procedure on confirmation but proceeded to maliciously use the notice clause to dismiss the appellant once he brought the complaint to court. That this was not only wrongful but also unlawful as argued in ground 3.

Learned counsel further argued that the court should have awarded the appellant damages in line with the claim for abrupt termination and putting the appellant out of a job particularly that it is difficult to find a similar job. The case of **Swarp Spinning Mills Plc v Chileshe and others**[3] was cited to support the argument that the appellant be granted not less than two years' salary with interest as compensation or damages.

In response, counsel for the respondent submitted that the court below was on firm ground when it refused to hold the respondent liable for damages for wrongful dismissal since the appellant's contract was terminated in accordance with his contract of employment by payment in lieu of notice.

In ground 3, the court is assailed for refusing to award damages for unfair dismissal. It was argued that the appellant's employment was capriciously terminated merely because he had taken the respondent to court after it failed to redress his

grievances and that the use of the notice clause was malicious and a reprisal for the court action.

It was further argued that the court was supposed to delve behind the notice clause to see the real reasons for termination, even if the claim was inadequately couched. The cases of **Zambia Consolidated Copper Mines v Matale**[4] and **Barclays Bank Zambia Limited v Chola and another**[5] together with **section 3(d) and 4(c) of the Employment (Amendment) Act No. 15 of 2015** were relied on to support this argument.

On the other hand, counsel for the respondent submitted that the court could not be blamed for refusing to grant damages for unfair dismissal on the basis that the same was not pleaded. It was argued that the parties were ably represented by counsel throughout the proceedings; and they filed a statement of agreed facts and narrowed down issues to be determined by the court. Therefore, the omission by the appellant to seek damages for unfair dismissal was done at his own peril.

We shall deal with the two grounds together as they are connected. First and foremost, as conceded by counsel for the appellant at the hearing of the appeal, the appellant did not in his notices of complaint or affidavits in support seek for a

declaration or order that the termination of his employment was wrongful or unfair or for damages for wrongful or unfair dismissal. Neither did the appellant seek for an order that the respondent's failure to confirm him in the position of Finance Manager after acting in that position for over six months, which he alleged amounted to unfair employment practices, resulted in wrongful or unfair dismissal.

Secondly, counsel for the appellant conceded in his filed heads of argument that the claim was inadequately couched but wanted to rely on the case of **Barclays Bank Zambia Limited v Chola and another**[4] when, as correctly argued by counsel for the respondent, the appellant was ably represented by counsel throughout the proceedings in the court below and he had opportunity to amend the notice of complaint.

Thirdly, as accepted by the appellant's counsel at the hearing of the appeal, the question of wrongful or unfair dismissal was not one of the issues settled by the parties for the court's determination. Indeed, the court below is a court of substantial justice but the court could only deal with the definite issues that were defined by the parties. In our view, there was no basis on which the court could award damages for wrongful or

unfair dismissal in line with the claim for abrupt termination when these were not pleaded or defined by the parties or proved.

Fourthly, as noted by the court below, the appellant's employment was terminated in accordance with clause 22.2 of his contract of employment by payment of three months' salary in lieu of notice. This was a lawful and acceptable way to terminate the contract unless the appellant could prove malice to enable the court to delve behind the notice clause. Regrettably, the issue of delving behind the notice clause was not defined by the parties for the court's determination and was only referred to by counsel for the appellant in his submissions.

Fifthly, the appellant sought to rely on the **Employment (Amendment) Act, 2015** to argue that he was not given reasons for termination of his contract when his employment was terminated long before the enactment of that law.

Lastly, the court below did not find that the appellant was unfairly dismissed because of the breach of the contract provisions. The issue the court touched on, and in passing we must say, as it considered the first issue of whether the appellant should have been deemed to have been confirmed related to the agreed position that in terms of clause 3.2 of the conditions of

service, the respondent was required to respond to the grievance raised within ten days.

However, as rightly stated by the court below and submitted by counsel for the respondent, the issue of damages (if any) arising from the breach of contractual provisions was again not settled by the parties for the court's determination. On the basis of all the foregoing, grounds 2 and 3 lack merit and equally fail.

Coming to ground 4, the court below is faulted for refusing to award damages for anguish and mental torture. Learned counsel for the appellant submitted that the appellant was unfairly treated and he had to bring the matter to court to seek redress for the wrongs he suffered, only to be dismissed which was a blatant aggravating circumstance which made this case appropriate for damages for anguish and mental torture. He also mentioned some benefits that the appellant should have been enjoying during the notice period such as medical treatment.

On the contrary, counsel for the respondent contended that the court was on firm ground when it refused to award damages for mental torture and anguish as the appellant had not led evidence that could prove the damages he was seeking and the

court as a trier of facts did not have the basis upon which it could award such damages.

We hasten to say that the court below cannot be faulted for refusing to award damages for mental torture and anguish especially after finding that the termination was lawful. The issue of benefits the appellant should have been enjoying during the notice period is extraneous to this appeal particularly that he was not given notice. Consequently, this ground must also fail.

In ground 5, the court below was accused of holding that the appellant should not have been deemed to be Finance Manager. It was argued both here and in the court below that in terms of clause 5.13.2(a) of the conditions of service, after six months of acting, the appellant should have been deemed to have been confirmed in the position of Finance Manager in default of being reverted to the substantive position and that there was legitimate expectation of being confirmed.

Furthermore, at the hearing of the appeal, counsel for the appellant referred us to some documents on the record in an attempt to persuade us that the appellant's performance was more than satisfactory. Hence, he should have been confirmed.

In opposition, counsel for the respondent submitted that the court below was right when it refused to deem the appellant confirmed in the position of Finance Manager; and in its interpretation of clause 5.13.2(a) of the conditions of service.

The crux of this aspect of the matter, as submitted by counsel for the appellant in the court below lay in the interpretation of clause 5.13.2(a) and not on the documents alluded to by counsel, which documents were never referred to in the appellant's affidavit in support of amended complaint. The documents should have been explained by the appellant in the court below. Counsel cannot attempt to do so now as that would amount to giving evidence from the bar.

The court below in interpreting clause 5.13.2(a) found that the clause did not provide for confirmation as a default course of action for acting in excess of six months or have a deeming effect. We do not agree with the submission by counsel for the appellant in the court below that there was ambiguity in this clause or that confirmation was automatic upon acting for the maximum period of six months. We totally agree with the interpretation of the clause by the court below.

We recognise that there may have been some legitimate expectation created when the appellant was left to act for a continuous period of more than nine months.

However, from the submissions of learned counsel for the appellant in the court below, it seems that there were some underlying issues of reorganisation of which the appellant was aware which prevented the respondent from confirming him in the position of Finance Manager. Therefore, ground 5 also lacks merit and must fail.

In the event, the appeal is dismissed. We make no order as to costs.

**M. MUSONDA**
**ACTING DEPUTY CHIEF JUSTICE**

**R.M.C. KAOMA**
**SUPREME COURT JUDGE**

**C. KAJIMANGA**
**SUPREME COURT JUDGE**