IN THE INDUSTRIAL RELATIONS COURT **COMP 148/2015**

HOLDEN AT LUSAKA

BETWEEN:

RAYMOND KAIMFA **1ST COMPLAINANT**
HARRISON MPANDE **2ND COMPLAINANT**

AND

CFB MEDICAL CENTRE LIMITED **RESPONDENT**

CORAM: J. CHINYAMA, CHAIRMAN

HON. K. KALALUKA, MEMBER

HON. N.Z. MBEWE, MEMBER

Appearances:

For the Complainants: Mr. L. Phiri, Messrs Chonta, Musaila & Pindani Advocates

For the Respondent: Mr. G. Chama, Messrs Dhudhia & Co.

JUDGMENT

Cases Referred to:

1. *Gerald Musonda Mumba v Maamba Collieries Limited (1988 - 1989) ZR 217*
2. *Chilanga Cement Plc v Kasote Singogo (2009) ZR 122*
3. *Zambia Consolidated Copper Mines Limited v Matale (1995 - 1997) ZR 144*
4. *Redrilza Limited v Abuid Nkazi & Ors (2011) 1 ZR 394*
5. *Barclays Bank Zambia Plc v Weston Luwi & Suzgo Ngulube SCZ Appeal No. 7 of 2012*
6. *Agholor v Chesebrough Ponds (Zambia) Limited (1976) ZR 1*
7. *Caroline Tomaidah Daka v Zambia National Commercial Bank Limited (2012) 3 ZR8*

8. *Barclays Bank of Zambia Limited Tolani Zulu and Musa Hamwala (2003) ZR 127*

Legislation Referred to:

1. *Employment Act, Chapter 269, Laws of Zambia.*
2. *Industrial and Labour Relations Act, Chapter 269, Laws of Zambia.*
3. *Employment (Amendment) Act, No. 15 of 2015.*

The two Complainants' respective contracts of employment were terminated purportedly under the termination clause on the recommendation of the respondent's disciplinary authority at the end of a disciplinary process. The Complainants felt that the termination of their contracts of employment was not reasonably justified. They came to court with the following claims:

(a) that the Complainants be paid damages for the wrongful, unwarranted, unlawful and unfair termination of their respective contracts of employment;
(b) interest on all sums found due;
(c) any other relief the court may deem fit;
(d) costs.

Matters of common occurrence, in this case, were that the 1st Complainant had been employed as the Respondent's Chief Financial Officer while the 2nd Respondent had been an Assistant Accountant. In the course of their employment, the respondent's management caused to be conducted a financial audit of its operations. As a result of the audit, the duo were charged with four disciplinary offences as

follows: (1) Causing damage to company image or business contrary to clause 37 of the Disciplinary Code in that the duo had allegedly failed to maintain up to date cash books and bank reconciliations in the year 2014; (2) Violation of the company's working/operating methods and procedures contrary to clause 35 of the Disciplinary Code in that the duo had allegedly misapplied or abused petty cash on meals, transport/fuel and personal errands; (3) Any act which is likely to bring the employer and/or its staff into disrepute contrary to clause 4 of the Disciplinary Code in that the duo had omitted to make loan recoveries from their own and other employees' salaries in stated months; and (4) Contravention of employee's obligations pursuant to clause 9 of the contract.

It is notable that under the Respondent's Disciplinary Code the penalty for the offence in clause 4 is dismissal after investigations on a first breach. The penalty for the offence in clause 35 is suspension or dismissal on first breach depending on the gravity of the offence. The penalty for the offence in clause 37 is discharge after investigations. Clause 9 of the contract which set a list of the employee's obligations did not provide any sanctions on breach. We

note that clause 10 in the contract stipulated conduct which would lead to the summary dismissal of the employee including for offences under the Disciplinary Code but did not cover breach of the employee's obligations. In the result, we conclude that the usual common law right entitling the employer to deem the contract as having been repudiated upon the occurrence of a breach would apply for any breach by an employee of his or her obligations.

The Complainants wrote exculpatory letters in answer to the charges. In his exculpation, the 1st Complainant did not deny that there was a failure to maintain and update cash books or do reconciliations for the year 2014. He blamed the circumstance on "operational challenges" on which he elaborated. With regard to the alleged abuse of the petty cash, the 1st Complainant endeavoured to justify the use of the money. He stated that the expenditures were necessary. On the non-recovery of the loans, the 1st Complainant explained that the loan recovery was merely delayed due to a technicality. As to his responsibilities under clause 9 of the contract, the 1st Complainant stated that despite some shortcomings in the reconciliation function and "some timing differences in loan

recoveries", the audit had not "revealed any financial loss to cfb". He, however, concluded by taking full responsibility of all the issues raised in the charges and asked for a chance to improve on any areas of weakness.

For his part, the 2nd Complainant explained in his exculpation that he had spent most of his working hours attending to teething implementation problems of the (accounting) systems. He stated though that he did not understand how the delayed reconciliation may have damaged the company image and asked for clarification of the charge. On the petty cash expenditures the explanation was that the transactions ranged from cost saving to increased productivity efficiencies for cfb. He, accordingly, did not see how this had anything to do with clause 35. On the staff loan non-recoveries, the 2nd Complainant explained to the effect that there were system delays but indicated that he needed to verify some entries. In relation to clause 9 of the contract, he contended that the offences did not prove that he had contravened the employment covenant, that he spent most of his time working in the best interest of the company.

The respondent then convened a disciplinary hearing at which the Complainants appeared. The outcome of the hearing were recommendations by the disciplinary committee. In respect of the 1st Complainant (Raymond Kaimfa), the recommendation was in the following manner:

> **"RECOMMENDATION**
> **After the hearing of Raymond Kaimfa the panel convened to discuss the submission made by Kaimfa. After a lengthy discussion and analysis the committee found Kaimfa guilty of violating the following offences of the Disciplinary Code of Conduct. It was clear that Kaimfa accepted he made a mistake and based on the findings as well as the penalties for the offences he committed they call for him being summarily dismissed and report sent to the Labour Office.**
>
> **The Panel also realized that Kaimfa was a professional person who needed to proceed with his future in this regard Management should use their discretion instead of summarily dismissing him they should terminate his employment services giving him one month pay in lieu of notice."** (sic)

The recommendation in respect of the 2nd Complainant (Harrison Mpande) was in the following terms:

> **"RECOMMENDATIONS**
>
> **After the hearing the Panel convened to discuss the submission made by Harrison it was resolved he should also be terminated because clearly he was not executing his duties diligently and effectively. Since he has accepted his wrong doing Management can use its discretion to terminate him and not report to Zambia Institute of Chartered Accounts"** (sic)

Following the recommendations made on 23rd April, 2015, the Respondent wrote similarly worded letters dated 27th April, 2015 to each Complainant terminating their employment in the following terms:

> **"RE: TERMINATION OF EMPLOYMENT CONTRACT**
> **Reference is made to the disciplinary hearing proceedings held on 23rd April, 2015 in which you exculpated yourself over the charges laid down to you after you made a response to the charge letter dated 21st April, 2015.**
>
> **Management has studied the case diligently and all factors you highlighted during the hearing. The same has been found unsatisfactory. It is very clear that you never performed your duties as per expectations. Management also observed that you tried as much as possible to justify your shortcomings even when your working attitude has been found wanting as your actions were made without concern or care for the end consequences even when you pleaded to faithfully execute your duties as outlined in your contract of employment.**
>
> **Taking due consideration that you did apologise of your shortcomings and the fact that the relationship has now soured it will not be right for you to continue in the employment of the company.**
>
> **Management has decided to invoke the termination of employment Clause 3.3 of your employment contract, by paying you one month gross pay in lieu of notice to terminate your employment with the company."**

Each letter tabulated the severance package which included one month's pay in lieu of notice. The outcome was that the 1st Complainant was going to be paid the sum of K80,669.00 while the 2nd Complainant was owing the Respondent the sum of K7,654.86

which took into account money owed to the respondent company and a bank loan.

It is common cause, as it were, that indeed Clause 3.3 in each respective contract provided that either party could terminate the employment at any time by giving not less than one month's prior written notice to the other of the intention to terminate the contract of employment.

By their affidavit and oral evidence given by the 1st Complainant, it was averred by the Complainants that the disciplinary process should have been exhausted and that the manner in which the matter was resolved did not avail them an opportunity to appeal. The 1st Complainant felt that by invoking the termination clause the Respondent was hiding something; that the disciplinary Code did not provide for termination by notice (or payment in lieu thereof); that proper and fair evidence was not given. The 1st Complainant also testified that the minutes of the proceedings at the disciplinary hearings did not reflect what transpired in the meetings. He explained that his statement in the exculpatory letter that he took

responsibility for what had transpired did not mean that he had accepted the charges.

In cross-examination, the 1st Complainant admitted that under clause 3.3 of the contract either party could terminate the contract at any time. He stated that there was no right to appeal against a mere termination but that he was not precluded from appealing (i.e. requesting the employer to reconsider the decision to terminate). He agreed in relation to the subject matter of the disciplinary charges that there were short comings in the reconciliations.

In re-examination, the 1st Complainant stated that he had an expectation that the disciplinary process would be exhausted.

The affidavit and oral evidence of the first witness called by the respondent, (RW1) was that the Complainants were found culpable at the disciplinary hearing; that they apologised but the relationship had soured. The respondent invoked the termination clause. She stated that the Complainant could have appealed against that manner of terminating their employment. Her view was that the termination of the contracts of employment was lawful and not wrongful or unwarranted or unfair as alleged by the Complainants.

The witness implored that we dismiss the complaint and order the 2nd Complainant whose account showed that he owed the Respondent to pay what was due.

In cross-examination, RW1 replied that (had the disciplinary process been followed to the end) it was possible that the Complainant could have been discharged. She responded also that the interim audit report on which the charges were based did not contain the final findings of the audit; that a second team of auditors were engaged whose work had not completed by the time of these proceedings; that the outcome of the report could be better or worse; and that the final audit report could alter the interim report findings. She replied that the Complainants could not invoke the grievance procedure to question the termination.

In re-examination, RW1 stated that the Complainants were dealt with in accordance with the disciplinary procedure.

The evidence of the second witness for the Respondent (RW2), Mrs. Esther Kafisa Chisenga was that she was a labour consultant. She testified that her firm chaired the disciplinary hearing in which she acted as secretary. She vouched for the due integrity of the hearing

and the minutes. She stated that the decision to terminate the Complainants' employment was taken to avoid tarnishing their professional records.

In cross-examination, RW2 replied that the minutes were not a misrepresentation of what transpired. She was not re-examined.

The learned advocates on either side filed written submission for which we are grateful.

The summary of the submission on behalf of the Complainants is that the Respondent was perfectly entitled to invoke the termination clause as provided in the contract within the provisions in section 36 of the **Employment Act** and the principles laid down in the cases of **Gerald Musonda Mumba v Maamba Collieries Limited**[1] and **Chilanga Cement Plc v Kasote Singogo**[2]. It was, however, submitted that this court has power to look behind a seemingly proper termination to redress any injustices found as stated in the cases of **Zambia Consolidated Copper Mines Limited v Matale**[3]; **Redrilza Limited v Abuid Nkazi and Others**[4] and **Barclays Bank Zambia Plc v Weston Luwi and Suzgo Ngulube**[5].

Counsel contended that this is a proper case in which we should exercise our discretion to pierce the termination by notice veil because the Complainants' contracts of employment were terminated as a result of what counsel called the "inconclusive disciplinary proceedings" which deprived them of the right to appeal with the possibility of a favourable outcome; that the Respondent relied on an interim audit report which was not availed to the Complainants which, in any case, was not final and could be altered by a final report; that the Complainants did not see the minutes of the disciplinary proceedings which were filed into court very late on 23rd September, 2015 when they came into existence on 23rd April 2015; and in any event that if the Complainants were found culpable as claimed by the Respondent they should have been dismissed rather than mask their alleged incompetence and/or inadequacies with a purportedly sympathetic termination under the notice clauses.

It was submitted, accordingly, that we award the Complainants damages of 24 months' salary bearing in mind the grim prospects of finding employment as well as the general cost of living and economic down turn which, according to Counsel, were currently plaguing the

nation. Reliance for this last submission was placed on the case of **Barclays Bank Zambia Plc v Weston Luwi and Suzgo Ngulube** *ante*. It was Counsel's prayer that the Complainants be awarded the claims endorsed with costs.

In response to the Complainants' submissions, it was submitted on behalf of the Respondent regarding the manner in which the employment was terminated, that there was nothing wrongful, unfair, unlawful or unwarranted about it. It was denied that the termination was wrongful as it was done in accordance with the terms of the contract and the law. It was argued that the employer has a right to terminate the employment of an employee at any time, for whatever reason or for none at all. The cases of **Agholor v Chesebrough Ponds (Zambia) Limited**[6] and **Caroline Tomaidah Daka v Zambia National Commercial Bank Limited**[7] were cited in support of the submission.

In relation to the claim that the interim audit report was not availed to the Complainants, it was submitted that the particulars of the disciplinary offences were sufficient and there was no obligation to avail the report to the Complainants.

It was contended that even if it were permitted, as argued by the Complainants, that having been charged, the disciplinary process should have been exhausted, clause 10.1.3 of the contracts of employment for both Complainants provided that the "Respondent may summarily dismiss," thus giving discretion to the Respondent to either summarily dismiss or terminate the contract in any other manner.

It was emphasised ~~out~~ that the Respondent lawfully exercised its right under clause 3.3 of the contract of employment by paying the Complainant one month's gross pay in lieu of notice which has been held in several authorities to be a lawful way of bringing a contract of employment to an end. The cases of **Gerald Musonda Mumba v Maamba Collieries Limited** *ante*; **Chilanga Cement Plc v Kasote Singogo** *ante* and **Tolani Zulu and Musa Hamwala v Barclays Bank of Zambia Limited**[8] were relied on.

On whether the termination was unfair, the submission was that there was no evidence that the Complainants were unfairly dismissed or treated in a discriminatory manner on any of the grounds under section 108 of the **Industrial and Labour Relations Act;** or that

there was no reasonable justification for the termination on the basis of the High Court decision in the case of **Caroline Tomaidah Daka** *ante*.

On whether the termination was unwarranted, the submission was that the Complainants did not execute their tasks in accordance with their job descriptions under the contracts of employment; that they were also found guilty of abusing petty cash. Therefore, that besides summarily dismissing them from their employment, the Respondent had the option of simply terminating the contracts which it did in accordance with the Supreme Court decision in the **Tolani Zulu and Musa Hamwala** case *ante*.

On the argument that the Complainants were precluded from appealing because of the termination, it was pointed out that under the disciplinary code the employee had the right to appeal at appropriate stages in the disciplinary process but in any case that the want of a right to appeal did not make the termination by notice unlawful, unfair or wrongful.

Regarding the court's discretion to delve into the reasons behind the termination by notice, it was submitted that this is not a suitable

case to exercise the discretion; that no malice or lack of rational reason has been proved; that the circumstances leading to the termination are evident in the letters of termination.

As to the veracity of the Minutes of the disciplinary committee, it was submitted that the Complainants have not provided what they claim to be the correct version of what transpired at the hearing.

Learned Counsel submitted, however, that in the event that we find in favour of the Complainants, the damages due to the Complainants should be based on the period of notice as determined in the case of **Chilanga Cement Plc v Kasote Singogo** *ante*. That this being the case, it should be found that this has already been paid to the Complainants as stated in the letter of termination; that in fact the 2nd Complainant owes the Respondent the sum of K7,654.86 which we should order to be paid to the Respondent.

It was argued that the complaint is baseless and lacks merit and we were urged to dismiss the claims with costs to the Respondent.

We have considered the complaint, the evidence and the submissions on either side. We are grateful to counsel on either side

for the correct expositions of the law on the various issues argued. It is common cause that the two Complainants' employment was terminated with reference to the notice clauses contained in their contracts of employment. It is also not in dispute that prior to that the Respondent had embarked on a disciplinary process which culminated in findings that the Complainants had admitted their wrongdoing and were guilty of the offences charged and recommendations were made by the disciplinary body that their contracts of employment be terminated to save their professional careers. As we see the matter, therefore, the central issue to be determined is firstly, whether the Respondent should have exhausted the disciplinary process rather than resort to invoking the terminations under the notice clause; and secondly, whether this is a proper case to look behind the termination under the notice clause to determine whether there was any injustice done to the employees which we must redress.

We agree in the first place that an employer was always entitled to terminate a contract of employment at any time with or for no reason at all so long as if it was done in contravention of the contract

of employment, the employee would be entitled to sue for damages. The case of **Chesebrough Ponds** is authority for saying so. This position is, of course no longer tenable after the enactment of the **Employment (Amendment) Act no. 15 of 2015** which took effect in November, 2015 and amended section 36(1) (c) of the **Employment Act** by adding to the provision a requirement that where the termination of a contract of service is at the initiative of the employer, the employer shall give reasons to the employee for the termination of the employee's employment. The amendment has further added subsection (3) which stipulates that **"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".** There are exceptions under the new subsection (4) regarding reasons that are not valid for the termination of a contract which it is presently not necessary to restate. All these apply only to written contracts of employment. There are separate provisions dealing with the termination of oral contracts of employment under the **Employment Act**. Suffice to

conclude that the two Complainants' contracts of employment were terminated in April 2015, well before the amendments took effect.

To return to the matter at hand, it is also the law that the mere fact that the employer had instituted disciplinary proceedings did not deprive the employer of its right to invoke a termination under the notice clause where such was provided in the contract of employment as was made clear by the Supreme Court in the **Barclays Bank Zambia Limited v Tolani Zulu & Musa Hamwala** case or otherwise under the common-law. We also agree that this court has jurisdiction to look behind a termination under the notice clause to examine the reasons given for the termination and that if any injustice is discovered, to redress it. The Supreme Court made this clear in the case of **Zambia Consolidated Copper Mines Limited v James Matale.** In the case of **Redrilza Limited v Abuid Nkazi & Ors** the Supreme Court, however, made the qualification that "**While the Industrial Relations Court is empowered to pierce the veil, the power must be exercised judiciously and in specific cases where it is apparent that the employer is invoking the termination clause out of malice**". In that case the respondents, among other

employees had participated in an illegal work stoppage. The issues pertaining to the work stoppage were resolved. About a month later the respondents' contracts of employment were terminated under the notice clause in their contracts of employment. The Industrial Relations Court decided to pierce the veil after finding that the respondents' contracts of employment were terminated because of their involvement in the work stoppage. The Supreme court's view, however, was that the fact that the termination clause in the contract was invoked after the settlement of the work stoppage issues could not bar the appellants from exercising their right to terminate under the ~~conduct~~ contract.

In the present case, the contracts of employment were terminated, certainly, in connection with the disciplinary charges. As to the question whether the Respondent was entitled to do so or should have gone on to exhaust the disciplinary process, the decision of the Supreme Court in **Barclays Bank Zambia Limited v Tolani Zulu and Musa Hamwala** *ante* is clear. The exercise of the termination clause under the contracts of employment was within the competence of the Respondent. The Respondent had an option to

exhaust the disciplinary process with the possible outcome of dismissal, discharge or acquittal; or to terminate by notice or pay in lieu of notice under clause 3.3. The Respondent opted to terminate by paying to the Complainants one month's salary in lieu of notice. In order for the Complainants to assail the decision to terminate under the notice clause, it is clear from the case of **Redrilza Limited v Abuid Nkazi and Others** that there must be evidence of malice or bad faith or ill will before this court can interfere with the termination under the notice clause. The Complainants did not provide any particulars of malice or bad faith. Their complaint is simply that the disciplinary process was not exhausted, which denied them an opportunity to appeal with a possibility of succeeding particularly bearing in mind that the charges were based on the interim audit findings. The contending position by the Respondent is that the Complainants were found guilty of the offences with which they were charged. The Respondent took into account the Complainant's professional careers and decided to invoke the termination clause. We see no malice or bad faith in the Respondent's decision. What we see is that the Respondent opted against exhausting the disciplinary process and decided to invoke the termination clause which was

provided for in the contracts. We do not, of course, agree that wrong doers must be protected from suffering the consequences of their misconduct. Courts do not endorse wrongdoing. The point, however, is that although the reason for terminating was misplaced with the apparent good intention of saving the Complainants' careers, it was not malicious and the respondent was still at liberty to terminate under the notice clause. The result of this that there was nothing wrongful, unfair, unlawful or indeed unwarranted about the decision to terminate the two Complainants' contracts of employment under the notice clause. We thus find no merit in the complaint and dismiss it.

The Respondent had asked that we order the 2nd Complainant to pay the balance of K7,654.86 due from him as computed in the terminal benefits. We find ourselves constrained to oblige the request. This is because the Respondent did not put up a counterclaim for the money to properly put the 2nd Complainant on notice so that he could defend himself if need be. In the manner in which the request was made it appeared as if it were a "*by the way.*" It is up to the Respondent to pursue the claim in a more appropriate

way if it so wishes. For the time being, we are unable to grant the request.

We will, however, order either party to bear their own costs.

Any party aggrieved with the decision in this judgment is entitled to appeal to the Court of Appeal within 30 days from the date hereof.

Delivered at Lusaka this 1st day of ~~May,~~ June 2017.

J. CHINYAMA
CHAIRMAN

REPUBLIC OF ZAMBIA HIGH COURT FOR ZAMBIA 01 JUN 2017 JUDGE INDUSTRIAL RELATIONS DIVISION P.O. BOX 34009, LUSAKA

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