

IN THE SUPREME COURT OF ZAMBIA APPEAL No. 009/ 2015

HOLDEN AT KABWE

(Civil Jurisdiction)



B E T W E E N :

ELIZABETH SOKONI MWENYA

APPELLANT

AND

CFB MEDICAL CENTRE LIMITED

RESPONDENT

CORAM: Mwanamwambwa DCJ, Hamaundu, Kabuka, JJS
on the 1st August, 2017 and 28th August, 2017.

FOR THE APPELLANT: Mr. J.M. Chimembe, Messrs. James &
Associates.

FOR THE RESPONDENT: Mr. Gilbert Chama, Messrs. Musa
Dudhia & Company.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Ngwira v Zambia National Insurance Brokers (1993/1994) Z.R. 140.
2. Bold v Brough Nicholson and Hall Limited [1963] QBD 849.
3. Colgate Palmolive Zambia Limited v Chuuka SCZ Appeal No. 182/2005.

4. Agholor v Cheesebrough Ponds (Zambia) Limited (1976) Z.R. 1.
5. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)
6. Chilanga Cement Plc v Singogo (2009) Z.R. 122 (SC).
7. Zambia Postal Services Corporation v Prisca Bowa and Caristo Mukonka SCZ Appeal No. 72/2009.
8. Zambia Privatisation Agency v James Matale (1995-1997) Z.R. 157 (SC).

Legislation referred to:

1. The Industrial and Labour Relations Act Cap. 296 S.85 (4).
2. The Employment Act Cap. 268 SS. 20 (3); 26A and 36 (c).
3. The Employment (Amendment) Act No. 15 of 1997.
4. The Employment (Amendment) Act No. 15 of 2015.

On the 22nd of October, 2014, the Industrial Relations Court delivered a judgment dismissing the appellant's claim, that the respondent terminated her employment unlawfully and in breach of her contract. The appellant now appeals against that judgment.

The background to the matter is that, on 1st February, 2012 the respondent employed the appellant as a Night Superintendent on a two year fixed term contract which was to expire on 31st January, 2014. After serving four months, the appellant wrote the respondent a letter dated 14th June, 2012, requesting for a one year extension of her contract.

The respondent acceded to the request and the two year contract was extended by one year, to now expire on 31st January, 2015, while all other conditions remained the same.

About one and half years later, the respondent invoked Clause 3 of the contract and wrote the appellant a letter dated 31st May, 2013, terminating her employment with effect from 30th June, 2013. The termination clause upon which the respondent relied, allowed either party to terminate the contract by giving the other, a one month written notice. In the letter of termination, the respondent disclosed it had also relied on **sections 20 (3) and 36 (c) of the Employment Act Cap. 268 of the Laws of Zambia** and informed the appellant she would be paid all her accrued benefits up to the date of termination.

The appellant reacted by writing a letter to the respondent dated 6th August, 2013, challenging the termination of her employment. In this letter, the appellant contended that, as her contract was in writing, **section 20 (3)** which provides for oral contracts, did not apply to her situation.

The appellant also claimed that, the respondent did not comply with **section 26A of the Employment Act**, prior to terminating her services and this entitled her to be paid all emoluments which she could have earned on the residue of the contract period, in form of salaries and gratuity, in the total sum of K297, 194.00.

In a reply to the appellant's letter, which was written the same day 6th August, 2013, the respondent asserted that, the termination was lawful as it had complied with Clause 3 of the appellant's contract of employment. The respondent also explained that, **section 26A** did not apply to the appellant's situation, as the ground for the termination was based on a termination clause and not on her conduct or performance, envisaged by **section 26A**. The respondent further reminded the appellant that, on termination of her contract, it had in fact paid her a separation package inclusive of all monies due to her in form of gratuity, leave days, less monies owing to the respondent. In addition, the appellant was paid ex-gratia monies in the sum of K25,026.00.

The appellant responded by letter dated 27th August, 2013 in which she contended that, Clause 3 of her contract of employment had ceased to apply, with the coming into effect of **section 26A** introduced by the **Employment (Amendment) Act No. 15 of 1997**. According to the appellant, this amendment barred employers from terminating contracts of employment without giving reasons. Consequently, the appellant claimed that, as her contract was terminated without giving reasons, the termination was contrary to **section 26A** and unlawful.

Having failed to resolve the grievance with the respondent, the appellant proceeded to issue a Notice of Complaint in the Industrial Relations Court (IRC) pursuant to **section 85 (4)** of the **Industrial and Labour Relations Act Cap. 296**. Her claim was substantially that, the respondent terminated her fixed term contract, prematurely, unfairly and unlawfully, contrary to the provisions of the Employment Act. For the said reasons, she was entitled to an order for:

1. **payment of salaries from 1st June, 2013 to 31st January, 2015 which she could have earned at the expiry of the contract period.**
2. **payment of gratuity; any other relief; and costs.**

In its Answer to the Complaint, the respondent admitted the appellant's contract was extended to three years, but denied that it was unlawfully terminated. The respondent maintained that the contract was lawfully terminated, as by letter dated 31st May, 2013 the appellant was informed that her contract was terminating on 30th June, 2013. The appellant was thus given the one month notice provided for under Clause 3 of her contract of employment; which was also a requirement under **sections 20 (3) and 36 (c) of the Employment Act Cap. 268**. That thereafter, the appellant was paid her gratuity on pro-rata basis, from 1st February, 2012 to 30th June, 2013, together with all other accrued benefits, including an ex-gratia payment in the sum of K25,026.

The respondent maintained that, in effecting the termination it had complied with the terms of the contract of employment signed by the appellant. That it had also complied with **section 36 (1) (a) (c)**, being the relevant statutory provision prevailing at the material time, for lawful termination of contracts of employment.

In her submissions filed at the end of trial in the court below, the appellant adamantly maintained her claim, that the respondent

did not give her any reasons for terminating her contract, prematurely. Citing the cases of **Ngwira v Zambia National Insurance Brokers⁽¹⁾** and **Bold v Brough Nicholson and Hall Limited⁽²⁾** the appellant's argument was that, the court below had the power to delve into the real causes of the termination of her contract of employment; and to uphold her claim, that she was unlawfully terminated and thus, entitled to payment of damages for the residue of the contract period.

On the evidence led, the court below considered the appellant's claim that she be paid salaries from 1st June, 2013 to the 31st of January, 2015, as damages for breach of contract. The court found that, as the respondent had given her one month's notice by letter dated 31st May, 2013 to terminate her contract on 30th June, 2013, it had complied with Clause 3 and there was no breach of her contract.

The court was also satisfied, that the respondent had not contravened the Employment Act, **section 20 (3)** as the said section relates to termination by notice of oral contracts of

employment and as such, did not apply to the appellant whose contract was written.

Granted the evidence that notice was infact given, the court further found, the respondent did not contravene **section 36 (c)** which allows for lawful termination of written contracts of employment, by the giving of notice.

In addressing the appellant's contention, that when terminating her contract, the respondent did not comply with **section 26A of the Employment Act**. The court below found the appellant did not lead any evidence to show that her termination was in any way related to her conduct or performance, as to bring it under that section and as such, that **section 26A** did not apply to her situation.

The court also considered **article 7 of the International Labour Organisation Convention 158** which prohibits the employer from terminating the services of an employee on grounds related to conduct of performance, without affording the employee an opportunity to be heard on the charges against him. It found the

amendment to **section 26A of the Employment Act** was to the same effect as **article 7** which states that:

“ The employment of a worker shall not be terminated for reasons related to conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

Reference was further made to the case of **Colgate Palmolive Zambia Limited v Chuuka**⁽³⁾ which restates the principle that, men of full age and competent understanding have the liberty of entering into free and voluntary contracts and the court's duty is merely to enforce such contracts. The court also cited the case of **Angholor v Cheeseborough Ponds (Z) Limited**⁽⁴⁾, a High Court decision, to support its finding that, in a master servant contractual relationship, the employer can terminate the contract of an employee at any time, for any reason or none. However, if the employer does so contrary to the terms of the contract, then he would be liable in damages.

The trial court found, as the termination of her contract by the respondent was lawful for having complied with both the contractual provisions and relevant laws, the appellant could not

claim for any payment including gratuity, for the residue of the contract period for which she did not work. Ultimately, the conclusion of the trial court was that, the appellant who had failed to prove her case on all her claims could not be entitled to judgment and relied on our decision in the case of **Wilson Masauso Zulu v Avondale Housing Project.**⁽⁵⁾

Dissatisfied with the outcome, the appellant launched her appeal before this Court and initially filed two grounds of appeal. She later abandoned ground one, and the appeal proceeded on ground two as the sole ground. Ground two sets out the grievance, punctuated with arguments and submissions, and is couched in the following terms:

"The lower court misdirected itself in law and fact when it held that the appellant cannot claim payment for the residue of the contract period which she did not work for, because the termination was lawful. The appellant contends that she is entitled to payment for the balance of the period of her contract, because the respondent breached the terms of the contract for which damages are wages for the unfinished period of the contract. Further the lower court's finding that the appellant failed to prove her case is unsupported by evidence."

In the heads of argument filed in support of the lone ground of appeal, learned Counsel for the appellant referred to the cases relied on by the trial court of *Colgate Palmolive Zambia Limited v Chuuka*; and *Angholor v Cheeseborough Ponds (Z) Limited*. According to Counsel, those cases can be distinguished from the present appeal on the facts and by their holdings. His argument was that, in the former case the High Court held that the respondents who were all casual workers became employees by operation of law, after serving for a period of six months, when the evidence before the court did not support such a finding. In the latter case, the holding was that, a master can terminate a contract of employment at any time, even with immediate effect and for no reason. In so doing, he is not in breach and liable in damages, unless he terminates outside the terms of the contract.

Counsel's argument on the point was that, unlike those cases, the appellant's contract in the present appeal was terminated by payment in lieu of notice and that the lower court fell in grave error when it held that the termination was lawful. Counsel referred to the learned author, **Friedman on The Modern Law of**

Employment, at page 463 where he states to the effect that, when there is an agreed time for the contract to endure, termination will occur at the end of such period, but that termination may take place lawfully or wrongfully before the agreed date. If termination is lawfully undertaken, the party terminating the contract incurs no liability, whereas, if termination is wrongful, the guilty party that terminates the contract prematurely, will be in breach of contract and liable accordingly.

Counsel contended that, the appellant's contract was terminated by payment in lieu of notice despite having been extended by one year by the respondent. As the contract period had not expired, the termination was made in bad faith. His submission was that, this rendered the termination wrongful, as the respondent was trying to hide behind payment in lieu of notice, to escape liability. The case of **Chilanga Cement Plc v Singogo**⁽⁶⁾ was cited in support of the submission, as a case whose facts in Counsel's view, were similar to the one at hand in the present appeal.

At the hearing of the appeal, Counsel with leave of Court, further relied on the case of **Zambia Postal Services Corporation v**

Prisca Bowa and Caristo Mukonka⁽⁷⁾ whose facts he claimed, were on all fours with those of the present appeal. He concluded his submissions by urging us to uphold the appeal and set aside the judgment of the lower court. We were also implored to award the appellant damages for wrongful dismissal on the basis of monies she could have earned on the residue of the contract period, taking into account the difficulty she may incur in finding similar employment.

In his response, learned Counsel for the respondent informed the Court that, he would entirely rely on the written submissions he had earlier filed on record on 24th July, 2017. These submissions were substantially, to the effect that, the trial court was on firm ground when it found the appellant had failed to prove her case, that her contract of employment was unlawfully terminated.

We have considered the evidence on record, arguments and submissions from learned Counsel, together with the case law and other authorities on which they relied to support their clients' respective cases.

The crux of the entire appeal in our view, rests on our resolution of one issue; whether, as contended by the appellant, the termination of her contract of employment was unlawful.

In urging this court to find that the termination was unlawful, learned Counsel for the appellant based his arguments on the appellant's contract of service as well as sections **26A; 20 (3)** and **36 (1) (a) and (c)** referred to by the trial court in its judgment.

Arguments by learned Counsel for the appellant on the issue were that, the appellant's contract was terminated by payment in lieu of notice and that the lower court fell in grave error when it held that the termination was lawful. Counsel contended that, the appellant's contract having been extended by one year by the respondent, the termination was made in bad faith, as the contract period had not yet expired. According to Counsel, this constituted evidence that there was something wrong, which rendered the termination wrongful; and the respondent was merely trying to hide behind payment in lieu of notice to escape liability.

We have looked at the record which shows that, in coming to the decision that the termination was lawful, the court below

considered the relevant clause of the contract of employment between the appellant and respondent, being Clause 3. The relevant parts of this clause read as follows:

“Either party may terminate the employment at any time by giving not less than one month’s prior written notice to the other to that effect.....the company may at any time terminate the employment by shorter notice or without notice by paying the employee such sum in lieu of notice....” (bold facing for emphasis supplied)

It was not in dispute that the contract was a fixed term contract. From our understanding of the arguments and submissions from Counsel, on the point, the contention is rather, whether a fixed term contract can be lawfully terminated by way of notice.

We find Counsel’s argument suggesting that the respondent having extended the appellant’s contract by one year, was not at liberty to use the termination clause to end the contract before its expiry date; and that doing so could only be evidence that the termination was in bad faith, contradicts the general position of contract law on the issue. It even contradicts the very quotation on which Counsel sought to rely, from the learned author **Friedman** to

the effect that, notwithstanding that normal termination of a fixed term contract is at the end of such term; the parties can still terminate before the end of the contract term. The learned authors of **Halsbury's Laws of England, Volume 41, at paragraph 725** affirm that position of the law in the following words:

"A contract may be stated to last for a set period of time in which case it is considered to be a fixed term contract and at the end of the relevant period it terminates by expiry."

The paragraph however, goes on to qualify that statement by further stressing circumstances in which there can be lawful termination before the expiry of the contract term, by invoking a termination clause. They state that:

"A genuinely fixed term contract does not lose that character if it contains a clause allowing termination by notice, before the expiry of the fixed term."

In our view, the above quotation makes it clear that, a fixed term contract can be terminated by notice, if the terms of the contract so provide and the contract in question in this appeal did have such provision under Clause 3, which was a termination clause. This is the same position of the law enacted by **section 36 (1)** as it existed in the statute books at the material time. This

section in subparagraph (c) did provide for lawful termination of fixed term written contracts as can be seen from the relevant portions which read as follows:

- 36 (1)(a).** A written contract of service shall be terminated by the expiry of the term for which it is expressed to be made;
or
(b)....
(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise.

It is obvious from the cited provision as reproduced above, that a fixed term written contract will, pursuant to **section 36 (1) (a)** 'normally' terminate at the end of the contract term by effluxion of time; or before that time, in any other *lawful* manner in which a contract may terminate, as provided by **section 36 (1) (c) of the Employment Act**. And, this Court has held that, every contract of service is terminable by reasonable notice. That the giving of notice or payment in lieu thereof; is a proper and lawful way of terminating employment, see **Zambia Privatisation Agency v James Matale**⁽⁸⁾.

In view of the provisions of the law referred to, we do not accept the argument by learned Counsel for the appellant, that payment in lieu of notice, was not a lawful way of terminating the appellant's fixed term contract of employment, in the circumstances of this case. Accordingly, we cannot fault the trial court for having come to the conclusion that, the termination was lawful for having complied with **Clause 3** of the contract of employment in question; and with the relevant law as provided by **section 36 (1) (a) and (c) of the Employment Act**, at the material time.

That position notwithstanding, we are mindful of the fact that, on 9th February, 1990 when Zambia ratified **the International Labour Organisation- Termination of Employment Convention 158** of 1982, in **article 4** the same prohibits termination of employment contracts without valid reasons when it states that:

"the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" (Underlining for emphasis supplied)

That article was domesticated by the **Employment (Amendment) Act No. 15 of 2015** through the addition of the following words to **section 36 (1) (c)**:

36 (1)(a) A written contract of service shall be terminated by the expiry of the term for which it is expressed to be made;or

(b)

(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under 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; (Underling for emphasis supplied)

According to **section 36 (1) (a) and (c)** as amended, an employer cannot terminate a written contract of an employee without giving the employee reasons and such reasons must be valid. However, as the said amendment only came into force on 3rd December, 2015, the issue does not fall for consideration in this appeal, since the amendment cannot retrospectively apply to the appellant, whose contract of employment was terminated two years earlier, on 31st May, 2013.

In his oral submissions made at the hearing of the appeal, learned Counsel for the appellant, still pursued the argument that, the termination was effected contrary to **section 26A**. He further relied on our decision in the case of *Zambia Postal Services Corporation v Prisca Bowa and Caristo Mukonka* where we held that **section 26A of the Employment Act**, only applies to oral contracts of employment. Counsel however urged that, the facts of that case were similar to his client's case subject of the present appeal. As we consider the facts of that case useful in addressing the arguments of the appellant in this appeal, we will give a little more detail.

The facts of that case were that, the two respondents were serving on three (3) year fixed term contracts. The contracts were terminated pursuant to the termination clause embodied in their respective contracts.

At the trial of their matter before the Industrial Relations Court, they led evidence of an acrimonious working relationship with the new Post Master General of the appellant, since his appointment.

The 1st respondent testified that, the Post Master General had asked her to report her juniors to him on unsubstantiated allegations of thefts, which she declined to do. She also refused his requests to meet with him socially, outside working hours over drinks, which angered him. He reacted by refusing to sign or approve work done by her. She was later subjected to disciplinary charges on a different issue, which were discontinued, following which she received a notice terminating her employment.

The 2nd respondent also testified that, he received a letter from the same Post Master General asking him to exculpate himself as to why disciplinary action should not be taken against him on allegations of insubordination and gross negligence, amongst others. He was summoned to a meeting where he denied all the allegations made against him. His employment was thereafter terminated by notice.

In his evidence, the Post Master General contended he terminated the contracts of the respondents in accordance with the termination clauses in their contracts. He however admitted having earlier recommended to the appellant's Board, to terminate the

respondents' contracts on the basis of incompetence, failure to obey lawful instructions, amongst other allegations.

It was on the basis of that evidence, led by the respondents, that the lower court found, this was a proper case for them to delve behind the notice clause, as the terminations were really predicated on the allegations raised against the two, by the Post Master General and not on the notice clause. The court also found that, an employer cannot use the termination clause in a bid to avoid **section 26A**, when he had openly made allegations relating to the conduct and performance of an employee.

On appeal by the employer, this Court held that, **section 26A** only applies to oral contracts of employment and was not applicable in the circumstances, where the employees were serving on written contracts. It was nonetheless observed that, the reasoning of the lower court on the matter could not be faulted, as it was anchored on the fact that, the rules of natural justice embodied in **section 26A of the Employment Act**, had not been observed, as the respondents disciplinary processes were abandoned mid-stream without any formal hearing. On the basis of evidence led by the

respondents to support the allegations of misconduct of the Post Master General, the lower court was also justified, in delving behind a notice clause, to find the real reasons for the termination.

In our view, the facts and decision in the *Zambia Postal Services Corporation v Prisca Bowa and Caristo Mukonka*, adequately address the appellant's arguments which were anchored on **section 26A**. The net result of which is that, **section 26A** relied upon by the appellant to advance the argument that, her termination was unlawful for failure by the respondent to comply with that section, fails as it is inapplicable. The appellant who was serving on a written contract, cannot rely on **section 26A** which applies to oral contracts of employment.

Further, even assuming **section 26A** applied, the allegation made by the appellant was that, she was actually terminated by reason of some other sinister motive falling under the ambit of **section 26A** which she unfortunately, did not disclose or 'kept under wraps', so to speak.

Against that background, we do not agree with the argument by learned Counsel for the appellant to the effect that, it

was the duty of the trial court, particularly as a court of substantial justice, to probe the allegation raised by the appellant, that she was terminated pursuant to **section 26A**. That the court should have delved behind the termination by notice, to establish the real reasons for the termination.

Our observation is that, even in a proper case, where the section applies, proceeding as suggested by Counsel in the circumstances of this case, would have entailed that the court below in effect, assists the complainant establish her allegation. In so doing, it would have also assumed the role of an investigative tribunal seeking evidence which would reveal the real reasons the respondent terminated the appellant's contract of employment. Suffice to state that, the jurisdiction of the court below, does not give it such a mandate.

We can only remind Counsel by re-iterating the trite legal position that, a claimant always bears the burden of establishing his/her case. This requires that the complainant proves any allegation made, by adducing evidence to support such allegation, to the required standard. A perusal of the record of appeal in this

matter discloses that, unlike in the *Zambia Postal Services Corporation* case on which she sought to rely, where the complainants led evidence on the real reasons for their termination, there was no evidence, at all, led by the appellant to support her allegation that her termination was prompted by some other reason which brought the termination within the ambit of section **26A of the Employment Act**.

The arguments that the termination was unlawful for failure to comply with **section 26**, assuming the section applied to the situation, would still have failed for lack of evidence to support them. As the section did not apply to the circumstances, the arguments fail for being misconceived.

The fact remains that, the appellant's contract specifically provided for termination by notice by either party under clause 3. As this requirement was complied with by the respondent in its termination letter dated 31st May 2013; this was a lawful way of terminating the contract under the termination clause; and pursuant to **section 36 (1) (c)** of the Employment Act, as it provided at the material time.

It is for the reasons we have given, that we are unable to fault the trial court when it came to that conclusion.

The sole ground of appeal accordingly fails.

Taking into account the circumstances of the case however, we order each party to bear their own costs of the appeal.



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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



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E.M. HAMAUNDU
SUPREME COURT JUDGE



.....
J.K. KABUKA
SUPREME COURT JUDGE