IT

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 17/2016**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

ROSEMARY NAMUKOLO SITUMBEKO KABWE **APPELLANT**

AND

JOOP JENSEN (in his Capacity as Chairman of the Board Of Churches Health Association in Zambia) **RESPONDENT**

CORAM: MAKUNGU, CHASHI, KONDOLO SC, JJA

On 9th March, 2017 and on 19th September, 2017

For the Appellant: Mr. M. Mukande SC of Messrs ML Mukande & Company

For the Respondent: Mr. H.H. Ndhlovu SC of Messrs HH Ndhlovu & Company

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J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Chilanga Cement Plc v Kasote Singogo (2009) Z.R. 8**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
3. **Zambia Consolidated Copper Mines Limited v Matale S.C.Z. Judgment No. 1996**

4. **Tolani Zulu and Musa Hamwala v Barclays Bank Zambia Limited (2003) Z.R. 127**
5. **MusondaLumpa v Maamba Collieries Limited (1998-1989) Z.R. 217**
6. **Zambia Consolidated Copper Mines Limited vJames MataleS.C.Z. Judgment No. 9 Of 1996**
7. **Redrilza Limited v AbuidNkazi and Others, S.C.Z. Judgment No. 7 of 2011**

LEGISLATION REFERRED TO:

1. **The Employment Act, Chapter 268, Laws of Zambia**
2. **The Industrial and Labour Relations Act, Chapter 269, Laws of Zambia**

This is an Appeal against the decision of the lower Court wherein the Appellant's entire claim for wrongful dismissal and the accompanying damages was dismissed.

The brief background of this case is that the Appellant was employed by the Respondent Organisation in 1995 as a Primary Health Care Officer and she rose to the position of Director Human Resource and Training. The Appellant told the trial court that her boss, Executive Director Mrs Karen Sichinga approved her application to pursue a course in Australia. Her boss supported her application for a visa but later wrote to her warning that she was not allowed to go for more than four weeks.

The Appellant discussed the issue with the Executive Director who said that she would give her 30 days study leave and the Appellant could use her leave days for the rest of the period. Her boss later informed her that she had decided to reject her application to proceed for studies but had reluctantly approved her application for personal leave for 60 days. The Appellant decided to utilize her personal leave to pursue the course and proceeded to Australia. Three weeks later, her employment was terminated by the Respondent giving her three months notice as provided in her contract of service.

The Appellant averred that her employment was terminated in bad faith and was thus wrongful and she sought an Order for re-instatement and the payment of damages.

The Respondent, through RW1, Karen Sichinga, the Executive Director, maintained that the Appellant's employment was terminated in accordance with Clause 11.2 of her conditions of service by payment in lieu of notice. RW1 did not deny that she initially recommended the Appellant for training but later told her that she could not go for more than one month. RW1 said that even though she approved her leave for 60 days, she did not want her to go. She

agreed that the Appellant was free to do whatever she wanted during her 60 days leave including going for training.

RW2, told the trial court that the Appellant had just been promoted from Manager to Director and ought to have stayed back to learn about her new duties and that the course she wished to pursue would not be beneficial in her new capacity. However, the Board was of the view that if she insisted on going for training then she could be relieved of her duties.

The Lower Court found that the Appellant went on training using her leave days, which days did not cover the entire period of the training. It found that her contract was terminated by giving her three months' notice and all her dues were paid. The Lower Court further found that there was no breach of any procedural rules when her employment was terminated and that she was therefore not wrongfully dismissed.

The Appellant is aggrieved with the entire Judgment of the Lower Court and has put forward four Grounds of Appeal, namely:

1. **The trial Court misdirected itself in law and fact by its failure to look beyond the termination;**

2. **The trial Court misdirected itself in law and fact by ignoring evidence to the effect that the termination was based on the Appellant's travel to Australia;**

3. **The trial Court erred in law and fact by ignoring evidence on record stating that at the time of approval of her study leave she was in fact serving in the position of Director of Human Resource Planning and Development.**

4. **The trial Court erred in law and fact by ignoring evidence showing that the Appellant was lawfully on leave at the time she travelled to pursue the course in Australia.**

Counsel for the Appellant, Mr. Mukande SC, submitted that the reference to the Disciplinary procedure was a misdirection on the part of the Court because the Appellant did not state that she was dismissed and as such the order must be set aside. The Respondent through his Counsel Mr. Ndhlovu SC, submitted that the reference to unlawful dismissal was introduced by the Respondent's in their submissions and therefore the Court was not misdirected.

In aid of ground one, two and three, State Counsel Mr. Mukande submitted that the Court failed to appreciate between a normal and an inordinate termination. He stated the case of **Chilanga Cement Plc v Kasote**

Singogo[1] that the Court relied on clearly illustrated the difference, which was why, in that case, the Supreme Court went behind the termination to ascertain the actual reasons behind it because the termination was ill motivated and wrongful. He contended that in casu the lower Court failed to appreciate the evidence of bad faith which was clearly reflected on the record and in particular the hostile relationship between the Executive Director and the Chairman of the Board on one side and the Appellant on the other.

State Counsel Mukande submitted that **Section 85(5) of the Employment Act**, clothed the lower Court with the power to go behind the termination and that as held in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] this Court could interfere with the findings of the lower Court. He argued that the train of events shows that the notice given to the Appellant by the Respondent was merely a cover up or smoke screen to terminate the Appellant's contract of employment when the real reasons for such termination were threats, accusations and allegations issued by the Executive Director. He placed reliance on the case of **Zambia Consolidated Copper Mines Limited v Matale**[3] and implored this Court to go behind the termination of the Appellant's employment.

Ndhlovu, SC rejoined on behalf of the Respondent that the Appellant's contract was terminated as provided therein and no breach of contract had occurred. It was State Counsel's argument that the case of **Chilanga Cement Plc v Kasote Singogo**[1] was different from this case because in the Singogo case the employer used a wrong method to terminate the employment. He buttressed his argument with the case of **Tolani Zulu and Musa Hamwala v Barclays Bank Zambia Limited**[4]in which the Supreme Court stated that the exercise of a notice clause is within the powers of an employer. He further cited the case of **Musonda Lumpa v Maamba Collieries Limited**[5] in which the Supreme Courtstated that *"...it made no difference that the employment was terminated because of the alleged use of abusive language....it is the giving of the notice or pay in lieu that terminates the employment..."* and with this State Counsel submitted that the lower Court had no jurisdiction to go behind and enquire as to what motivated the giving of the notice, if the same was done within the provisions of the Contract of Employment.

Lastly in Ground four, Mr. Mukande contended that the Appellant was lawfully on leave at the time she travelled to pursue the course in Australia. He accepted that the Appellant was informed that Clause 29 of the Respondents

Handbook would apply to her and which clause was to the effect that, where the studies are full time in nature, an employee will be relieved of his duties for the duration of the study without any guarantee of a job when they return. Mr. Mukande however maintained that the Executive Director approved the Appellant's leave and could not therefore turn round to get recommendation from an organ of the Respondent which had no authority over the matter. In his view, the approved 30 days leave and the approved 62 days annual leave granted were sufficient to cover the entire training program.

In reply to ground four Mr. Ndhlovu emphasized that terminating the Appellants contract whilst she was on leave was not a breach of contract and that the Respondent had done nothing that amounted to a breach of contract so as to entitle the Appellant to damages.

We have carefully considered the Record of Appeal, the lower Court's Judgment and the spirited arguments by both State Counsels.

The record shows that neither Party disputes the fact that the Appellants employment was terminated by way of Notice pursuant to Article 11.2 of the Appellant's Contract. We therefore accept State Counsel's argument that the

Court erred to refer to the termination as unfair dismissal which was not even pleaded. The said Article 11.2 reads as follows:

> ***" this agreement can be terminated by either party giving three months notice or payment of three months salary in lieu of notice, provided that where an employee so terminates the contract the employer shall not be liable to repatriate the employee"***

As we see it, the main issue for determination in this matter is whether the termination was inordinate and motivated by ill will and therefore wrongful. The learned State Counsel Mr. Mukande, relying on the case of **Chilanga Cement Plc v Kasote Singogo**[1] urged this Court to delve into the matter and ascertain the real reason behind the termination because in his view, the trial Court had failed to appreciate the evidence of bad faith exhibited by the Executive Director. His view was premised on the fact that she was dismissed during the period she was on leave and which leave was authorized by the Executive Director of the Respondent organisation.

Mr. Ndhlovu SC, took a contrary view and argued that the case of **Chilanga Cement v Kasote Singogo** is inapplicable in this case because in

that particular case, they used the wrong method to terminate the employee's contract of employment which is not what happened *in casu*.

Learned counsel for the Appellant, called upon this Court to consider the provisions of **Section 85(5) of the Industrial and Labour Relations Act**, which reads as follows:

> ***85.(1) The Court shall have original and exclusivejurisdiction to hear and determine any industrial relation matters and any proceedings under this Act.***
>
> ***(5) The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it.***

The above Section was interpreted by the Supreme Court in the case of **Zambia Consolidated Copper Mines Limited v James Matale**[6] in which it stated as follows:

> ***"...The mandate in subsection 5 which required that substantial justice be done does not in any way suggest that the Industrial Relations Court should fetter itself with any technicalities or rules. In the process of doing substantial***

justice, there is nothing in the Act to stop the Industrial relations Court from delving behind or into reasons given for termination in order to redress any real injustices discovered; such as the termination on notice or payment in lieu of pensionable employment in a parastatal on a supervisor's whim without any rational reason at all, as in this case..."

In a more recent case, **Redrilza Limited v Abuid Nkazi and Others**[7], the Supreme Court had this to say;

"We must hasten to point out, that while the Industrial Relations Court is empowered to pierce the veil, this must be exercised judiciously and in specific cases, where it is apparent that the employer is invoking the termination clause out of malice. Looking at the facts of this case, we do not find any evidence of malice on the part of the appellants..."

....In our view, the fact that the termination clause in the contract was invoked after the settlement of the work stoppage issues, cannot bar the appellants from exercising their right to terminate under the contract. This also cannot justify the Industrial Relations Court to 'pierce the veil'. In* Zulu and Another v Barclays Bank Zambia Limited (4), *where the appellants were actually on suspension, before termination of their employment we said that:

'The respondent had a number of options open to them: they could have had the appellants prosecuted; put on disciplinary charges or opt to give them notice required under the conditions of service or pay the amount in cash in lieu of notice. The respondent opted for the last option of paying a month's salary in lieu of notice.' "

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

It is therefore clear that the Court should only 'pierce the veil' where there is evidence of malice on the part of the employer. *In casu,* the Appellant alluded to the hostile relationship between herself on the one hand and the Executive Director and the Chairman of the Board on the other hand as well as the fact that she was legitimately on leave approved by the Executive Director.

We have considered the circumstances under which the Appellant proceeded on leave and observe that the Executive Director initially supported her application to proceed for the course[1]. However, the Appellant was later informed by the Executive Director, in writing, that despite having supported

[1] Record of Appeal, pages 33 and 35

her application, in view of the fact that her training would last more than four weeks, she should be mindful of her conditions of service and particularly Clauses 29.1.2 to 29.1.8.[2] The Executive Director wrote another letter to the Appellant advising her that the organizations Executive Board had recommended that the Executive Director not approve the Appellants application for study leave. She informed the Appellant that on the basis of that recommendation, her application for leave beyond 30 days had been declined[3]. The Appellant, appealed to the Board Chairperson[4] who informed her that the Board was in full support of the Executive Directors decision[5].

The Appellant, however, persisted and appealed to the Executive Director yet again, who informed her that the Respondent organisation was not approving her participation in the course and that her study leave had not been approved but added the following, *"However, you are* ***entitled to your Annual leave*** *which I am reluctantly approving for a maximum of 60 days as stated in your Appeal. Reluctantly because I would not under normal*

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[2] *Record of Appeal, p. 36, letter from the Respondent to the Appellant dated 18th July, 2013*
[3] *Record of Appeal, p. 37, letter from the Respondent to the Appellant dated 13th August, 2013*
[4] *Record of Appeal, p. 38, letter from the Appellant to the Respondent dated 13th August, 2013*
[5] *Record of Appeal, p. 42, email from the Respondent to the Appellant dated 19th August, 2013*

circumstances approve leave of 60 days for a person in your capacity and responsibility"[6].

Notwithstanding the Executive Directors initial support for the Appellant to attend the course, it is quite clear from the foregoing and the Respondent later informed the Appellant, in no uncertain terms, that the application for study leave had been denied. The Respondent explained to the Appellant why the organization found it undesirable for her to proceed for the course, *inter alia*, that she had assumed the office of Director of Human Resources only seven months earlier[7].

Quite contrary to the Appellant's submission, the record shows that the duration of the course the Appellant wished to undertake was from 26th August to 19th November, a total of 84 days, excluding travel time. Her application for 30 days study leave having been denied, the Respondent was left with only 60 days annual leave which was insufficient to cover the duration of the course.

We yet again refer to the holding in **Redrilza Limited v Abuid Nkazi and Others**[(7)]that it must be shown that the termination clause was invoked out of

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[6]*Record of Appeal, p. 45, letter from the Respondent to the Appellant dated 21stAugust, 2013*
[7] *Record of Appeal, p. 37, letter from the Respondent to the Appellant dated 13th August, 2013*

malice. The trial Court found as a fact that there was no malice and we see no misapprehension of the facts in that regard. What we quite clearly see on the other hand, is an intransigent officer who decided to proceed on a course which her employers clearly did not support and whose duration exceeded the leave days available to her. We see no malice on the part of the employer and therefore no need to "pierce the veil" and we consequently find that the termination by notice was within the employer's power in accordance with the contract of Employment.

This Appeal is consequently dismissed.

We make no Order as to Costs.

Dated this day of 19th September, 2017

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J. CHASHI
COURT OF APPEAL JUDGE

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE