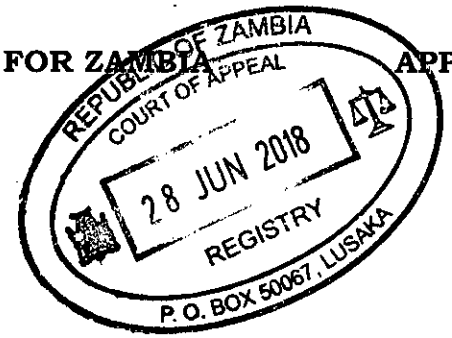
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 120/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

JOSEPHAT LUPEMBA	**APPELLANT**
AND	
FIRST QUANTUM MINING AND OPERATIONS LIMITED	**RESPONDENT**

CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

on 28th March 2018 and 28th June 2018

FOR THE APPELLANT: J. MATALIRO OF MESSRS MUMBA MALILA & PARTNERS

FOR THE RESPONDENT: D. LIBATI OF MESSRS ABHA PATEL AND ASSOCIATES

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. ***Chilanga Cement PLC v Kasote Singogo (S.C.Z Judgment No. 13 of 2009)***
2. ***Barclays Bank (Z) PLC v Weston Lyuwi and Sugzo Ngulube SCZ Appeal No. 07/2012***
3. ***Joseph Chintomfwa v Ndola Lime Company Limited (1999) ZR 172***

4. ***Swarp Spinning Mills Ltd v Sebastian Chileshe and Others (2002) ZR 23***
5. ***Agholor v Cheesebrough Ponds (Z) Ltd, (1976) ZR1***

This is an appeal against part of the lower Court's Judgment that awarded the Appellant 4 months' salaries as damages for wrongful, unlawful and unfair dismissal for being inadequate, regard being had to all the circumstances and the justice of the case.

The Appellant successfully challenged his dismissal by the Respondent in the Industrial Relations Division of the High Court Under complaint number COMP/IRD/17/2016 and claimed as follows;

1. An order and declaration that the termination of employment of the complainant by the Respondent was unfair, wrongful and unlawful.
2. Damages for unfair, wrongful and unlawful dismissal.
3. An order that the 24 hour notice veil used be pierced for this (Court below) Honourable Court to investigate the real reason behind the termination of employment.
4. Costs and interest on sums to be found due and payable.
5. Further and other relief the Court main deem fit and just.

The brief background facts are that, the Appellant was employed by an entity called HYSPEC MINING SERVICES which offered

contractual services to both Barrick Lumwana Mine and the Respondent.

In August 2016, the Appellant responded to an advertisement posted on the Respondent's website. He was then invited to attend an interview on 1st September 2016 along with other applicants. Subsequently, he was asked to attend medicals on 15th September 2016 after which he and other successful candidates were invited to sign contracts of employment and to submit silicosis certificates on 19th September 2016.

By letter dated 29th September 2016, he was offered employment as Foreman, Hydraulic workshop with effect from 5th October 2016.

However, prior to the letter dated 29th September 2016, the Appellant had been advised to tender a letter of resignation from HYSPEC by the Respondent in readiness for his new job.

He accordingly tendered his letter of resignation dated 20th September 2016 with a formal handover taking place on 3rd October 2016, two days before assuming his new job with the Respondent.

On 10th October 2016, barely five days into his new job, he was summoned by the Human Resource Officer who questioned him over the silicosis certificate and how he had obtained it.

After explaining how he obtained it, the Human Resource Officer informed him that the Respondent had decided to withdraw the offer of employment because he had a wrong silicosis certificate. He was handed a letter dated 10th October 2016 informing him of his termination from employment on account of unsuccessful probation.

Aggrieved by the decision to terminate his employment, he filed a Notice of Complaint in the court below which gave rise to this appeal.

The sole ground of appeal advanced is that;

> The court below erred both in law and fact when it awarded the Appellant an inadequate pay of four (4) months' salary as damages for wrongful, unlawful and unfair dismissal without having regard to the circumstances of the case and the justice that the case demanded.

Both parties filed heads of argument with authorities with two of the authorities being relied upon by both parties namely;

1. Chilanga Cement PLC V Kasote Singogo[1] and;
2. Barclays Bank (Z) PLC V Weston Lyuwi and Sugzo Ngulube[2].

The thrust of the argument between the parties is whether or not the Appellant deserved more than he received taking into account the circumstances of the case.

The two leading cases relied upon by both parties namely *Chilanga Cement*[1] Case and *Barclays Bank*[2] case, both decided by the Supreme Court of Zambia affirm the position that the normal measure of damages for unlawful/wrongful dismissal is the Notice period at common law but that in deserving cases, the Notice period can be exceeded. In both cases the Supreme Court upheld an award of twenty-four months as damages befitting the circumstances of the cases.

We note that in the two cases, and the others cited by the parties, the Supreme Court guided on the factors to be taken into consideration to award damages beyond the common law practice of the Notice period. Some of the considerations are future job prospects, inconvenience, stress and abruptness of termination. In so guiding, the emphasis was that the trial court should consider all the circumstances of each case and where it considers that a particular case is deserving, it should go beyond the common law measure of damages.

In both the *Chilanga Cement*[1] and *Barclays Bank*[2] cases, the Supreme Court referred to its earlier decision in *Joseph Chintomfwa v Ndola Lime Company Limited*[3] where 24 months' salaries were

allowed as damages in the circumstances of that case on the basis that it was appropriate to compensate the Appellant for loss of employment opportunities.

In the *Chilanga Cement*[1] *case*, the court held that enhanced damages are meant to encompass the inconvenience and any distress suffered by the employee as a result of the loss of employment.

In the *Barclays Bank*[2] case, a 2012 decision of the Supreme Court, reference was made to its 2002 decision in *Swarp Spinning Mills Ltd v Sebastian Chileshe*[4] where the Court stated as follows;

> ***"What we said in that case is that the normal measure of damages is departed from where circumstances and the justice of the case so demand. Therefore termination inflicted in a traumatic fashion causing undue distress or mental suffering is but one example. Loss of employment opportunities is another".***

We observe from the comments obiter in the *Chilanga Cement*[1] case where the Supreme Court observed as follows;

> ***"There is no indication in the Judgment as to the consideration it took into account to arrive at the 24 months' pay save for a reference to "abrupt loss of employment"***

It is important for the trial court to state the reasons or factors it took into account whenever it awards damages above the normal common law measure.

In this case, the Appellant contends that the learned trial Judge did not take into account the circumstances under which he was terminated and hence, the measure of damages not being adequate.

The submission is that, given that the Appellant was in permanent and pensionable employment at the time the Respondent asked him to resign his job, only to dismiss him barely five days later was distressful.

Further, it was submitted that, as at the date of the filing of the heads of argument on 5th October 2017, the Appellant was still out of employment, a year after his termination on 10th October 2016 an indication of the fact that jobs are scarce.

It is therefore, the Appellant's argument that had the learned trial Judge addressed his mind to the above stated factors he would have come to the conclusion that the four (4) months' salaries awarded were inadequate.

On the other hand, the Respondent argues that because the Appellant was on probation and his contract of employment provided for a 24 hour notice, the learned trial Judge in fact went

outside the common law measure of damages by awarding four months' salaries. In the alternative, if damages were to be awarded for the period of the probation period, the learned trial Judge still went beyond the common law measure of damages because the contract of employment provided for three months probation and as such at common law the Appellant was only entitled to three months salaries.

The Respondent also referred us to the case of *Agholor v Cheesebrough Ponds (Z) Ltd*[5], a decision of the High Court for persuasive purposes wherein it was stated as follows;

> **"Generally speaking an employee on probation cannot expect the same notice on termination of employment as one confirmed in his appointment".**

By citing the above case, the Respondent seeks to persuade us to accept the position that an employee who is on probation does not deserve to be treated in accordance with the established principles of the law.

We reject this proposition as it does not reflect the position of the law and it would lead to employers treating employees on probation with disrespect. Employers should always treat their employees fairly and in accordance with the law and the terms upon which they have contracted.

We have carefully considered the arguments by both sides and the Judgment delivered by the court below which is sound in so far as the decision to uphold the Appellant's claims is concerned.

After analysing the evidence, the learned Judge held as follows at page 14 lines 17 to 21 of the record of appeal;

> ***"It is wrong to give a person a letter of offer of employment before all pre-employment formalities are finalized. A letter of offer of employment signifies that the prospective employee has satisfied all the pre-employment formalities and that he has been given the job, subject only to him accepting or rejecting the offer."***

However, on the award of damages, the learned Judge simply stated as follows at page 17 lines 6 to 10 of the record of appeal;

> ***"I have analysed these claims. I have already ruled that these claims have succeeded, and I have given my reasons.***
>
> ***Now therefore, I order that the Respondents shall pay four (4) months' salaries as damages for wrongful, unlawful and unfair dismissal."***

From the above extract of the Judgment, it is clear that the learned Judge did not give any reason for the measure of damages he

awarded. The reasons referred to in the extract relate to the upholding of the Appellant's claims.

As earlier observed, it is a requirement that the trial Judge gives reasons for awarding a measure of damages, either as the period of notice, when the award is within the common law measure or justification for the award if it exceeds the common law measure as was the case in this case.

We think that the learned trial Judge did not seriously consider the injustice, trauma and mental anguish that the Appellant was subjected to by his abrupt termination. We believe that if he had done so, he would have awarded a much higher measure of damages than he did.

We believe that the principles laid down in the cases cited in this Judgment apply with equal force to an employee who is on probation as to one who is confirmed, because termination by Notice applies to both categories of employees with the only difference being in periods of Notice required in each case.

In this case, as observed by the learned trial Judge, the offer of employment letter dated 29th September 2016 incorporates conditions of employment and in Clause 1 it stipulates a notice period by either party of twenty-four (24) hours during probation and thirty-days (0) after probation.

We accordingly hold that where an employee is terminated whether during or after the probation period, and it is found by the Court that the termination was unlawful, wrongful and unfair, the principles for awarding the measure of damages will be the same depending on the circumstances of each case.

A deserving case in a termination involving an employee on probation will be given the same consideration as an employee who was terminated after confirmation.

We have therefore, carefully considered the circumstances that led to the Appellant's termination just five (5) days after taking up his appointment and find that he deserved much more than the measure of damages awarded by the court below.

Having recognized that the Appellant was given a contract which he accepted nearly a month after he had submitted his silicosis certificate and having induced him to resign his job by offering him a job which he accepted, the Respondent cannot be allowed to only pay the Appellant a four month salary. The experience was shocking, traumatic and abrupt such as to fall within the exceptions to the common law measure of damages.

We believe that this is a deserving case warranting departure from the common law measure of damages and the learned trial Judge should have so found.

The result of our position is that we find merit in the appeal and substitute the four (4) months for an award of twenty-four (24) months with interest at the short term commercial deposit rate as approved by the Bank of Zambia.

Costs in the court below shall be borne by each party while costs in this Court are for the Appellant.

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J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE