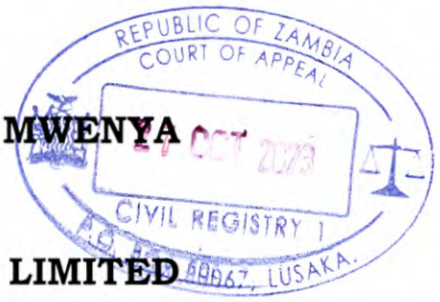
IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 247/2021

HOLDEN AT LUSAKA CAZ/08/352/2021

(Civil Jurisdiction)



B E T W E E N:

CHRISTOPHER KABWE MWENYA **APPELLANT**

AND

KALUMBILA MINERALS LIMITED **RESPONDENT**

CORAM: Kondolo, Majula and Chembe, JJA
On 21st September 2023 and 27th October, 2023.

For the Appellant	:	*Mr. M. Kasofu of Tembo Ngulube & Associates as Agents for Douglas & Partners*
For the Respondent	:	*Mr. H. Pasi of Mando & Pasi Advocates*

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Printing and Numerical Registered Company vs Simpson (1875) LR 19 EQ 562.*
2. *Colgate Palmolive (Z) Inc vs Able Shemu Chuka and 110 Others - SCZ Appeal 185 of 2005.*
3. *Konkola Copper Mines Plc vs Chileshe - SCZ Appeal No. 94 of 2015.*
4. *Attorney General vs John Tembo - SCZ Judgment No. 10 of 2012.*
5. *Evans Chongo Musonda (suing as Administrator of the estate of the late Charles Kabesha) vs African Explosives Zambia - (2007/HK/45).*
6. *Chilanga Cement Plc vs Kasote Singogo - SCZ Judgment No. 13 of 2009.*
7. *Redrilza Limited vs Abuid Nkazi and Others SCZ Judgment No. 7 of 2011.*

8. *Care International Zambia Limited vs Misheck Tembo - Selected Judgment No. 56 of 2018.*

9. *Masauso Zulu vs Avondale Housing Project Limited.*

1.0 Introduction

1.1 This appeal originates from a decision of the High Court delivered by Kawimbe, J. (as she then was) dated 21st July, 2021. The appellant approached the court for damages for wrongful dismissal and breach of statutory duty. To the dismay of the appellant, the court below dismissed his claims.

1.2 The appellant has now come to us appealing the dismissal of his case and we are being implored to overturn the decision of the court below which held that his dismissal was not wrongful. In addition, he has urged it upon us to interrogate whether the work capacity certificate amounted to a medical report. And lastly to award him damages for what he believes was wrongful dismissal.

2.0 Background

2.1 A brief summary of the facts of this case is that the appellant was employed by the respondent on 22nd August, 2018 as a Service Truck Operator on a two-year fixed term renewable contract. He was a member of the National Union of Miners and Allied Workers (NUMAW) and his conditions of service were subject to the collective bargaining agreement between

the respondent and the NUMAW; as well as his contract of employment.

2.1 In January 2019, the appellant was diagnosed with a brain tumor. He was successfully operated on at Fairview Hospital in Lusaka at the respondent's expense. Afterwards, he returned to work to do light duties but was officially placed on medical leave from 22nd August, 2019. This is because his doctors recommended, on 15th August 2019, that he needed 6 months to fully recover from his health condition. After the surgery, he was restricted from working as a driver.

2.2 That notwithstanding, the appellant received 3 months full salary whilst on sick leave and half pay for a further 3 months period. He was discharged from employment on medical grounds on 21st January, 2020. Aggrieved by the discharge, the appellant issued a writ of summons against the respondent seeking, *inter alia,* damages for what he considered to have been wrongful dismissal and breach of statutory duty.

3.0 The Decision of the lower Court

3.1 After examining the evidence that was deployed before her, the learned Judge was of the view that the issue for her determination was whether the appellant's contract of employment was lawfully terminated on medical grounds. The court below opined that even though the appellant's employment contract was terminated, this did not affect his

entitlements under clause 20 item 15.3 of the collective bargaining agreement in that he was paid 4 months basic salary. In addition, he received other benefits such as a salary in *lieu* of notice in terms of the requirement under section 5.2 of his contract of employment and repatriation allowance of K4,000. Thus, the fact that he left the company a few days before his medical leave expired was held to be inconsequential.

3.2 On the appellant's assertion that a medical report was not obtained in terms of clause 4.2.2 of the contract of employment, the court reasoned that there was no standard prescribed in the clause or elsewhere of what constituted a medical report, upon which, the respondent could have been held accountable. That the only requirement was that a report should be prepared by a registered medical practitioner. It was held that the work capacity certificates prepared by qualified medical practitioners, who included occupational health practitioners, sufficiently served as medical reports. That this provided the respondent sufficient basis for discharging the appellant from employment on medical grounds.

3.6 In dismissing the appellant's claims, the trial court was of the view that since the appellant's discharge from employment on medical grounds did not amount to wrongful dismissal and breach of statutory duty, the claim for an award for damages could not be sustained in this case.

4.0 Grounds of Appeal

4.1 Dissatisfied with the decision of the High Court, the appellant has appealed fronting three grounds couched as follows:

> *"1. The Honourable Learned Judge in the court below erred in law and fact in holding that the respondent's dismissal was not wrongful when the court itself stated in its Judgment that the plaintiff's leave prematurely ended when he was discharged on medical grounds on the 21st July, 2020.*
>
> *2. The Honourable Learned Judge in the court below erred in law and fact when she relied on the Work Capacity Certificate that was prepared before the expiration of the appellant's medical leave.*
>
> *3. The Honourable Learned Judge in the Court below erred in law and fact in holding that the appellant was not entitled to an award of damages for wrongful dismissal when the evidence before court and the court's holding that the plaintiff was prematurely discharged on medical grounds proved that there was wrongful dismissal."*

5.0 Appellant's arguments

5.1 In support of ground one, the learned counsel for the appellant averred that the appellant was discharged from employment on medical grounds before the expiration of 6 months as required in clause 4.2.2 of the contract.

5.2 Counsel contended that since the parties had signed a contract, they ought to have strictly followed it as they were bound by its written terms. The case of ***Printing and Numerical Registered Company vs Simpson***[1] quoted in the case of ***Colgate Palmolive (Z) Inc vs Able Shemu Chuka and 110 Others***[2] was cited as authority for this proposition.

5.3 Counsel went on to refer us to the case of ***Konkola Copper Mines Plc vs Chileshe***[3] where the Supreme Court held that:

> *"The concept of wrongful dismissal has been widely accepted to mean that in considering whether a dismissal was wrongful or not, it is the form to be considered rather than the substance.*

5.4 He then posed a question on whether the respondent did follow the procedure laid down under clause 4.2.2 of the contract in terminating the appellant's employment on medical grounds. In answering the question, counsel asserted that since the appellant's medical leave begun to run on 22nd August 2019 as held by the lower court and was supposed to end on 23rd February 2020, there was a breach of clause 4.2.2 when the respondent terminated the contract on 21st January 2020.

5.5 Our attention was further drawn to the case of ***Attorney General vs John Tembo***[4] where it was held as follows:

"(3) There was a blatant disregard of the Respondent's conditions of service and the rules of natural justice.

(4) The Respondent's dismissal from employment was wrongful."

5.6 In light of the authorities and the evidence, counsel implored us to allow this ground of appeal.

5.7 Pertaining to ground two, counsel argued that the Court below erred when it considered the work capacity certificate as being equivalent to a medical report. It was stoutly argued that according to clause 4.2.2 to discharge the appellant on medical grounds, a report of a registered medical practitioner should have been submitted after the expiration of 6 months.

5.8 A persuasive High Court judgment of ***Evans Chongo Musonda (suing as Administrator of the estate of the late Charles Kabesha) vs African Explosives Zambia***[5] was called in aid.

5.9 In view of the above submissions, counsel contended that there was no medical report to state that he was not capable of performing his duties.

5.10 Moving on to ground three, the thrust of the appellant's submission was that the circumstances of this case merit an award of damages because the correct procedure was disregarded by the respondent when it medically discharged the appellant. That the respondent was bound by the contract of employment but failed to follow the procedure.

The case of ***Chilanga Cement Plc vs Kasote Singogo***[6] was referred to where it was held that:

> *"When awarding damages for loss of employment, the common law remedy for wrongful termination of a contract of employment is the period of notice. In deserving cases, the courts have awarded more than the common law damages as compensation."*

5.11 Based on the forgoing, counsel urged us to allow the appeal.

6.0 Respondent's Arguments

6.1 In the heads of argument filed on behalf of the respondent on 9th November 2021, the respondent submitted in respect of ground one that the court below was on firm ground when it held that the termination of the appellant's contract of employment on medical grounds did not amount to wrongful dismissal and breach of statutory duty. It was asserted that an employer's entitlement to sick leave ceases the moment he is certified permanently unfit to carry out his normal duties.

6.2 Relying on **Section 38** of the **Employment Code Act**, the respondent argued that over and above the contractual provisions, the law allows for termination of contract for reasons connected to the capacity of the employee to discharge his duties. It was pointed out that in this case, the appellant fell ill and was diagnosed with a brain tumor in January, 2019. He underwent surgery at Fairview Hospital

on 13th March, 2019 and thereafter attended the respondent's health services until the date of his discharge.

6.3 It was thus contended that the employer is entitled to terminate a contract of employment on medical grounds where the employee has not recovered from an illness after 6 months from the date of the illness and not from the date of commencement of sick leave. In support of this argument, the respondent referred us to **Section 38(5) of the Employment Code Act**[1].

6.4 It was further submitted that the mere fact that the appellant could not continue working as a driver for the remainder of the contract, the employer was entitled to terminate the contract on account of frustration. This argument was premised on **Section 52 of the Act** and the holding in the case of **Marshall vs Harland and Wolf Limited**[7]**.**

6.5 The gist of the respondent's submission in respect of ground two was that there is no requirement under the law or contract that a recommendation from a medical practitioner could only be made after the exhaustion of 6 months sick leave.

6.6 Moving to ground three, the respondent submitted that the court below was on firm ground when it did not award damages for wrongful dismissal in view of the fact that the appellant failed to establish his claim for wrongful dismissal.

We were thus called upon to dismiss the entire appeal with costs to the respondent.

7.0 Hearing of the Appeal

7.1 At the hearing, learned counsel for both parties informed us that they would significantly rely on the heads of argument that were filed.

7.2 In addition, Mr. Pasi implored us to address the question of whether an employer is obliged to place an employee on sick leave for six months after a medical practitioner has certified that the said employee is permanently unfit to continue in that job.

8.0 Decision of the Court

8.1 We have meticulously gone through the record and considered the submissions by both parties. We shall consider the grounds of appeal in the manner that they were placed before us, namely whether or not there was wrongful dismissal, what constitutes a medical report as well as consideration of damages for wrongful dismissal.

9.0 Wrongful dismissal

9.1 The grievance in the first ground of appeal emanates from the trial court holding that the appellant's dismissal was not wrongful when the court itself stated in its judgment that his leave prematurely ended when he was discharged on medical grounds on 21st January, 2020.

9.2 We note from the onset that the appellant has used the words 'dismissal' and 'termination' interchangeably. These two terms cannot be used interchangeably as they connote different things and even though they relate to cessation of the employer/employee relationship. The Supreme Court guided in the case of ***Redrilza Limited vs Abuid Nkazi and Others***[7] that:

> *"It is apparent that the court in its judgment used the term 'dismissal' and 'termination' interchangeably. This should not have been so especially that the respondents were not dismissed from employment but their services were terminated by way of notice."*

9.3 In addition, they went on to explain that:

> *"There is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the employer to terminate the contract of employment without invoking disciplinary action."*

9.4 It is clear from the foregoing that it is wrong to use the two terms interchangeably. That being said, the appellant's cessation of employment was by way of termination.

9.5 The law on wrongful dismissal is clear in that it relates to the manner in which the dismissal is effected. Regarding what amounts to wrongful dismissal, we turn to a book entitled **'Employment Law in Zambia'** where the learned author Dr. WS Mwenda at page 105 opines as follows:

> *"When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was effected. The commonest incidence of wrongful dismissal is where the employer fails to give the requisite notice. Most contracts of employment have provisions for the employer to terminate the services of the employee upon giving the required notice or payment of money in lieu of notice... Another form of wrongful dismissal is one that involves a legal challenge on the basis of procedural error."*

9.8 The Supreme Court also had occasion to pronounce itself on the distinction between 'wrongful dismissal' and 'unfair dismissal' in the case of ***Care International Zambia Limited vs Misheck Tembo***[8] when they adverted to a book entitled Employment Law and Practice by Sprack John where he stated at page 117 that:

> *"Wrongful dismissal...essentially is a dismissal which is contrary to the contract and its roots lie in the common law. The remedy is usually limited to payment for the notice period...(In contrast) unfair dismissal is dismissal contrary to statute... Unfair dismissal is, therefore,*

usually a much more substantial right for the employee and the consequences for the employer of dismissing unfairly are usually much more serious than those which attend a wrongful dismissal."

9.9 In this instance the dissatisfaction stems from the trial court's finding that the appellant's termination was not wrongful on the one hand and in the next breath, having found that the appellant's leave prematurely ended when he was discharged on medical grounds. The appellant holds the view that the Judge ought to have found in his favour as the respondent had not followed the laid down procedure in the contract when it discharged him before the six months period had elapsed.

9.10 The crux of the matter is having found that the termination was a few days shy of the six months could the respondent be said to have violated the procedure laid down in clause 4.2.2. of the contract of employment? The Judge's reasoning is clearly articulated at pages J19 to J21 which appear at pages 26 to 28 of the record of appeal (ROA). She made a finding that the 6 months medical leave begun to run from 22nd August, 2019 and was therefore supposed to end on 23rd February, 2020. However, the appellants leave was prematurely ended when he was discharged on medical grounds on 21st January, 2020. She held that the premature termination did not affect the appellant's entitlement under clause 20 item 15.3 of the collective bargaining agreement. The learned Judge went on to hold that the fact that he left

his employment a few days before the medical leave expired was inconsequential.

9.11 We could not agree more with the trial court. The notice period could have fallen shy by a few days. However, that notwithstanding, all the benefits that accrued under the provisions of the contract were paid. He was further paid a salary in *lieu* of notice. This, in our view, compensated the procedural error if at all it was an error. The fact that he was paid for the month of February, 2020 when the leave was supposed to end, mitigated the detrimental consequences of the premature termination. We further hold the view that the premature termination notwithstanding, there was no prejudice occasioned on the appellant.

9.12 From where we stand, we see no basis upon which the findings by the trial court can be assailed in light of the foregoing. There was a proper evaluation of the evidence and the findings were not perverse and neither were they made upon a misapprehension of facts. They do not fall within the parameters set out in the ***Masauso Zulu vs Avondale Housing Project Limited***[9] in order for us to reverse the same.

9.13 The Judge as a matter of fact looked at the totality of the case and the relevant facts. Although the finding is that official communication was on 22nd August, 2019, the evidence on record also reveals that, in point of fact, the appellant had been sick in excess of 6 months. It further discloses that he

was admitted at Fairview Hospital from 9th March, 2019 and discharged on 25th March, 2019. Payment for treatment was effected by the respondent. A quick computation from March, 2019 when he was operated on, exposes the fact that he was incapacitated for that period until when he was discharged which is a period in excess of 6 months. However, we note that he was officially placed on medical leave from 23rd August, 2019.

9.14 Before we leave this issue we are of the well considered view that at this stage, we should answer the question raised by Mr. Pasi Counsel for the respondent. We have been called upon to interrogate the issue whether, notwithstanding the fact that a medical practitioner has certified an employee permanently unfit, the employer has an obligation to wait for the 6 months period to elapse before they are entitled to terminate the employment contract.

9.15 From our stand point each case must be determined on its peculiar set of facts. Suffice to state that the case of ***Evans Chongo Musonda (suing as Administrator of the estate of the late Charles Kabesha) vs African Explosives Zambia***[5] brought to our attention by counsel for the appellant is quite insightful. In the said case it was held that:

> *"A contract of employment may be validly terminated on the basis of an employee's illness, when that illness had demonstrated an adverse impact on the employee to perform the inherent requirement of the job.*

However, if the employee demonstrates that they are able to perform the duties and responsibilities of that job even after the period of absence from work, a termination will not be valid and will be harsh and unreasonable."

9.15 Notwithstanding that it is a High Court decision, it is persuasive in that it indicates that a contract of employment may be validly terminated on illness where the illness has had a detrimental impact on an employee. It behoves us to state that where it has been demonstrated that an employee is not capable of performing his duties owing to ill-health and there is a medical report to that effect then the termination would be valid. The rider is that the failure to perform the duties and responsibilities by the employee should be in relation to his capabilities to perform the inherent requirements of the job he was employed to do.

9.16 Our view is that each case should be decided on its own merit.

9.17 Taking all the relevant facts into consideration, the Judge was spot on to find that the fact that he left the company a few days before his medical leave expired was inconsequential. We accordingly find no merit in ground one and we dismiss it.

10.0 Work capacity certificate vs medical report

10.1 The question that we have been called upon to determine in the second ground of appeal is, whether or not the work capacity certificate amounted to a medical report. The

spirited arguments by counsel for the appellant is that the provisions of the contract of employment (see page 78 of ROA) in particular clause 4.2.2 indicate that in order to discharge the appellant on medical grounds, 6 months should have elapsed and a report of a registered medical practitioner should be submitted. It has been strenuously argued that in this instance, there was only a work capacity certificate prepared at the expiration of the appellant's medical leave and this was contrary to the aforecited provision.

10.2 The disappointment arises from the reliance on the work capacity certificate by the court below as being sufficient to satisfy the provisions of the employment contract clause 4.2.2. For ease of reference, we shall reproduce clause 4.2.2 of the employment contract which provides as follows:

> *"The Company has the right to end their Contract by placing the employee on medical discharge where the employee confirms to be incapacitated after the initial six months period on the report of a registered medical practitioner."*

10.3 The reasoning of the Judge at page J21 of the judgment appearing at page 28 of the ROA is follows:

> *"As regards the plaintiff's allegation that a medical report was not obtained in terms of clause 4.2.2, my reaction is that there was no standard prescribed in the clause or elsewhere of what constitutes a medical report, upon which, the defendant must be held accountable. The only requirement is that it should be prepared by a registered medical practitioner."*

10.4 She went on to hold that the work capacity certificate prepared by qualified medical practitioners, who included occupational health practitioners, sufficiently served as a medical report. We could not agree more with the reasoning of the Judge and adopt it accordingly.

10.5 In substance, we find that the work capacity certificate was a form of medical report as pointed out by the trial court. There was no prescribed format. We are inclined to state that a medical report is one that incorporates elements such as patient information, medical history, findings etc. It provides a comprehensive overview of a patient's health status, helping health care professionals make informed decisions about patients in their care. In employment cases it gives recommendations in terms of the health status of the employee to enable the employer arrive at a decision.

10.6 It has not been disputed that the preparation of the work capacity certificate was done by medical practitioners who include occupational health practitioners. As to the structure or format of the medical report, this has not been provided for in clause 4.2.2. Suffice to state, that there must be a medical report. In *casu*, the work capacity certificate embodied the elements which enabled the respondent to make an informed decision.

10.7 In light of the foregoing, we find no merit in the second ground of appeal and dismiss it accordingly.

11.0 Damages for wrongful dismissal

11.1 In the third ground of appeal, the unhappiness stems from the failure by the trial court to award the appellant damages. This ground, is entwined with the first ground on alleged wrongful dismissal in the sense that this claim is dependant on the success or otherwise of the first ground. Having found that the termination was not wrongful, it follows therefore that there is no basis upon which damages can be awarded. Crisply put, on account of the fact that the termination was not wrongful, the appellant is not entitled to damages.

11.2 Consequently, we find this ground to be bereft of merit and we dismiss it.

12.0 Conclusion

12.1 For the foregoing reasons, we dismiss the entire appeal for want of merit. The parties shall bear their respective costs in this court and in the court below.

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M.M. Kondolo, SC
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE

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Y. Chembe
COURT OF APPEAL JUDGE