IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 291/2021
HOLDEN AT KABWE

(Civil Jurisdiction)

B E T W E E N:

JOHN CHABA **APPELLANT**

AND

ACC MINE EXECUTIVE LIMITED **RESPONDENT**

Coram: Kondolo, Majula & Chembe, JJA
On 13th October, 2023 and 30th October, 2023

For the Appellant : *Mr. D. Mazumba of Messrs Douglas & Partners*

For the Respondent : *No Appearance — Messrs A. Imonda & Co.*

JUDGMENT

MAJULA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Chilanga Cement Plc vs Kasote Singogo (2009) ZR 122.*
2. *Tebuho Yeta vs Africa Banking Corporation ABC (Zambia) Limited - SCZ Appeal No. 117/2013.*
3. *The Attorney-General vs Clarke (2008) Vol. 1.*
4. *Philip Mhango vs Dorothy Ngulube and Others (1983) ZR 61.*
5. *Patrick Maguwudge vs Mopani Copper Mines Plc - SCZ Appeal No. 234/2013.*
6. *Ethiopian Airlines vs Sunbird Safaris Ltd & Sharma's Investment Holding Limited and Vijay Babulai Sharma's Investment Holding and Another (2007) ZR 235.*

7. *The Attorney General vs Marcus Achiume (1983) Z.R. 1.*
8. *Collett vs Van Zyl Brothers Ltd (1966) ZR 65 (CA)*

Legislation & Other authorities referred to:

1. Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia.
2. Employment Act, Chapter 268 of the Laws of Zambia (Repealed)
3. R.A. Percy, Charlesworth & Percy on Negligence, 12th Edition (London, Sweet and Maxwell, 2013).
4. High Court Act, Chapter 27 of the Laws of Zambia

1.0 Introduction

1.1 The appeal contests the Judgment of the High Court (Makubalo J) which dismissed the appellant's claims for negligence and wrongful termination of employment.

1.2 In determining the appeal, we shall discuss instances when an appellate court can interfere or reverse findings of fact that were made by a trial court. We shall also consider whether a defence of contributory negligence can be upheld in circumstances where it was not pleaded by a defendant.

2.0 Background Facts

2.1 The undisputed facts to this matter were that on 3rd March, 2010, the appellant was employed as a degreaser by the respondent. His job involved mixing chemicals with water to clean mining machinery.

2.2 On 14th March, 2014, the appellant suffered injury to his eyes whilst on duty. He was shortly thereafter hospitalized and the injury resulted in a permanent disability of loss of sight in his right eye. The appellant's oral contract was eventually terminated in May, 2014.

2.3 Piqued with the loss of employment, the appellant instituted an action in the High Court of Zambia against the respondent seeking payment of terminal benefits, damages for negligence and loss of future earnings. He also sought interest on the amounts due and costs.

2.4 The respondent denied the appellant's claims and averred that the injury was caused by his own negligence.

3.0 Decision of the Trial Court

3.1 In its judgment, the court below reviewed the evidence which had been deployed before it and made a number of findings of fact from which the court's conclusions were drawn.

3.2 In relation to termination of the appellant's employment, the learned Judge found that the respondent told the appellant in May, 2014 when getting his salary that that was his last salary. That the termination was therefore in accordance with **section 20(3)** of the **Employment Act**[2] (Repealed but applicable at the time).

3.3 Regarding the claim that the appellant suffered the accident as a result of the respondent's negligence in not providing him with approved personal protective equipment (PPE), the court found that no evidence was adduced to demonstrate the appropriate PPE that the respondent was required to provide and neither was an expert called to show whether or not the PPE that was given to the appellant were substandard.

3.4 The learned Judge ultimately found that there was contributory negligence on the part of the appellant to his injury when adding water to the degreaser. Overall the court dismissed the appellant's claims.

4.0 Grounds of Appeal

4.1 The appellant was not happy with the Judgment of the lower court and has appealed to this court on six (6) grounds expressed as follows:

"1. The court below erred in law to make a finding that notice to terminate was given to the appellant when he was paid his leave days for 24 days when none of the respondent's witnesses testified to that effect.

2. The court below also erred in law when it held that, the plaintiff was given verbal notice of termination in accordance with section 20 (3) Employment Act when this was not supported by any evidence from the defence.

3. *The court below erred in holding that the plaintiff was not entitled to anything for the 4 years of service since the appellant's employment was duly terminated by notice.*

4. *The court below erred in law and facts when it held that the claim for contributory negligence is sustained in the circumstances when contributory negligence was not pleaded in defence.*

5. *The court below erred in law and fact to overlook the unchallenged evidence that the plaintiff was given inappropriate (PPEs).*

6. *The court below also erred in law and in not awarding interest and costs despite finding Judgment for the plaintiff to be paid 70 days leave pay and K800.00 wages for April to May, 2014."*

5.0 Appellant's Arguments

5.1 The appellant filed his heads of argument on 28th November, 2021. With regard to ground one, it was asserted that the notice to terminate should have been given to the appellant or payment in *lieu* of notice. To support this submission, the appellant cited the case of ***Chilanga Cement Plc vs Kasote Singogo***[1] where it was held:

> *"Payment in lieu of notice is a proper and lawful way of terminating employment since every contract of service is terminable by reasonable notice."*

5.2 The appellant thus contended that since he was not a casual worker in terms of the **Employment Act**[2], he was, therefore, entitled to be given notice of termination or payment in *lieu* of notice.

5.3 The kernel of the appellant's argument in relation to ground two was that the court below erred in finding that the notice was verbally given to the appellant when there was no evidence on record to support this finding of fact. Our attention was drawn to the part of the judgment of the court below in which it was stated at page 25 line 9 as follows:

> *"From the evidence on record, none of the defence witnesses attested that the plaintiff was given notice to terminate his contract."*

5.4 We were thus implored to reverse the finding of fact to the effect that he was given notice to terminate on the authority of the case of ***Tebuho Yeta vs Africa Banking Corporation ABC (Zambia) Limited***[2]**.**

5.5 With respect to the third ground of appeal, the appellant faulted the trial Judge for holding that he was not entitled to anything for the 4 years of service on account of the fact that the employment was properly terminated. It was submitted that the respondent was in breach of the contract when it did not pay the appellant a salary in *lieu* of notice.

5.6 Turning to the fourth ground of appeal, the appellant averred that the respondent did not plead contributory negligence but the court below went ahead to make a finding that there was contributory negligence on the part of the appellant. To support this submission, the case of ***The Attorney General vs Clarke***[3] was called in aid where it was held that:

> *"A party cannot rely on unpleaded matters except where evidence on the unpleaded matters has been adduced in evidence without objection from the opposing party."*

5.7 Based on the cited authority, it was argued that contributory negligence was never pleaded in the defence to support the finding that was made by the lower court.

5.8 Moving on to ground five, the appellant criticized the lower court for allegedly glossing over evidence that he was given inappropriate PPE. The appellant referred us to the evidence on page 99 line 26 which according to him shows that he was given goggles which were not recommended on the container for the chemical he was using. That the PPE he was given was not covering his entire face but was only covering the eyes. We were thus called upon to reverse the perverse findings of fact in relation to the PPEs relying on the case of ***Philip Mhango vs Dorothy Ngulube and Others***[4].

5.9 Finally, as regards ground six the appellant submitted that despite finding that he was entitled to payment of April to May, 2014 salaries and 70 leave days, no interest was

awarded in accordance with **section 2** of the **Judgments Act**, **Chapter 81 of the Laws of Zambia**.

5.10 We were accordingly urged to allow the appeal and set aside the judgment of the court below.

6.0 Respondent's Arguments

6.1 In relation to grounds one and two which were argued simultaneously, the main point taken by Counsel was that the court below was on firm ground when it made a finding that notice to terminate was given to the appellant when he was paid his leave commutation for 24 days in the sum of K800 and was told verbally that it was his last money.

6.2 Counsel drew our attention to the appellant's letter on pages 57 and 58 of the record of appeal wherein the appellant confirms that he was given verbal notice of termination. We were also referred to the appellant's oral evidence on page 100 lines 13 to 17 of the record of appeal where the appellant confirmed that he was informed of the termination of his employment.

6.3 In light of the foregoing, Counsel contended that the court below properly guided itself when it held that the appellant was given verbal notice of the termination in accordance with **section 20(3)** of the **Employment Act**[2].

6.4 Pertaining to ground three, the respondent's Counsel submitted that the appellant was not entitled to payment of

benefits of redundancy or medical discharge due to lack of evidence on this aspect.

6.5 Turning to ground four, the gist of the respondent's argument was that the appellant never disputed the respondent's averment that the injury to the eye was caused by his negligence. That in any case the action relating to personal injuries was statute barred in terms of **section 3** of the **Law Reform (Limitation of Actions)[1].**

6.6 In relation to ground five, Counsel drew our attention to the appellant's testimony on page 99 lines 21 to 22 of the record of appeal where the appellant confirmed that he was given protective clothing, overalls and goggles. Further that the respondent's witness informed the court that PPEs that were being used by the appellant were the recommended safety attire. That in light of the above, this ground of appeal lacks merit.

6.7 Moving on to ground six, the respondent asserted that the issue of payment of 70 days leave was not even pleaded because the appellant had no unpaid leave days at the point of termination. To support this submission, we were referred to pages 75 and 76 of the record of appeal for calculations that were compiled. It was contended that the 70 days leave pay ordered by the court below was therefore not legitimately due to the appellant but is a windfall payment.

6.8 It was further submitted that the April to May, 2014 salary is also a windfall payment in view of the fact that the appellant was given 14 days' notice of termination.

6.9 In relation to costs, the respondent argued that the lower court properly used her discretion.

7.0 Hearing of the Appeal

7.1 When the matter came up for hearing on 13th October, 2023, only Mr Mazumba attended the hearing. The respondent's advocates were not in attendance on account of the fact that they had filed a notice of non-appearance.

7.2 In presenting the appeal, Mr Mazumba wholely relied on the record as well as the appellant's heads of argument that were filed herein. We thereafter adjourned the matter for judgment.

8.0 Decision of the Court

8.1 We have carefully considered the record of appeal and the submissions of the parties. We shall deal with grounds one and two together as they are related while the other grounds shall be dealt with separately.

9.0 Ground one and two - Right of appellate court to interfere with findings of fact

9.1 In the first and second grounds of appeal, the appellant contends that the finding by the court below that he was

given verbal notice of termination in line with **section 23** of the **Employment Act**[2] and that he was paid his leave days for 24 days was not supported by any evidence.

9.2 There are a plethora of authorities that guide as to when we as an appellate court can reverse findings of fact made by a trial judge. These authorities have consistently stated that we can only do so if we find that the findings of fact in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. In the case of ***Tebuho Yeta vs Africa Banking Corporation ABC (Zambia) Limited***[2] it was held:

> *"The appellate court will only reverse findings of fact made by a trial Judge if it is satisfied that the findings of fact in question were either perverse or made in the absence of any relevant evidence or upon a misappropriation of the facts"*

9.3 The court below having scrutinized the evidence concluded that the appellant was given verbal notice of termination. We have critically examined the evidence adduced particularly at page 58 record of appeal (ROA) which is a letter authored by the appellant where he indicated that:

> *"Although I was injured on duty I was surprised to be told that I was being paid my last salary for March 2014 and encashment of leave days on 10th April 2014. This was because AAC Mining was not receiving contracts*

from Konkola Copper Mines and therefore this affected my job."

9.4 This clearly speaks to the verbal communication that had been given. In addition, at page 100 of the ROA in his evidence the appellant stated that:

"I took the medical report to my working place. I was told I had been dismissed. I took the medical report on 17/04/2."

9.5 In light of the foregoing, the court below was entitled to come to the inescapable conclusion that the appellant was well aware of his verbal termination of employment. The evidence fell out of his mouth and it was accepted. How can he now turn around at this late stage to challenge the evidence that was deployed before the court? The appropriate place to have challenged this evidence was in the court below.

9.6 We further agree with the respondent that their contention regarding the appellant having been given 14 days verbal notice to terminate the employment was not challenged neither in the appellant's reply to the defence nor in his testimony. They have drawn our attention to the case of ***Patrick Maguwudge vs Mopani Copper Mines Plc***[5] which stated that:

"...we do note from the record and from the respondent's heads of argument that the respondent's counterclaim was not challenged in the court below."

9.7 In ***Ethiopian Airlines vs Sunbird Safaris Ltd & Sharma's Investment Holding Limited and Vijay Babulai Sharma's Investment Holding and Another***[6], the apex Court made the following observation in relation to matters in pleadings and evidence which are not controverted:

"There are a number of facts that were pleaded in the petition which the 3rd respondent did not challenge."

9.8 Chirwa JS in delivering the judgment on behalf of the Supreme Court outlined the serious issues which were not challenged and went on to hold that:

"They should and are deemed accepted."

9.9 In the context of the present appeal, we accept the submissions by Counsel for the respondent that the counterclaim which the respondent had mounted was neither challenged nor controverted. It stands to reason therefore that the respondent's counterclaim remains unassailed.

9.10 Turning to this particular case we are of the considered view that the appellant did not mount a challenge against the respondent's contention that he had been notified verbally about the termination as earlier stated. He in fact went on

to give evidence to this effect from what we have gleaned from the record.

9.11 For the foregoing reasons, we find grounds one and two to be bereft of merit. We dismiss them accordingly.

10.0 Ground three - Entitlements to pension benefits for 4 years service

10.1 With respect to the third ground of appeal, the appellant has faulted the trial Judge for holding that he was not entitled to anything for the 4 years' service on account of the fact that the employment was properly terminated. The gist of the appellant's submission is that the respondent was in breach of the contract when it did not pay him all the perks upon termination as well as payment of salary in *lieu* of notice

10.2 From where we stand, this ground of appeal should also suffer the fate of dismissal as there was no evidence adduced to support this claim. In his statement of claim, the appellant had pleaded payment of terminal benefits (redundancy/medical discharge). In addressing this claim, the trial Judge held that:

> *"The evidence is very clear that the circumstances in which the plaintiff's employment was terminated does not in any way show that the defendant was downsizing its work or that the plaintiff was not required at all for the specific job he was doing, he was given a notice to terminate which was not disguised for him to fall under* ***section 26B of the Employment (Amendment) Act 1997*** *or those being on medical grounds which would require a medical doctor to certify him unfit to perform the*

same duties or any other duties related to his employment. There being no such evidence, I am unable to conclude that the plaintiff was dismissed by way of redundancy or medical discharge.

I believe the employment relationship between the two parties was terminated pursuant to ***section 20(3)*** *as argued by the defendant."*

10.3 Taking into consideration the foregoing, we see no basis upon which the finding by the court below can be assailed. The appellant failed to substantiate his claims.

10.4 Consequently, this ground lacks merit and is dismissed.

11.0 Ground 4 – Unpleaded matters/Contributory negligence

11.1 The issue we are called upon to interrogate in the fourth ground is whether contributory negligence can be upheld without being pleaded or the lack of a finding of negligence on the part of the defendant.

11.2 The law on pleadings has been well settled. The general rule is that litigants are bound by their pleadings and cannot be awarded reliefs that they have not pleaded.

11.3 The function of pleadings has been dealt with on a number of occasions by the Supreme Court. There is rich case law on the subject. The general rule is that parties are bound by their pleadings and cannot be awarded a relief which has not been pleaded. The essence of pleadings is that a party must not be taken by surprise and should also be heard on the matter. The determination of a case by a trial court must be on matters that have been pleaded.

11.4 In the case of ***Attorney General vs Clarke***[3] it was stated that:

> *"A party cannot rely on unpleaded matters except where evidence on the unpleaded matter has been adduced in evidence without objection from the opposing party."*

11.5 In *casu*, the court found that there was contributory negligence on the part of the appellant. The question that begs an answer is, was this pleaded? We have considered the law on unpleaded matters and the effect thereof. Additionally, we have addressed our minds to a passage of the learned authors of **Charlesworth & Percy on Negligence 12th Edition at page 232 paragraph 4 - 013** where it has been opined that:

> *"If the defendant intends to rely upon averments of contributory negligence, the allegations must be specifically pleaded. In the event of a failure to plead them, the trial Judge is disentitled to apportion liability between the parties of his own motion and he is under no obligation to take contributory negligence into account."*

11.6 In light of the foregoing, it is our firm belief that the trial Judge was precluded from finding contributory negligence which was not specifically pleaded. The point that must be made is that contributory negligence must be pleaded. If not pleaded the Judge cannot of his own motion take contributory negligence into account. That being the case, the finding by the trial Judge was perverse in light of the law and we accordingly set it aside. This is in line with the guidance

given in the case of ***The Attorney-General vs Marcus Achiume***[7] which guides us in what instances we can upset the findings of the lower court.

11.7 In the view that we have taken, we find it otiose to deal with the alternative arguments as to whether contributory negligence can be upheld in the absence of a finding of negligence on the part of the defendant.

12.0 Ground 5 - Personal protective equipment (PPE)

12.1 In the fifth ground of appeal, the appellant is grappling with the aspect of appropriate personal protective equipment (PPE). His argument is simply that the respondents were negligent in not providing him with appropriate eye protective goggles which he claims resulted in his eye being damaged. The respondent on the other hand strongly disputes this assertion and contends that the attire he was given was recommended by Mopani.

12.2 We have examined the evidence on record and note at page 103 of the record of appeal (ROA), lines 15 to 16 where the appellant stated that the company gave him overalls, gumboots, a respirator and safety goggles. He had initially indicated at page 99 of ROA that the goggles he had been given were not the ones indicated on the container of the degreaser which was supposed to cover the face and the neck. Unfortunately, he did not lead any evidence to support this contention and the court was therefore entitled to arrive at the decision that the claim was unsubstantiated.

12.3 Honorable Judge Makubalo had this to say at page J27 (page 32 of ROA):

> *"What I have to consider now is whether or not having been supplied with PPEs the plaintiff out of his own negligence ignored to use the PPEs or that the PPEs were not fit for the intended purpose. I must point out here that no pictures were produced to show the kind of PPEs provided by the defendant or the ones which the plaintiff claimed were the right PPEs recommended on the said container. Further, there is no expert evidence to show whether or not the PPEs provided were substandard to protect the plaintiff."*

12.4 Flowing from the foregoing, we see no basis upon which the reasoning of the trial Judge can be assailed. Therefore, this ground of appeal must fail for want of merit.

13.0 Ground 6 - Interest on judgment sum and costs

13.1 The protestation in the sixth ground is in the failure by the court below in awarding interest on the judgment sum despite entering judgment for the appellant for the payment of leave pay for 70 days and wages in the sum of K800 for the period April to May 2018.

13.2 The contention by the respondent on the other hand is that leave pay was not pleaded as he had already been paid the outstanding 24 days of leave accumulated at the point of termination.

13.3 We have meticulously perused the record and it is clear particularly at pages 75 and 76 of the ROA, that at the time of termination, the leave days that were due were 24 which were paid. Therefore, the finding that he was entitled to 70 leave days was perverse.

13.4 Regarding the K800 also awarded, there is evidence on record in particular at pages 79 to 80 where the appellant did confirm being paid an amount of K800. In light of the foregoing, we find that there is no merit in this ground of appeal as the amounts awarded should not have been awarded as this flies in the teeth of the evidence adduced. We accordingly set aside the award that was given and as a consequence the claim for interest and costs is not tenable and we dismiss it forthwith.

13.5 The second limb of the last ground of appeal is the discontent by the appellant arising from the alleged failure by the lower court to award him costs. The principle of law is that they are within the discretion of the court. This position has been articulated by the Court of Appeal in the case of ***Collett vs Van Zyl Brothers Ltd***[8], where it was held:

> *"The award of costs in an action is at the discretion of a trial judge, such discretion must be exercised judicially."*

13.6 Further **Order XL Rule 6** of the **High Court Rules**[4] of the Laws of Zambia also spell out the same principle. The court in the exercise of its discretion clearly articulated the reasons

why it made no order as to costs notwithstanding partial success. The Judge stated at page J29 of her judgment that:

> *"The plaintiff has only succeeded in the payment of the April to May 2014 s,alary and outstanding leave days not paid - he has been unsuccessful in all his other claims- I order no costs."*

13.7 It is our firm view that, the court below cannot be faulted for the exercise of its discretion as it was exercised judiciously.

13.8 Consequently, the sixth ground of appeal is dismissed for being devoid of merit.

14.0 Conclusion

14.1 All the six grounds of appeal save for ground four are dismissed for lack of merit.

14.2 As there has only been minimal success, we award costs to the respondent to be taxed in default of agreement.

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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