IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.018/2013**
HOLDEN AT KABWE
(CIVIL JURISDICTION)

BETWEEN:

TARICK MWAMBWA CHANAIKA **APPELLANT**

AND

ZAMANITA LIMITED **1ST RESPONDENT**

ZAMBEEF PRODUCTS PLC **2ND RESPONDENT**

CORAM: Malila, C.J, Phiri and Hamaundu, JJS

On 12th August, 2015 and 6th May, 2024

For the Appellant: Col. M. Maanga, Messrs W.M. Kabimba & Company

For the Respondents: Mr K. Wishimanga, Messrs A.M. Wood & Company

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JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Gerald Musonda Lumpa v Maamba Collieries Ltd (1988/89) ZR 217**
2. **Contract Haulage v Kamayoyo (1982) ZR 13**
3. **Zambia Consolidated Copper Mines v Matale (1995/97) ZR 144, 147**
4. **Salomon v A. Salomon & Co Ltd [1897] AC 22**
5. **Vine v National Dock Labour Board (1956) 3 All E. R. 937, 944**
6. **Masauso v Avondale Housing Project Limited (1982) Z.R. 172**

Legislation referred to:
The Employment Code, No.13 of **2019, Sections 52 and 53**

1.0 Introduction

1.1 When we heard this appeal, we sat with Mr Justice G.S. Phiri. The learned judge has since retired, and therefore this judgment is by majority.

1.2 The delay in delivering this judgment is deeply regretted. It has been caused by a number of factors which were compounded by the retirement of our brother as we have stated.

1.3 This is an appeal against the decision of the Industrial Relations Court which dismissed the appellant's claim for damages for breach of contract of employment. The appeal is on the following three grounds:

> **"1. The trial court erred in law and in fact in finding that the appellant's contract of employment was properly terminated by a non-party to the contract, namely an employee of the 2nd respondent when the appellant was employed by the 1st respondent:**
>
> **2. The trial court erred in law and in fact when it found that there were no compelling reasons to delve behind the termination notwithstanding that the termination of the contract was by a non-party:**
>
> **3. The trial court erred in law and in fact when it found that the appellant did not act in a higher capacity in the 2nd respondent company than the position he held in the 1st respondent company; and that the trial court also erred when it found that the appellant was not**

transferred from the 1st respondent company to the 2nd respondent company".

2.0 The Facts

2.1 The appellant was employed by the 1st respondent, Zamanita Limited, in 2008 on a contract whose duration was two years. The contract was renewed in 2010 for another term of two years, and was to expire in 2012. On or about the 3rd January, 2011, however, the employment was terminated by the 1st respondent upon giving one month notice to the appellant.

2.2 At the time that the contract was terminated, the 1st respondent was part of a group of companies headed by Zambeef Products Plc, the 2nd respondent in this case. Another company in that group was Novatek Limited. The appellant, who was employed as Information Technology Manager, was providing his specialist services to the three companies in the group. As a matter of fact, at the time of the termination of employment, the appellant was working from the parent company, which was regarded as the Head Office of the group of companies.

2.3 The letter that informed the appellant about the termination of the contract was on Zamanita Limited's

headed paper but was signed by the Group Head Human Resources, whose usual place of work was at the Head Office.

3.0 The Appellant's Case

3.1 The appellant, being aggrieved by the termination of the contract, took the matter to the Industrial Relations Court: That was before that court became a division of the High Court. The main claim that the appellant launched in the Industrial Relations Court was for damages for breach of contract on the ground that the contract of employment was terminated without any justifiable reason. There were also two other claims namely, for unpaid salary increment and unpaid acting allowance.

3.2 As far as the termination of employment is concerned, the appellant's contention in the court below was that the person who signed the letter of termination was not from Zamanita Limited, and therefore, the termination was void. For that reason, the appellant urged the court to delve behind and find that the termination was on improper motives.

3.3 Regarding the secondary claims for unpaid salary and acting allowance, the appellant's contention was that he had been transferred to the Head Office in a new capacity which entitled him to receive an enhanced salary of K10,000 net, and not the K5,000 that he was receiving. The appellant claimed that the new salary was never paid. On the acting allowance it was the appellant's contention that, because he was transferred to the Head office, that was a rise in his position which should have entailed at least an acting allowance.

4.0 The Respondent's Case

4.1 The position of the respondents was that the appellant's employment was terminated properly under a clause which allowed either party to terminate the contract upon giving the requisite notice, or payment of salary in lieu thereof.

4.2 It was also the respondents' position that the appellant was required, as part of his normal routine, to carry out computer-related assignments at Zamanita Limited, Novatech Limited and all divisions of Zambeef Limited. The respondents contended that the appellant, therefore, did

not act in any higher capacity that attracted either a higher salary or an acting allowance

5.0 The Trial Court's Decision

4.1 The trial court side-stepped the contention that the letter of termination was written by an alleged non-party to the contract of employment, but instead found as a fact that the contract was terminated by Zamanita Limited. Proceeding on that finding, the trial court considered our decisions in the case of **Gerald Musonda Lumpa v Maamba Collieries Ltd**[1] and in the case of **Contract Haulage Limited v Kamayoyo**[2]. It then concluded that, according to the decisions in these two cases, termination of employment by way of notice, or payment in lieu of notice, was a perfectly legal way of terminating the contract.

4.2 Coming to the appellant's plea for the trial court to delve behind the termination, the court upon considering the case of **Zambia Consolidated Copper Mines v Matale**[3], among others, held that a court can only delve behind a termination when there is evidence presented to it that the employer invoked the termination clause out of malice. The

court found that, in this particular case, the appellant did not adduce any evidence which would suggest that the 1st respondent acted out of malice when it invoked the termination clause in the contract. Consequently, the court found that the claim for unfair and wrongful termination was without merit, and dismissed it.

4.3 On the claim for acting allowance, the trial court found that clause 24.1 of the contract of employment provided for such payment only when an employee had acted in a higher position for at least one month. In the case of the appellant, the court found that, although he had worked at Novatech and Zambeef as well, he nevertheless worked in the same capacity as Information Technology Manager. The court therefore held that, according to that clause, the appellant was not entitled to any acting allowance.

4.4 As regards the claim for salary increment, the court held that other than the appellant's own proposal, there was no evidence that the parties had finally reached agreement on a salary increase, and amended the contract accordingly.

4.5 The court, consequently, dismissed the whole of the appellant's action.

6.0 The Appeal

5.1 The three grounds of appeal that have been filed can be divided into two categories; one that goes to the propriety of the termination of the employment, and the other that goes to entitlements. The first two grounds belong to the first category while the third ground belongs to the second one.

5.2 The appellant's arguments in the first ground of appeal are anchored on the fundamental principle of the separate legal personality of an incorporated company as laid down in the case of **Salomon v A. Salomon & Co Ltd**[6]. Counsel for the appellant, Colonel Maanga, relies on this case, and other subsequent English authorities, to support his argument that this principle overrides even the fact that the 1st respondent was a subsidiary of the 2nd respondent company.

5.3 It is counsel's argument that, in view of the above principle, the termination of employment in this case was void because the letter was signed by an employee of the parent company who was a stranger to the contract between the appellant and the 1st respondent. In counsel's

view, the fact that the termination was void meant that the damages arising from the resultant breach of contract were to be calculated as full salary and benefits for the remainder of the contract, and not on the usual reasonable period of notice.

5.4 In the second ground of appeal, Colonel Maanga criticizes the trial court for holding that a court can only delve behind the reasons for termination of employment when there is evidence that the termination was motivated by malice, or improper motives. He argues that, in this case, there was a good reason to delve behind and find a breach of contract because the letter of termination was signed by a stranger to the contact.

5.5 In the third ground of appeal, Colonel Maanga has based his arguments on the trial court's finding that, during the course of his employment with the 1st respondent, the appellant was assigned work by Zambeef Limited and Novetek, as well. Colonel Maanga argues that the appellant's move must have necessarily increased the scope of his responsibility, and that this obviously would amount to a *"higher position"* which entitled him to an

acting allowance in terms of clause 24.1 of the conditions of service, if not an increased salary. Counsel goes on to point out that, infact, the appellant testified that the head of finance at Zambeef Limited, one Sanjeer Gaduf, had told him that he would be paid for his extra services at Zambeef Limited.

5.6 In response, counsel for the respondents, Mr Wishimanga, has argued in the first ground of appeal that the facts before the trial court had disclosed that this was a group of companies, and that RW1 was the Head of Human Resources of that group. Counsel argues that, in that capacity, RW1 was able to perform the duties of the 1st respondent company.

5.7 Mr Wishimanga points out that, in any case, the wording of the letter of termination shows that the decision to terminate the employment was made by management of the 1st respondent company, and not by RW1 in his individual capacity.

5.8 Reacting to the appellant's argument that the termination of employment was void, Mr Wishimanga submits that the appellant never raised the issue in the court below.

5.9 In response to the appellant's argument in the second ground of appeal, Mr Wishimanga supports the trial court's holding that a court will only delve behind the termination of a contract of employment if it is shown that there was malice in the termination, and that the termination resulted in some form of injustice.

5.10 With regard to the third ground of appeal, Mr Wishimanga argues that the appellant failed to demonstrate to the trial court that he had acted in a higher position than that which was stated in his contract. Counsel points out that the appellant was employed as an IT Manager in 2007, and that when his contract was renewed two years later it stated that the appellant would be serving in the same capacity.

6.0 Our Decision

6.1 In the case of **Contract Haulage Limited v Kamayoyo**[(2)], Gardner, the acting Deputy Chief Justice at the time, in a judgment that was adopted by the Court, said this:

> **"In my view, the question of whether or not a dismissal is in breach of contract or null and void is one of jurisdiction. Where there is a statute which specifically provides that an employee may only be dismissed if**

> **certain procedures are carried out, it can properly be argued, as in the *Kang'ombe* case, that an improper dismissal is *ultra vires.* In the same way, where there is some statutory authority for a certain procedure relating to dismissal, a failure to give an employee an opportunity to answer charges against him or, indeed, any other unfairness may be said to be contrary to natural justice to the extent that a dismissal under such circumstances would be null and void".**

6.2 By submitting on behalf of the appellant that the termination of the employment in this case was void, Colonel Maanga is arguing as though the terms of the contract of employment in this case were provided for in a statute. It should be noted that, at the time that the appellant was in employment with the 1st appellant, our labour laws contained only general provisions regarding contracts of employment. **Section 52** and **Section 53** of the **Employment Code, No. 13** of **2019**, which nowadays place some restrictions on an employer regarding the termination of a contract of employment, were not in existence then. So, the relationship that existed between the parties in this case is that which, in cases such as **Contract Haulage Limited v Kamayoyo**[(7)], was referred to as a pure master and servant relationship. One feature

of such a relationship can be seen from the following words of Viscount Kilmuir, L. C. in the case of **Vine v National Dock Labour Board**[8]:

> **"This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him".**

6.3 The point that we wish to drive home from this passage is that, in an employment relationship which is categorized as a master and servant case, such as the contract in this case was, any manner of wrongful termination of the employment can only amount to breach of contract, and not to the nullification of the termination. So, it is pointless to argue, as the appellant has done in this case, that because the letter of termination was signed by an employee from Zambeef Products PLC, and not by one from Zamanita Limited, then the termination was null and void; for, if that argument is indeed valid, it can only mean

that there was a breach of contract, and this can only give rise to an award of damages and not re-instatement.

6.4 Having said that we now wish to consider whether indeed the fact that the letter of termination was written by the Group Head of Human Resources was, itself, a breach of the contract.

6.5 It was not in dispute that the appellant's employer, Zamanita Limited, was part of a group of companies and the signatory of the letter of termination was the group's head of human resources. We also agree with the submissions by counsel for the respondents that not only was the notice written on Zamanita Limited's headed letter but that the contents thereof stated that the decision had been made by management of Zamanita Limited. So, this was a decision made by Zamanita Limited, and it was immaterial that it was communicated by the group's head of human resources. In our view, therefore, the fact that the termination was communicated by him was not, in any way, a breach of contract. Consequently, we find no merit in the first ground of appeal.

6.6 The second ground of appeal clearly arises from a misunderstanding of what we said in the case of **Zambia Consolidated Copper Mines v Matale**[3]. Commenting on **section 85**, **subsection 4**, of the **Industrial and Labour Relations Act**, we said this:

> **"There is nothing in the language of this subsection to suggest that certain genuine complaints of any particular kind or category may not be litigated, such as wrongful, unjust or unfair dismissal. The mandate in** *ss(5)* **which requires that substantial justice be done does not in any way suggest that the Industrial Relations Court should feter 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 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".**

6.7 Now, this passage applies to a case where the termination by a notice clause appears to have been used properly when, in actual fact, there are improper motives behind the termination. Hence, when evidence of such ulterior motive is led, the Industrial Relations Court is indeed entitled to examine and accept them. In such a case, the

court will hold that the termination was wrongful, even if that termination, on the face of it, appears to be perfect. That is what *'delving behind'* is all about.

6.8 In this case, however, the appellant contends that the termination by notice was wrong because it was effected by a non-party to the contract, and there is no other hidden reason which the appellant suggested to the court below. Therefore, there was nothing that the court was required to delve behind, and find out. The only thing that was there for the court to do was to examine the alleged fault and see whether it amounted to a breach of the contract of employment; this is what the trial court did and it arrived at the conclusion that the termination was not in breach of contract. We have since confirmed that conclusion in the first ground of appeal. Hence, we find no merit in the second ground, as well.

6.9 In the third ground, one of the two issues that the appellant is unhappy with is the finding that the appellant did not act in a higher position, so as to entitle him to an acting allowance under clause 24.1 of the contract of employment.

6.10 The trial court resolved this question as an issue of fact. In other words, the court weighed the appellant's evidence as against that of the respondents' witness, (that is, the Head of Human Resources), and accepted the latter's version that the appellant was called upon from time to time to provide IT services to the sister companies within the group, in the same capacity. Now, we have held in a number of cases that, when it comes to findings of fact, an appellate court will be slow to interfere with findings made by a trial court. In the case of **Masauso v Avondale Housing Project Limited**[9] we held:

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

6.11 In this case, the appellant has not shown that the finding in this case was perverse or was made in the absence of any relevant evidence or that it was made upon a misapprehension of the facts. His only argument is that, since the respondents called upon him to provide IT services to other sister companies, this amounted to a

"higher position". This argument does not meet the criteria that we have set out above. Consequently, we cannot set aside that finding of fact; instead, we agree with the trial court that because the appellant did not act in a higher capacity, he was not entitled to an acting allowance under clause 24.1 of the contract of employment.

6.12 Within the same ground, the appellant is unhappy with the holding by the trial court that his claim for an increased salary was unsubstantiated. The appellant contends that, in arriving at that holding, the trial court ignored evidence of e-mail communication between the appellant and management of the 2nd respondent.

6.13 The judgment of the trial court shows that the court did not ignore the e-mail communication, but merely thought it to be not weighty enough to prove that there was agreement to increase the appellant's salary. The court said that, if there had been such an agreement, it should have culminated into the amendment of the contract of employment.

6.14 We concur with the trial court's reasoning. We expect that a change in a fundamental term of a contract of

employment, such as the salary, should be expressed in a concrete document, and not merely through proposals in e-mails. Consequently, we find no merit in the appellant's argument on this point.

6.15 Having found no merit in each ground of appeal, we are compelled to dismiss the whole appeal. This being a matter that came from the Industrial Relations Court, we order each party to bear their own costs.

M. Malila
CHIEF JUSTICE

E. M. Hamaundu
SUPREME COURT JUDGE