IN THE HIGH COURT FOR ZAMBIA

AT THE PRINCIPAL REGISTRY

INDUSTRIAL RELATIONS DIVISION

HOLDEN AT LUSAKA

COMP NO. IRCLK/48/2013

BETWEEN:

NKANDU PRISCILLA CHIKONDE CHANSA
COMPLAINANT

AND

NATIONAL SAVINGS AND CREDIT BANK
RESPONDENT

Coram: Chigali Mikalile, J this 3rd day of April, 2024

For the Complainant: Ms. S. Chisanga Miti – KMG Chisanga Advocates

For the Respondent: MSK Advocates

JUDGMENT

Legislation referred to:

1. The Industrial and Labour Relations Act, Chapter 269

Cases referred to:

1. Redrilza Limited v. Abuid Nkazi & Others, SCZ Judgment No. 7 of 2011

2. Care International Zambia Limited v. Misheck Tembo Selected Judgment No. 94 of 2015
3. Zambia Privatisation Agency v. Matale (1995-1997) Z.R 144
4. Zambia Postal Services Corporation v. Bowa & Mukonka, Appeal 72 of 2009 [2012] ZMSC 6.
5. Choonga v. Zesco Recreation Club, Itezhi Tezhi, Appeal 168 of 2013) [2016] ZMSC 32
6. Mike Musonda Kabwe v. BP Zambia Limited, SCZ Appeal No. 11 of 1996
7. Sililo v. Mend-A-Bath & Another, SCZ Appeal No. 168 of 2014
8. Zambia Airways Corporation Limited v. Gershom B.B. Mubanga, SCZ Judgment No/1992
9. Barclays Bank Zambia Limited v. Mando Chola & Another SCZ Judgment No. 8/1997
10. Swarp Spinning Mills Plc v. Sebastian Chileshe & Others (2002) Z.R. 223

Texts referred to:

1. Mwenda, W.S. and Chungu, C. A Comprehensive Guide to Employment Law in Zambia (UNZA) Press, 2001
2. Gwyneth Pitt, Employment Law, London: Sweet & Maxwell, 1995

The delay in the delivery of this judgment is deeply regretted more so that this is quite an old case. This was due to pressure of work.

Introduction

1. The complainant is challenging the termination of her employment contract while she was on study leave. She contends that the

respondent's action, though purportedly founded on the termination clause in the contract, was actuated by spite, ill will and malevolence.

2. The respondent contends that the contract of employment was properly terminated pursuant to clause 10 of the contract and not out of spite, ill will and malevolence as alleged. It further denies dismissing the complainant. It asserts that the complainant's employment was terminated and she is not entitled to any of the reliefs sought as all dues were paid.

3. In her notice of complaint and affidavit in support filed on 25th February, 2013, the complainant seeks the following reliefs:

(a) A declaration that the decision by the respondent to terminate the complainant's contract of employment was wrongful and without justifiable and reasonable cause and thus amounted to wrongful dismissal;

(b) Damages amounting to the full contractual benefits payable to the complainant at the end of the contract period;

(c) Any further or other relief as the court may deem fit; and

(d) Costs for and incidental to these proceedings.

Complainant's affidavit evidence

4. The complainant deposed that she was employed by the respondent as Company Secretary and Legal Counsel in December, 2007. On 2nd June, 2011, she applied for and was granted leave by the Board of Directors of the respondent for one year to proceed to the United Kingdom to pursue a Masters of Law Degree from September, 2011.

5. It was a condition of the grant of this paid study leave that she would continue to draw a salary and all benefits and that upon successful completion of the studies, she would remain bonded in the employ of the respondent for two years. Exhibited to the affidavit and marked "NPCC1" is a copy of the letter granting paid study leave.

6. On 2nd August, 2011, shortly before her departure for her study leave, the respondent upgraded her position from Grade NS3 to NS2 in recognition of her performance and competence and a three-year contract of employment was duly signed between the parties. The letter upgrading the complainant's position and the contract of employment are exhibited as "NPCC2" and "NPCC3 respectively.

7. It was the complainant's further averment that while pursuing her studies and unknown to her, the respondent wrote a letter (exhibited as "NPCC4") in November, 2011 purportedly terminating the contract of employment by giving notice to terminate.

8. According to the complainant, the manner in which her contract was purportedly terminated was in violation of the terms of the contract and the law that applies thereto and she further verily believes that in terminating her contract, all the concerned parties who participated in the exchange of internal correspondence were actuated by ill will, malice and malevolence against her. The respondent's actions, though they purportedly relied on the termination clause in the contract, were a manifestation of a wrongful dismissal.

9. Further, from the time the respondent terminated the complainant's contract, it has not made payment due to her and has not accorded her a computation of her benefits as required by the contract executed between the parties.

Respondent's answer and affidavit evidence

10. The respondent filed its response to the complaint on 14th May, 2013. In the affidavit in support of answer sworn by Cephas Chabu, the respondent's Managing Director, it was confirmed that the complainant's contract of employment was terminated on 24th November, 2011. According to the deponent, the termination was pursuant to the termination clause, No. 10 of the contract of employment, and without any spite, ill will or malevolence.

11. The letter of termination was duly received by the complainant on 29th November, 2011. Exhibited to the affidavit and marked "CC1" is a copy of the letter confirming delivery.

12. The deponent further deposed that following the termination of the contract, the complainant was duly paid all contractual dues up to the date of termination. She was not dismissed from employment and she has not produced any document even remotely suggesting a dismissal. The complainant is not owed any contractual benefits beyond the date of termination of her contract.

Trial course

13. The complainant testified on her own behalf and did not call any other witness. The respondent did not attend trial despite being duly served with the notice of hearing.

14. The complainant testified in line with her affidavit evidence. She added that the letter of termination dated 24th November, 2011 was sent to her university and she only received it much later. She emphasized that the termination was driven by malice and ill will. Despite knowing that she was going to school, the respondent promoted her and a couple of months later, they purported to execute their right to terminate in total disregard of the expectation that they had created that she would be on one year study leave and thereafter bonded for two years. It was her testimony that the termination was wrongfully done.

15. According to the complainant, she had not been paid her dues which included her gratuity and payment in lieu of notice. The

documentation filed by the respondent shows computations done in February, 2012, three months after termination. The computation on page 14 of the respondent's bundle of documents shows basic pay for the month of September of K 60,740,375.00, fuel allowance of K 4, 824,092.30, talk time of K 769,230.77, car allowance of K 2.5 million, child education allowance of K 17,666,538.46, car lease rental of K 7,692,307.69 and non-private practice allowance of K 6,615,384.62. Thus, the total salary earned was K 100,807,928.54. According to their computation, gratuity was K 35,282,775.09 (all amounts unrebased).

16. The same computation shows that the respondent altered her conditions without her consent in the subsequent months, that is October to December. The basic salary was computed at K 40 million while fuel, which was paid through the payroll, was not paid. Talk time, car lease rental and non-private practice allowances were paid. Child education allowance was not paid in October and November.

17. According to the respondent, in October and November, gratuity was K 20,151,923.08. In December, they added child education allowance which brought gratuity to K 28,452,307.69. Further, the personal loan in the sum of K 44,444,444.44 indicated in the computation was actually paid off in her previous contract.

18. According to the complainant, the respondent ought to have computed gratuity on her basic pay and all allowances as per clauses 5.0 and 6 of her contract. When she was granted study leave, the

allowances were not excluded from her benefits as evidenced by the letter of 2nd June, 2011 and the payment made in September, 2011 when the study leave begun.

19. She was never availed the computation despite the respondent preparing the same in 2012. According to the respondent, they paid net gratuity of K 136,373.62. She, however, never received this money. It was paid into her staff account to which she has no access.

20. In concluding, the complainant testified that the wrongful termination caused a lot of hardship and stress because when she was leaving, she was given assurance that she would be paid her salary and allowances. Despite promoting her, the respondent later decided to send her the letter of termination. This was quite inhuman.

21. At the end of the complainant's evidence in chief, the matter was closed for judgment.

Submissions

22. Learned counsel for the parties filed written submissions for which I am most grateful. I shall not reproduce the submissions but will make reference as appropriate.

Determination

23. I have carefully considered the evidence, the final submissions and authorities cited therein. I remind myself that it is trite that he who

alleges must prove and the standard of proof generally is on a balance of probabilities.

24. The facts not in dispute are that the complainant was employed by the respondent as Company Secretary/Legal Counsel. On 2nd June, 2011, she was granted one year paid study leave effective September, 2011. She proceeded on study leave and whilst away in the United Kingdom, her three-year contract of employment, which commenced on 2nd August, 2011, was prematurely terminated on 24th November, 2011 with immediate effect. The termination was pursuant to clause 10 of the contract which clause provides for termination by either party giving 30 days written notice or payment of one month basic salary in lieu of notice.

25. The complainant contends that the termination was actuated by spite, ill will and malevolence towards her, as such, was wrongful and without justifiable and reasonable cause. According to the complainant, this amounted to wrongful dismissal. The respondent of course denies this allegation.

26. As submitted by counsel for the complainant, the decision herein must necessarily turn on determination of whether the termination of the employment relationship was wrongful. Only if this issue is determined in the affirmative will the complainant be entitled to the damages as claimed.

27. Counsel for the respondent submitted that a declaration that the termination amounted to wrongful dismissal is untenable at law because this relief entails that this court should find that there was wrongful termination and further that wrongful termination is wrongful dismissal. In support of his argument, he relied on the case of **Redrilza Limited v. Abuid Nkazi & Others**[1] whose brief facts are that the respondents' employment contracts were terminated by notice. The Industrial Relations Court found in favour of the respondents on the basis that the appellant invoked the termination clause in the respondent's contract of employment in bad faith, and consequently ordered that they be paid six months' salary as damages.

28. On appeal, the Supreme Court held that:

> *(1) There is a difference between dismissal and termination. Dismissal involves loss of employment arising from disciplinary action. While termination allows the employer to terminate the contract of employment without invoking disciplinary action.*
> *(2) The terms "dismissal" and "termination," should not be used interchangeably.*

29. The Court stated that:

> *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.*

30. The Court went on to conclude as follows:

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. After considering the facts, the judgment of the lower Court, and learned counsels' submissions, our finding is that the Court misdirected itself in holding that the appellant acted in bad faith and unfairly, when it terminated the respondents' employment by notice. It follows therefore that the respondents are not entitled to any damages as their termination was lawful.

31. As can be seen, the case has been heavily quoted and this is because it is quite similar to the case at hand. That case was decided before there was an amendment to the law which now requires that a valid reason be given for terminating the employment contract.

32. As found, the complainant's contract was terminated pursuant to the termination clause which gave either party the liberty to bring the employment relationship at an end either by giving one month's notice or payment in lieu of notice. There was no disciplinary action in this case. Quite clearly, and as guided by the **Redrilza** case, the complainant was not dismissed. Her employment contract was terminated as per the agreement governing the employment relationship.

33. I therefore do agree with counsel for the respondent that a declaration that the termination amounted to wrongful dismissal is untenable.

34. In any event, wrongful dismissal, as stated in the case of **Care International Zambia Limited v. Mischeck Tembo**[2] relied on by the complainant is dismissal at the instance of the employer that is contrary to the terms of employment. Form rather than merits of the dismissal must be scrutinized.

35. As noted already, the respondent terminated the employment relationship in accordance with the contract and particularly clause 10. The termination was not in breach of the contract. There was, therefore, nothing wrong with the form.

36. I have considered the complainant's argument that the respondent's conduct was irrational and I have also considered her request to this court to scrutinize the said conduct on the basis that this court is a court of substantial justice unfettered by legal technicalities. In this regard, reliance was placed on section 85(5) of the Industrial and Labour Relations Act, Cap 269 as well as the cases of **Zambia Privatisation Agency v. Matale**[3] and **Zambia Postal Services Corporation v Bowa & Mukonka**[4]. In the latter case, the Supreme Court stated as follows:

> *In this case, where there was a general complaint of wrongful and unjust or unfair dismissal by the Respondents, in accordance with sub 4 of Section 85, the court below, in order to carry out its mandate of doing substantial justice, rightly decided to delve behind the termination clauses. We agree with the Industrial Relations Court that in doing substantial justice, there is nothing in the Act to stop it from delving behind or into reasons of terminating any employee's contract of employment. In our view, the court below was on firm ground to have done that.*

37. What emerges from the cited cases is that this court has the mandate to look into the reason behind the termination by the employer in order to do substantial justice.

38. The complainant contends that the termination clause in the contract was actuated by spite, ill will and malevolence towards her. According to the complainant, the decision to terminate her employment was preceded by adverse correspondence with the respondent organization the effect of which was to create a negative portrayal of the complainant.

39. The respondent denied this assertion and pointed out in its submissions that the complainant had not produced proof of the said correspondence. I join hands with the respondent on this submission. There is indeed no proof of the ill will or spite that the complainant speaks about. In the letter of termination, the respondent did not give any reason for the termination and there was nothing unlawful about proceeding in that manner.

40. The complainant did also argue that she had legitimate and reasonable expectation that she would retain her contractual position in the respondent for the contractual period. Counsel on her behalf went on to cite various authorities on legitimate and reasonable expectation and argued that the expectation makes the termination wrongful.

41. However, I am not swayed by this line of argument for the reason that I am not here dealing with non-renewal of a contract. As established, either party was at liberty to terminate the contract at any time and the respondent exercised that right lawfully.

42. Having refused to declare that the termination of the complainant's contract of employment amounted to a wrongful dismissal, it follows that the complainant is not entitled to damages for wrongful dismissal.

Any other relief and costs

43. The complainant did seek any other relief the court may deem fit. At the hearing, the complainant brought to the fore the fact that the respondent altered her conditions of service. She relied on the computation of gratuity document at page 14 of the respondent's bundle of documents which shows that from October to December, 2011, her basic salary was reduced to K 40,000,000.00 from K 60,740,375.00 while fuel was not paid at all. Further, the child education allowance was not paid in October and November and this affected the gratuity amount.

44. It was the complainant's contention that the respondent ought to have computed gratuity on her basic pay and all allowances as per her contract. When she was granted study leave, the allowances were not excluded from her benefits as evidenced by the letter of 2nd June, 2011 and the payment made in September, 2011 when the study leave begun.

45. Counsel, in the written submissions argued that the discrepancies demonstrate the respondent's unilateral variation of the contract terms and conditions and consequently breaches the provisions of clauses 5.1, 5.2, 6.1 and 6.3 which state as follows:

> *5.0 Without limiting the generality of all other benefits and/or allowances to which the employee may be entitled under the Bank's Management Terms and Conditions of Service, the employee shall be entitled to:*
>
> *5.1 Fuel of 360 litres per month*
>
> *5.2 The Bank shall pay 85% of the actual school fees per child up to 4 registered children as school fees and dependants for schools within Zambia.*
>
> *6.1 The employee shall be paid, on satisfactory completion of the contract period under this service agreement, a gratuity calculated at the rate of 35% of the total gross earnings during the contract period including leave days. Total gross earnings will only include basic salary and any other allowances enshrined in the conditions of service. Which gratuity shall be computed with effect from 20th September, 2011 when this contract started running.*
>
> (underlined for emphasis)
>
> *6.3 Where the contract of service is terminated before the completion of the contract period, gratuity shall be calculated on prorata basis. Save that this clause shall not apply in the case where termination is on grounds of summary dismissal.*

46. As noted earlier, the respondent was not in attendance at trial, as such, the complainant's testimony was neither objected to nor rebutted.

In its written submissions, however, the respondent did point out the fact that the complainant was not claiming payment of any outstanding salary and terminal dues. That is true.

47. Nevertheless, what the complainant brings to the fore is the fact that by altering her conditions of service, the respondent breached the contract of employment.

48. I must mention here that I am alive to the fact that the complainant did not seek a declaration that her contract was breached. However, I am of the considered view that I ought to consider this relief under the umbrella of the general claim of 'any other benefit the court may deem fit'. This is what the justice of the case demands. I am fortified by the case of **Choonga v. Zesco Recreation Club, Itezhi Tezhi**[5].

49. In that case, the appellant, after alleging in his notice of complaint that he was unfairly and unlawfully dismissed, did not plead for damages for unfair and unlawful dismissal. His case was dismissed in its entirety by the Industrial Relations Court. On appeal, the Supreme Court found that the appellant was indeed unfairly and unlawfully dismissed and went on to award damages for unfair and unlawful dismissal from employment. The Court expressed itself in the following terms:

> *The argument that the appellant cannot be awarded damages because he did not include them in his claim before the IRC lacks merit. This is in view of the jurisdiction of the IRC which does not*

allow the court to be fettered by rules of evidence in doing substantial justice. Flawed pleadings, therefore, cannot stand in the way of the IRC in its exercise of its power. In particular, Section 85(5) of the Industrial and Labour Relations Act states that: "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."

Further, in the case of Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga, we rejected the appellant's argument on pleadings when we stated that:
"While, undoubtedly, it would be desirable that a recognisable cause of action should be manifest in the originating documents including the affidavits in order that the opponent may have reasonable notice of the case to be met and so prepare adequately, nonetheless, it is not wrong for a court of substantial justice to entertain a complaint however inadequately couched-especially by a lay litigant - and to make a decision or give an award on the merits of the case, once it is heard. The hearing is frequently a summary one and there is no need to depart from such practice. It follows that we do not accept the argument based on the "pleadings," such as they are. "

50. Based on this authority, I shall proceed to determine whether the contract was breached and if so, determine the appropriate remedy to award.

51. As the respondent's own evidence has shown, that is, the computation of gratuity at page 14 of the respondent's bundle, the complainants salary was adjusted downwards and fuel allowance was

not paid for the months of October to December, 2011. Further, child education allowance was not paid in October and November. The record is devoid of the reason for the downward adjustment of the basic salary and nonpayment of the allowances as highlighted. This was a variation in the conditions of service and there was no agreement between the parties for the variation of her earnings.

52. Gwyneth Pitt's Employment Law states as follows at page 103:

> *The employer has a further obligation to inform employees of any changes in their terms and conditions...Any variation must be agreed between the parties as with any other contract. This is normally done as part of the general round of negotiations. Should the employer insist on unilateral variation, it will be a breach of contract, usually a fundamental breach.*

53. Further in the case of **Mike Kabwe v. BP Zambia Limited**[6], the Supreme Court observed that:

> *If an employer varies a basic or basic conditions of employment without the consent of their employee then the contract of employment terminates. The employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment.*

54. Thus, ordinarily, in light of the variation of the complainant's earnings without her consent, which as seen, is a fundamental breach, the complainant would be entitled to a redundancy payment. However, a perusal of the contract of employment reveals that redundancy was

not provided for. I am, therefore, of the view that the remedy available to the complainant is damages for breach of the contract.

55. I am fortified by the case of **Sililo v. Mend-A- Bath Zambia Limited & Another**[7] in which the Supreme Court found that there was unilateral alteration of the appellant's terms and conditions of service to his detriment and as a result awarded him damages for breach of contract.

56. As for quantum, reliance is placed on a plethora of cases wherein damages have been awarded equivalent to the contractual period of notice. These include **Zambia Airways Corporation Limited v. Gershom B.B. Mubanga**[8], **Barclays Bank Zambia Limited v. Mando Chola & Another**[9], **Swarp Spinning Mills Plc v. Sebastian Chileshe & Others**[10].

57. The court of apex jurisdiction has elaborated the reason why normal measure of damages is based on the period of notice. It has been held that this is the period within which the employee could reasonably be expected to have obtained other comparable employment.

58. However, the Supreme Court has also held in numerous authorities including the very Swarp Spinning Mills case that the normal measure is departed from where the termination may have been inflicted in a traumatic fashion which caused undue stress or mental suffering.

59. In the case at hand, there is unchallenged evidence from the complainant that the termination caused a lot of hardship and stress because she left the country for school with the assurance that she would have job up to 1st August, 2014 when the contract would expire. Consequently, she was assured that she would have a steady income until then.

60. I have no hesitation in finding that the termination was traumatic for the complainant more so that she was away in foreign land and may not have been in a position to find alternative employment of a similar nature and pay if not better. In the circumstances, the complainant is deserving of damages above the normal measure which is notice period. The termination clause in the complainant's contract as seen above provided for one month's notice.

61. The complainant testified that she did not receive her terminal benefits computed by the respondent and that the personal loan in the sum of K 44,444,444.44 indicated in the computation was actually paid off in her previous contract. However, it is established at law that he who alleges must prove. The complainant has not substantiated her allegations. As rightly pointed out by the respondent, the account into which the moneys were paid was the complainant's personal account. Thus, she ought to have explained why she could not access the money. As for the personal loan, there is similarly no proof that she paid it in the previous contract.

Costs

62. Costs, in this division are only awarded as per rule 44 of the Industrial Relations Court Rules, Cap 269. In the matter at hand, no unreasonable conduct as envisaged by rule 44 was exhibited by either party to warrant condemnation in costs.

Conclusion and final orders

63. There is no merit in the complainant's assertion that she was wrongfully dismissed. There is however merit in her allegation that her contract was breached through the unilateral variation of her conditions of service.

64. As such, I make the following orders:

(i) I award the complainant damages for breach of contract equivalent to 6 months' salary with all other perquisites.

(ii) The amount in (i) shall attract interest at short term bank deposit rate from the date of notice of complaint to the date of Judgment and thereafter, at current lending rate as determined by the Bank of Zambia from date of Judgment until full payment.

(iii) Each party shall bear own costs.

65. Parties are informed of their right to appeal.

Dated at Lusaka this 3rd day of April, 2024

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M.C Mikalile

HIGH COURT JUDGE