

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ Appeal No. 027/2020
CAZ/08/312/2020

BETWEEN:

MUKABA MUKABA

AND

**THE ASSOCIATION OF CHARTERED
CERTIFIED ACCOUNTANTS (ACCA)**

APPELLANT

RESPONDENT



CORAM : Kondolo, Chishimba and Ngulube JJAs

On 25th August, 2021 and 11th November, 2021

For the Appellant : N/A

For the Respondent : Mr. M. Ndalameta of Messrs Musa Dudhia & Co.

JUDGMENT

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

- 1) Zambia Privatisation Agency v James Matale (1995 - 1997) ZR 157
- 2) Tebuho Yeta v African Banking Corporation SCZ Appeal No. 117/2013
- 3) Barclays Bank Zambia PLC v Zambia Union of Financial Institutions & Allied Workers (2007) Z.R. 106
- 4) Zambia Postal Services Corporation v Prisca Bowa & Caristo Mukonka SCZ Appeal No. 72/2009
- 5) Mukobe Musa Bwalya v the Attorney General SCZ Appeal No. 62/2012
- 6) Contract Haulage Limited v Mumbuwa Kamayoyo (1982) ZR 13
- 7) Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited SCZ Appeal No. 129/2017
- 8) Ruth Saviye Samatemba v Zambezi Waterfront Limited SCZ Appeal No. 110/2011

- 9) Agholor v Cheesebrough Pond's (Zambia) Limited (1976) Z.R. 1. (H.C.)
- 10) Daniel Miyoba Sichoma v The Citizens Economic Empowerment Commission CAZ Appeal No. 122/2019
- 11) Tolani Zulu & Musa Hamwala v Barclays Bank of Zambia Limited (2003) ZR 127
- 12) Redrilza Limited v Abuid Nkazi (2011) ZR 394
- 13) Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) ZR 70
- 14) Itayi Maguwudge v Mopani Copper Mines Plc SCZ Appeal No. 234/2013
- 15) Zambia Privatisation Agency v James Matale (1995 - 1997) ZR 144

LEGISLATION CITED:

1. The Employment Act Chapter 268 of the Laws of Zambia (now repealed)

1.0 INTRODUCTION

- 1.1 The appeal is against the judgment delivered by the Hon. Mr. Justice W. G. K. Muma dated 3rd September, 2019 in which he dismissed the appellant's claims for a declaration that the termination of his employment was unlawful and unfair and damages sought.

2.0 FACTUAL BACKGROUND

- 2.1 The appellant in the court below sought the following reliefs:
 - (1) *A declaration that the termination of employment was unlawful and unfair;*
 - (2) *Damages for wrongful and unfair dismissal;*
 - (3) *Costs; and any other relief the court may deem fit*

- 2.2 The facts not in dispute are that the appellant was employed by the Association of Chartered Accountants (respondent) on 3rd January, 2005 as Manager. On 4th April 2007 he was subsequently promoted to the rank of Country Manager for Zambia. In the course of his employment, the appellant faced financial challenges and borrowed money from some members of the respondent association. At one point, the appellant explained his financial problems to the respondent who in turn advanced him loans on a number of occasions. The advanced sums were deducted from his salary.
- 2.3 The appellant's financial challenges continued to a point where he wrote directly to the Chief Executive Officer of ACCA who referred the matter to DW1, Jamil Ampomah, the Director for Africa. The said Director engaged the appellant to find a solution. DW1 testified that the matter got to a point where loan sharks started going to the ACCA office demanding payment from the appellant thereby disrupting operations at work.

“Your contract with ACCA is terminated on grounds of your conduct relating to your inappropriate and unethical behavior, in particular borrowing monies from ACCA members. We believe that this is totally unacceptable behavior, more so from an employee in your position. As a Country Manager you

have the highest duty to promote and further the interests and business of ACCA and not to do anything which is prejudicial or detrimental to the business of ACCA. By your actions, you have brought ACCA into disrepute.”

- 2.4 The appellant was subsequently paid one month's salary in lieu of notice. Further, as a gesture of goodwill, the respondent provided him with outplacement support worth ZAR24, 000.00 through its South African outplacement provider, EOH.
- 2.5 The appellant was of the view that it was not unethical for him to borrow money from ACCA members as it was done in his individual capacity and was not in conflict with the interests of the respondent. He argued that the letter of termination was supposed to state the reasons for the termination in line with the ACCA Ethics and Employee Relations for handling unethical matters.
- 2.6 His three-fold main grievances were that he was never charged with any offence, no investigations were instituted into the allegations against him and that he was not given an opportunity to be heard or to exculpate himself of the offence he was charged with.

2.7 On the other hand, DW1 testified that when handing over the termination letter, he had explained the reasons for the termination which the appellant did not dispute. Reference was also made to the conditions of service in the contract of employment. The respondent took the view that the conduct of the appellant to borrow money from members, who then pursued him, including a widow who was demanding payment of monies on behalf of her deceased husband, brought ACCA into disrepute and amounted to gross misconduct. He stated that ACCA is not bound to take disciplinary action and that it was not a standard practice to dismiss without a hearing.

3.0 DECISION OF THE LOWER COURT

3.1 Judge Muma considered the evidence and submissions and took the view that the issue for determination is whether, arising from the circumstances surrounding the termination, there was unfairness thereby rendering the termination unlawful. Further, that only upon the determination of this issue in the affirmative, would the issue of damages and any other relief be considered.

- 3.2 The trial court found that it was not in dispute that the appellant was borrowing money from people he deemed to be his acquaintances but who also happened to be members of ACCA. The fact that even loan sharks started following the appellant at his place of work demanding payment, was considered by the respondent as a vice, and hence the termination of his employment.
- 3.3 The trial court considered the terms contained in the contract of employment with regard to termination of employment and found that it provided for a notice period of one month. Further that employment could be terminated without notice in appropriate circumstances, such as, an act of gross misconduct. Though the letter of termination of employment gave the appellant one month's notice, he was not required to serve out the notice period and was instead paid one month's salary in lieu thereof. Consequently, the court below found that the respondent had complied with the terms of the contract of employment.
- 3.4 Having complied with the terms of the contract of employment, the lower court considered the case of **Zambia Privatisation**

Agency v James Matale ⁽¹⁾, and found nothing wanting in the procedure or otherwise in the manner the appellant was dismissed.

3.5 With respect to the opportunity to exculpate oneself or be heard, the lower court reasoned that this was vitiated by the fact that the appellant was employed under a written contract which provided the mode of termination and that he accepted payment in lieu of notice. On the authority of the cases of **Tebuho Yeta v African Banking Corporation** ⁽²⁾ and **Barclays Bank Zambia PLC v Zambia Union of Financial Institutions & Allied Workers** ⁽³⁾, the learned Judge held that **section 26(A) of the Employment Act Chapter 268 of the Laws of Zambia**, which places an obligation on the employer to afford the employee an opportunity to be heard, only applied to oral contracts, whereas, the appellant was employed under a written contract.

3.6 Consequently, the court below found it *otiose* to consider the other arguments advanced by the parties as they had been addressed by the finding of fact that the appellant's employment was properly and lawfully terminated on account of his misconduct which was perceived to be detrimental to the

business of ACCA thereby putting the employer into disrepute. The learned Judge accordingly dismissed the claims by the appellant and made no order as to costs.

4.0 **GROUNDS OF APPEAL**

4.1 In seeking to overturn the decision of the court below, the appellant has advanced two grounds of appeal, as per the Memorandum of Appeal, couched as follows:

- 1) The court below erred in law and in fact when it held that section 26(A) of the Employment Act only applies to oral contracts; and*
- 2) The court below erred in law and in fact when it held that the appellant's employment was properly and lawfully terminated on account of his misconduct which was invariably perceived to be detrimental to the business of ACCA thereby putting his employer into disrepute.*

5.0 **APPELLANT'S ARGUMENTS**

5.1 In the appellant's heads of argument dated 5th March, 2020, the appellant argues the appeal on one ground that reads as follows:

"The trial court erred when it held and decided that the appellant was not entitled to be accorded an opportunity to exculpate himself because he was employed under a written contract of employment."

This ground of appeal is different from those appearing in the memorandum of appeal filed on 4th October, 2019. Further, the record of appeal does not indicate whether the appellant obtained leave of court to amend the grounds of appeal. We shall revert to this issue at a later stage.

5.2 The appellant submits that the only question for determination before this court, is whether the respondent was under any obligation to accord the appellant an opportunity to be heard?

It is argued that the evidence on record clearly shows that the respondent terminated the appellant's employment purely on the basis of alleged misconduct as the letter of termination of employment.

5.3 The appellant contends that the respondent ought to have invoked its disciplinary code to deal with the appellant's issue but that there is no evidence to this effect. The failure to invoke the disciplinary code was a departure from the rules of natural justice. The respondent's Ethics and Employee Relations document is instructive on the manner and procedure that ought to have initiated the disciplinary procedure. The appellant was accused of a disciplinary offence and as such, he

had a fundamental right to be given a chance to respond to the accusations.

5.4 The case of **Zambia Postal Services Corporation v Prisca Bowa & Caristo Mukonka** ⁽⁴⁾ was called in aid where the Supreme Court stated that:

“The Industrial Relations Court’s decision was anchored on the fact that the appellant had not observed the rules of natural justice which are embodied in section 26A of the Employment Act domesticating Article 7 of the International Labour Organisation Convention. This is so as according to the facts not in dispute, the appellant was accusing the respondents of disciplinary offences and as such the two respondents had the fundamental right of being given a chance to respond to the accusations.”

5.5 The appellant was at a loss on what grounds the respondent based the charges against him having admitted through its witness that it did not have in place a disciplinary code of conduct to discipline employees. In the absence of such a disciplinary code, it was submitted that the termination of the appellant’s employment was rendered wrongful regardless of whether or not the appellant contested the dismissal immediately upon receipt of the termination letter.

- 5.6 The appellant submits further that the failure of the respondent to avail him an opportunity to exculpate himself prior to the termination of his employment was a breach of natural justice. As authority, we were referred to the cases of **Mukobe Musa Bwalya v the Attorney General** ⁽⁵⁾; **Contract Haulage Limited v Mumbuwa Kamayoyo** ⁽⁶⁾ and **Sarah Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited** ⁽⁷⁾ which hold that failure to give an employee an opportunity to answer charges against him, is contrary to natural justice.
- 5.7 On this basis, the appellant submits that the failure to avail the appellant an opportunity to be charged with an offence, appear before and be heard by a disciplinary body, and judged as stipulated in the Ethics and Employee Relations Handbook before dismissing him, entails that the respondent breached the terms of natural justice. Therefore, the lower court should have granted damages for unfair dismissal.
- 5.8 Lastly, the appellant conceded that the contract of employment under the clause entitled “**TERMINATION OF EMPLOYMENT**”, provided for termination without notice in appropriate circumstances, such as in an act of gross misconduct.

Regardless of the fact that there was an allegation of misconduct, in the absence of the appellant being accorded an opportunity to be heard, the termination was unlawful.

6.0 **RESPONDENT'S ARGUMENTS**

6.1 Heads of argument in opposition to the appeal were filed on behalf of the respondent dated 13th November, 2020. With respect to ground one, it was submitted that **section 26A**, under **Part IV** of the repealed **Employment Act, Chapter 268 of the Laws of Zambia**, only applied to oral contracts and not written contracts. This is because **section 16** of that Act provided that, "***The provisions of this Part shall apply to oral contracts.***" It is not in dispute that the appellant was engaged under a written contract of employment appearing at page 110 of the record of appeal. The contract did not impose an obligation on the respondent to afford the appellant the right to be heard before termination on grounds related to conduct. Therefore, the appellant is seeking to impeach the provisions of his contract by relying on a provision of the Employment Act which does not apply to him.

6.2 As authority, we were referred to the cases of **Tebuho Yeta v African Banking Corporation** ⁽²⁾ and **Ruth Saviye Samatemba v Zambezi Waterfront Limited** ⁽⁸⁾, where the Supreme Court considered **Part (IV)** of the then **Employment Act** and found that **section 26A** applied to oral, and not written contracts of employment and as a result, the employer was not obligated to give the employee a right to be heard before terminating his contract.

6.3 With respect to the argument that the appellant ought to have been given the right to be heard, the respondent submits that the appellant quoted a portion of the case of **Zambia Postal Services Corporation v Prisca Bowa & Caristo Mukonka** ⁽⁴⁾ which does not form the ratio of the court's decision as it is the part where the apex court was recounting what transpired in the court below. It was submitted that at page J40 of that case, the court stated as follows:

"On the first issue, that is whether or not section 26A applies to the issues before this court, it is obviously clear that section 26A of the Employment Act, coming under Part 4 of the Act and with section 16 providing that this part of the Act shall apply only to oral contracts, was not applicable to the issues before the court."

- 6.4 It was further contended that a reading of that case also reveals that it is not applicable to the appellant as that case dealt with a situation where the disciplinary process was invoked by the respondent therein and that the appellants therein were charged but not given a right to be heard. Thus, the reference to the rules of natural justice was made as a result of the disciplinary proceedings invoked by the employer in that case. However, in the present case, the respondent did not invoke the disciplinary process and elected to terminate the appellant's contract of employment by payment in lieu of notice.
- 6.5 The respondent further contends that the record will show that there are no facts to support a finding that the respondent invoked the termination clause in bad faith. It was not in dispute that the reason for the termination of employment, as admitted by the appellant at trial, was his inappropriate and unethical behavior of borrowing monies from ACCA members. Therefore, the court below found that the appellant's employment was properly and lawfully terminated.
- 6.6 In respect to the contention that the appellant should have been charged with a specific offence under the disciplinary code and

be given an opportunity to exculpate himself, the respondent submits that this contention is devoid of merit and legal basis. By reference to the High Court decision of **Agholor v Cheesebrough Pond's (Zambia) Limited** ⁽⁹⁾, the respondent submitted that it is a settled principle of law that there is a difference between summary dismissal and termination, and that where an employer has several options to terminate, the employer is at liberty to elect an option and will only be liable if he fails to abide by the procedure of the elected option.

- 6.7 It follows that a termination will be lawful if the employee is given the requisite notice under the contract or is paid in lieu of notice, and that the employer gives a reason for the termination connected to the employee's conduct, capacity or operational requirements. In this case, it was submitted that the letter of termination and the proof of payment show that the appellant's employment was terminated by payment in lieu of notice and was given a reason for the termination.
- 6.8 The respondent further contended that an employer has the right of election to choose an option of termination of employment provided it is within the contract of employment.

We were referred to our decision in **Daniel Miyoba Sichoma v The Citizens Economic Empowerment Commission** ⁽¹⁰⁾ in which we relied on the case of **Tolani Zulu & Musa Hamwala v Barclays Bank of Zambia Limited** ⁽¹¹⁾ to hold that an employer is within his right to opt to invoke the notice clause in the contract even in the midst of a suspension and disciplinary charges so long it is done in accordance with the contract.

6.9 Therefore, in terms of the **Daniel Miyoba Sichoma** ⁽¹⁰⁾ and **Redrilza Limited v Abuid Nkazi** ⁽¹²⁾ cases, it is only when the proper procedure of termination of an elected option is not followed, that an employer can be held liable. In this case, the respondent had two options available to it: either to summarily dismiss the appellant, or to terminate by notice or payment in lieu of notice. The respondent elected to terminate by payment in lieu of notice and, in so doing, followed the correct procedure provided in the contract of employment.

6.10 The respondent further submitted that it had complied with the provisions of **sections 36(1)(c) and 36(3)** of the then applicable **Employment Act** which requires an employer to provide reasons for termination of employment connected with the

conduct or capacity of the employee or the operational requirements of the employer. Given that the respondent terminated the contract of employment on grounds that the appellant misconducted himself by borrowing monies from the respondent's members, it followed that the appellant's contract of employment was properly terminated. Therefore the provisions of the respondent's Code of Ethics and Employee Relations on how disciplinary matters should be handled is immaterial as the respondent did not invoke disciplinary proceedings against the appellant.

6.11 Therefore, the cases relied upon by the appellant to contend that he should have been charged and given an opportunity to be heard, are distinguishable from this case in that they relate to situations where the employee was summarily dismissed without being heard, or there was evidence of malice on the part of the employer as was the case in **Zambia Postal Services Corporation v Prisca Bowa & Caristo Mukonka**⁽⁴⁾ and **Contract Haulage Limited v Mumbuwa Kamayoyo**⁽⁶⁾. In the present case, the contract of employment was properly terminated by notice or payment in lieu of notice, and without

malice as evidenced by the provision of an outplacement support worth ZAR24, 000.00.

6.12 Therefore, the respondent contends that the termination of the appellant's employment was neither wrongful nor unfair as the employment was terminated by way of payment in lieu of notice and a reason for the termination connected with the conduct of the appellant was given. As authority reliance was placed on the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa** ⁽¹³⁾ in which the Supreme Court stated that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the failure to comply with procedure in the contract does not amount to wrongful or unlawful dismissal.

6.13 With respect to ground two, the respondent submitted that the appellant has not advanced any arguments under this ground in its heads of arguments. Therefore, in terms of the case of **Itayi Maguwudge v Mopani Copper Mines Plc** ⁽¹⁴⁾, the appellant not having addressed the particular ground in its

heads of argument, it ought to be deemed to have been abandoned.

6.14 We were urged to dismiss the appeal in its entirety.

7.0 **DECISION OF THIS COURT**

7.1 We have considered the record of appeal, the judgment appealed against and the arguments advanced by the parties. We note that in the heads of argument, the appellant appears to argue one ground. Further ground one in the memorandum of appeal is at variance with ground one appearing in the heads of arguments as follows hereunder.

Ground one in the memorandum of appeal states that;

“The court below erred in law and fact when it held that section 26(4) of the Employment Act only applies to oral contracts.”

7.2 In the heads of argument dated 5th March 2020, ground one reads as follows that;

“The trial court erred when it held that the appellant was not entitled to be accorded an opportunity to exculpate himself because he was employed under a written contract of employment.”

7.3 It appears that the appellant seeks to add an additional ground of appeal without leave of court. It is trite that an appellate court

will not consider additional grounds of appeal without leave of court.

7.4 A closer perusal of the ground in the heads of argument shows that it relates to section 26(4) of the Employment Act applicable to oral contracts. Though the grounds are worded differently, we are of the view that they relate to the same issue whether the appellant was entitled to an opportunity to be heard before the termination of contract. We will therefore deal with the ground as stated in the memorandum of appeal.

7.5 The main contention by the appellant is that the respondent was under an obligation to accord him an opportunity to be heard before terminating the employment for "**inappropriate and unethical behavior**". The appellant argues that the respondent ought to have invoked the provisions of the Ethics and Employee Relations Handbook which require, in appropriate circumstances, that an investigation be conducted followed by a disciplinary hearing, and an appropriate sanction being imposed, where one is found wanting. According to the appellant, the failure to hold such a hearing resulted in him

being denied the right to be heard resulting in the termination of his employment being unlawful and unfair.

- 7.6 It is not in dispute that the reason for the termination of the appellant's contract of employment was his conduct of borrowing money from ACCA members which the respondent found to be inappropriate and unethical.
- 7.7 We are in agreement both with the court below and the respondent that as the appellant was engaged under a written contract of employment, the provisions of **section 26A of the Employment Act Cap 268 of the Laws of Zambia**, which was applicable at the time, do not apply in this situation. This was the position taken by the Supreme Court in the case of **Zambia Postal Services Corporation v Prisca Bowa & Caristo Mukonka**⁽⁴⁾ which held that the provisions of Part IV of that Act, under which section 26A fall, only apply to oral contracts of employment.
- 7.8 Therefore, the argument that the appellant ought to have been given an opportunity to be heard or to exculpate himself as though he was employed under an oral contract of service is devoid of merit.

7.9 Having found that **section 26A of the repealed Employment Act** is not applicable to this case, it follows that the terms of the contract of employment between the appellant and respondent, are cardinal in determining whether or not the termination of his contract of employment was lawful and fair.

7.10 It is not in dispute that the appellant was employed under a written contract of employment which is set out at pages 122 to 129 of the record of appeal. The said contract under the clause - '**Termination of Employment**', provided as follows:

"The period of notice to be given by ACCA to terminate your employment is one month PROVIDED that nothing in this clause will preclude ACCA from terminating your employment without notice in appropriate circumstances, for example, if you commit an act of gross misconduct.

The period of notice to be given in writing by you to terminate your employment is one month."

7.11 It is evident that the contract provided for termination of employment by the employer provided notice of one month is given by ACCA. This position was premised on **section 36(1)(c)** of the repealed **Employment Act** which provided as follows:

36. (1) A written contract of service shall be terminated-

(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise.

7.12 In this regard, it has been held in a plethora of cases, among them, our decision in **Daniel Miyoba Sichoma v The Citizens Economic Empowerment Commission** ⁽¹⁰⁾ and the Supreme Court in **Tolani Zulu & Musa Hamwala v Barclays Bank of Zambia Limited** ⁽¹¹⁾ that employers have a number of options open to them with respect to termination of employment, including prosecution, disciplinary charges or the giving of notice or the payment of an amount in cash in lieu of notice.

7.13 Further, in **Zambia Privatisation Agency v James Matale (1995 - 1997) ZR 144**, the Supreme Court held:

"That payment in lieu of notice was a proper and lawful way of terminating the respondent's on the basis that in the absence of express stipulation, every contract of employment is determinable by reasonable notice."

7.14 In this case, the respondent elected to terminate the appellant's employment by giving him one month's notice of its decision to terminate the contract of employment in line with the provisions of his contract. Further the Respondent was informed that he

was not required to serve the notice period and that ACCA would pay him a month's salary in lieu of notice as provided under the contract of employment. Therefore, the respondent cannot be faulted for having taken this route.

7.15 We are of the view that the argument that the termination of the contract of employment was unfair and unlawful because the appellant was neither charged with any offence nor underwent a disciplinary process, is not tenable. This is for the reason that an employer is at liberty to terminate a contract of employment without invoking any disciplinary process provided the contract contains a termination clause. We as earlier stated are of the view that the appellant's employment was terminated, not by way of dismissal, but by termination of the contract of employment as evidenced by letter of termination pursuant to the termination clause in the contract of employment.

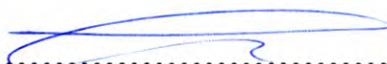
7.16 We are accordingly guided by the decision of the Supreme Court in **Redrilza Limited v Abuid Nkazi & Others**⁽¹²⁾ where it was held that:

"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.”

In this case, the respondent properly elected to terminate the appellant's employment without invoking any disciplinary action and the reason for the termination was given.

7.17 For the forgoing reasons, we hold that the appellant's dismissal was not wrongful or unfair and that he is not entitled to damages therein. The appellant's employment was terminated in accordance with the terms of the contract of employment. We accordingly uphold the decision of the lower court and dismiss the appeal. The parties shall bear their own costs.



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M. M. Kondolo S.C
COURT OF APPEAL JUDGE



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F. M Chishimba
COURT OF APPEAL JUDGE



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P. C. M. Ngulube
COURT OF APPEAL JUDGE