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## Prof. E. Clive Chirwa v Zambia Railway & Another (2018/HP/0578)

Kayula James  
*University of Zambia*

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***Prof. E. Clive Chirwa v Zambia Railway & Another (2018/HP/0578)***

Kayula James<sup>1</sup>

The plaintiff was appointed Chief Executive Officer of Zambia Railways by the late President, Michael Chilufya Sata, and subsequently his appointment was adopted by Zambia Railways when a contract of employment, dated 11<sup>th</sup> January 2013, was executed between the plaintiff and Zambia Railways. The contract was to run for a period of five years. One of the terms in the contract of employment provided: “In the event of premature termination of the contract by the company on grounds other than disciplinary, the employee shall be entitled to full payment of the amount due to him for the remaining part of the five-year contract.”

By a letter dated 22<sup>nd</sup> April 2013, under the name and hand of the President of Zambia, the plaintiff was suspended from duty and placed on half salary, purportedly to facilitate investigations by the Anti-Corruption Commission. The suspension was in contravention of the Zambia Railways General Staff Regulation and Disciplinary Code and Procedure.

By another letter dated 7<sup>th</sup> June 2013, also under the hand of the President of Zambia, the plaintiff was purportedly retired in the public interest without reference to, and in total disregard of, the conditions as stipulated in his contract of employment. At the time of the termination, the plaintiff had only served 7 months on the five-year contract he had entered into with Zambia Railways.

As a consequence, the plaintiff instituted an action against Zambia Railways (1<sup>st</sup> Defendant) and the Attorney General (2<sup>nd</sup> Defendant). The plaintiff sought *inter alia* the declaration of the termination of his employment as unlawful and an award of damages. The Court found that the termination of employment was unlawful and awarded damages in form of gratuity, as well as salaries and other benefits as though the contract ran its full course of five years.

### **Significance**

The starting point, in terms of legal analysis in this case, is the wording of the contract of employment between the plaintiff and Zambia Railways. The relevant part of the contract is provided under clause 3 of the contract of employment: “In the event of premature termination

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<sup>1</sup> LLB (University of Zambia) LLM (University of Zambia) Advocate of the High Court for Zambia (AHCZ), Lecturer in law at the University of Zambia.

of the contract by the company on grounds other than disciplinary, the employee shall be entitled to full payment of the amount due to him for the remaining part of the five-year contract.”

Arising from this provision, the court concluded that since the contract provided for payment of all dues in case of premature termination, apart from termination on disciplinary grounds, the complainant was entitled to all the benefits as the contract provided.

Indeed, a casual look at the wording of the contract would suggest that the plaintiff was entitled as per the contract terms. The general law of contract regarding contractual relations is well stated in the case of *Colgate Palmolive Inc v Able Shemu and 110 Others*, in this case, the courts stated that:

If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice.<sup>2</sup>

Courts observe and respect the sanctity of individual bargains and this is in recognition of the fundamental principle of freedom to contract enjoyed by men of full age and competent understanding. The courts have long regarded its role as one of, essentially, giving effect to the true and honest intention and expectations of the parties to a bargain. This general principle has, however, been modified when it comes to assessment of the quantum of damages in contracts of employment. The Supreme Court in the case of *National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie*,<sup>3</sup> was confronted with a case of termination of a contract of employment whose wording is materially on all fours with Professor Chirwa’s. The contract of employment in the case National Airport Corporation provided for termination with three months notice by either party and went on to provide:

If the employer terminates the contract prematurely for reasons other than incompetence or willful neglect of duty, all the benefits under the contract shall be paid as if the contract had run the full term.

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<sup>2</sup> SCZ Judgment No.11 of 2005

<sup>3</sup> 2000 ZR 154

The Industrial and Labour Relations Court, having looked at the wording of the contract in question, ordered that the damages for wrongful termination be computed as if the contract had run its full term.

On appeal, the Supreme Court stated that damages for wrongful termination, where the contract provided that damages would be paid as though the contract had run its full term, can only be defended if the sum thereby stipulated can be held to be liquidated damage, that is to say, a genuine pre-estimate of the damages the parties themselves intended should govern the contract in the case of termination. The court further stated that the intention of the parties could not be implemented by the court if the sum is held to be a penalty. The court characterized the argument of Mr Mwanawasa, who argued that parties enter into contracts with their eyes wide open, by stating that none of them should be heard to complain that the bargain is or has become too onerous or unconscionable, as one which flew in the face of equitable intervention by the courts, and which had become too entrenched to require or permit fresh debate. The court noted that there are now rules or guidelines which have evolved over time and which can still be further developed for distinguishing liquidated damages from penalties.

The Supreme Court cited the case of *Mobil Oil Zambia Limited v Patel*<sup>4</sup> with approval, whose principle is to the effect that where the contract-breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option. The Supreme Court thus held,

In this case, the damages should relate to the period of three months of salary and perquisites and any other accrued benefits such as gratuity over that period. We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin, in *Dunlop Pneumatic Tyre Company Limited v New Garage And Motor Company Limited*, especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

The decision above handed down by the Supreme Court demonstrates that, in cases of breach of a contract of employment, damages payable are distinguishable from those under the general law of contract. This case gives critical guidelines which a court faced with the assessment of

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<sup>4</sup> 1988 ZR 12

damages in contracts of employment must invoke, especially for chief executives or very senior positions whose contracts normally provide to the effect that in case of termination on grounds other than incompetence, damages would be paid as though the contract had run its full term. The binding principle as laid down by the Supreme Court, is that even where the contract provides that damages are to be paid in case of termination as though the contract had run its full term, the court would not implement such an intention as it is analogous to a penalty, that it is to say, implementation of such an intention has the effect of penalizing the other party. Instead, the court will order damages equivalent to what complaint would have been paid had the notice period been given in accordance with the contract of employment. In other words, if the contract provided for termination notice of three months, the court would order that damages for wrongful termination be paid in reference to the period of notice regardless of stipulations that benefits be paid as though the contract had run its full-term. The court arrived at this position because there is no justification, whatsoever, for paying an employee full benefits as if the contract has run its full term when he has only served a fraction of the term as doing so would constitute unjust enrichment of an employee. Such a payment would be gratuitous unsupported by consideration, and as such lacking legal basis.

Further, in the case of *Zambia State Insurance and Attorney General v Allisand Singogo*,<sup>5</sup> the Supreme Court also considered the quantum of damages for breach of contract involving a managing director and chief executive of Zambia State Insurance. The contract of employment provided for notice period of three months in case of termination by either party or pay in lieu of notice. The contract further stated, “the employee shall immediately be paid in full all monetary benefits and be able to exercise the option to purchase any articles, items or such related equipment the employee would have befitted if the contract had run its full-term.” The court, in reversing the award of damages granted by the lower court, held that there was need to exercise caution in deciding the measure of damages to avoid virtual reinstatement without consideration and run away damages of “near vengeance”. The court reiterated the principle as laid down in the *Zimba and Konnie* case (cited above) that where there is a breach of contract of employment, and the party in breach had an option of terminating, the complainant would be awarded damages equivalent to what he would have been paid had the notice period been given regardless of the intention of the parties.

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<sup>5</sup> 2007 SCZ (unreported)

The jurisprudence in Zambia, therefore, with respect to damages for breach of contract of employment, is that payment of benefits in terms of salaries and gratuity for the unexpired term of the contract is highly untenable as it lacks consideration. Such a payment when effected constitutes unjust enrichment. Paying an employee benefits for the unexpired term is also regarded a penal act on the employer and as such frowned upon by the courts.

In view of the principles and authorities discussed, it becomes very clear that the High Court erred in awarding Professor Chirwa damages for the unexpired period of the contract of employment. The award is therefore unlawful as it offends the entrenched principles laid down by the Supreme Court in awarding damages in contracts of employment. It must be stressed categorically that there is no authority that supports the award of damages for the unexpired period of the contract on account of special circumstances because such an award or awards are regarded to be too extravagant and constitute what the Supreme Court referred to as “virtue reinstatement without consideration” and run away damages of near vengeance. Put it differently, such awards are avoided because they smack of unjust enrichment and are analogous to penalizing the employer.

The correct position in the case at hand would have been to award damages to the plaintiff commensurate to the notice period stipulated under the contract of employment. Gratuity and other perquisites should have equally been paid on a prorated basis. The court also did not consider the concept of mitigation of loss and in this particular case, the court should have paid attention and ascertained whether the Plaintiff had prospects of finding alternative employment. Taking this factor into account helps courts to avoid excessive awards of damages in both employment and ordinary contracts.

### **Conclusion**

This case is a stain on the stilts of clear and well-entrenched principles relating to awarding of damages in employment contracts. The case departs radically from the consistent and unwavering pronouncements by the Supreme of Zambia on the considerations a court should take into account when faced with the determination of quantum of damages in employment. In view of the fact that there has already been sound pronouncements on this matter by the Supreme Court, the Chirwa case is of no jurisprudential value and may soon be consigned to the dustbin of history.