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Facts

Two employees were employed by their employer, MP Infrastructure. The first employee was employed as Country Manager on a fixed-term contract, whilst the 2nd employee was employed as a Project manager on a fixed-term contract for two months but continued working after the expiration of his contract.

In 2016, the employer dismissed both employees for alleged unsatisfactory performance. However, the respective dismissals were effected without affording them an opportunity to be heard and without complying with the provisions of the employer's Grievance and Disciplinary Procedures in the employer's Company Handbook. Both employees were paid one month's salary in lieu of notice.

The employees commenced an action before the Industrial Relations Division of the High Court alleging that their termination was wrongful and unlawful as their employer did not raise an issue with their unsatisfactory performance during the employment. The employees stated that the employer did not warn, caution, or charge them prior to effecting the termination of employment. The two employees also asserted that they were never the subject of a negative performance appraisal. The 1st employee even provided evidence of an email from the employer's Chief Executive Officer Mr. Clement Nwogbo commending him for his good work.

The employer on the other hand claimed that both employees were informed of their poor performance. As it related to the 1st employee, the employer asserted that his dismissal related to the failure to follow prescribed procedures, particularly in relation to the recruitment of an accounts clerk, namely Sarah Cassim. The 1st employee averred that it was agreed that he would pay Sarah Cassim for the period spent at the employer and that the employer would not use this as a basis for poor performance.

The Industrial Relations Division of the High Court held that the dismissal of the 1st employee was valid in terms of the law as the employees conduct of recruiting an employee contrary to procedure was unjustified. In relation to the 2nd employee, the lower court found that he was an employee as he continued working after the expiry of his contract. The court thereafter held that the reasons for his dismissal were insufficient and unsubstantiated. The court subsequently awarded him twenty-four (24) months' salary as general damages and six (6) months' salary for mental distress.

The employer appealed the decision to the Court of Appeal, particularly as it related to the lower court court's holding with respect to the 2nd employee. The 1st employee cross-appealed, challenging the lower court's finding that his dismissal was valid and justified.

Holding

The Court of Appeal held that the 2nd employee was an employee of the employer even after the expiry of his two-month contract of employment. This was based on section 3 of the

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Employment Act which recognises an employee as one who works under a contract of service, whether express or implied. In the circumstances, given that the 2nd employee continued working after the expiration of the two months, the court was of the view that he was serving under an implied contract of service that rendered him an employee of the employer.

Secondly, the court was of the view that in terms of section 36 of the Employment Act (which applied at the time but has since been repealed and replaced by section 52 of the Employment Code Act), an employer is mandated to provide a valid reason prior to initiating the termination of an employee's contract of employment. In the circumstances, the Court of Appeal stated that the dismissal of the 2nd employee was unlawful and not for a valid reason recognised by the law as the employer did not point out any wrongdoing on his part.

In other words, the failure by the employer to inform the employee of his poor performance prior to the dismissal meant that the reason given of poor performance was without any legal basis. The failure to produce any work appraisals was held as material fact in finding that the dismissal of the employee was without merit.

As it relates to damages, the Court of Appeal held that the award of thirty (30) months' salary split into two amounts as general damages and six (6) months for mental distress was erroneous. According to the Court of Appel, a lump sum should be awarded. Further, in the circumstances of this case, the court held that the damages to be awarded in the circumstances were excessive as the employee was on a two-month contract and was already paid one month in lieu of service when his contract provided for one week's notice.

The Court subsequently substituted the Industrial Court's award of thirty (30) months' salary as damages with an award of two (2) months' salary as damages for unlawful termination of employment, mental distress and inconvenience caused to him by the sudden termination.

As it relates to the 1st employee, the Court upheld the decision of the Industrial Relations Division of the High Court and stated that the dismissal was justified based on his failure to follow the correct procedures when recruiting the accounts clerk.

Analysis

Presumption of continuity of employment

The 2nd employee in this matter was serving on a two-month contract that expired but continued working. The Court of Appeal correctly held that as he continued working following the expiry of his contract, he remained an employee of the employer on the same terms and conditions as the previous contract.

The Court of Appeal however did not give sufficient details as to the basis for the above holding. The reason why the Court of Appeal was correct is based on the principle of estoppel under the law of contract. Based on the principle of legitimate expectation and promissory estoppel under the law of contract, where the employer has conducted itself in such a way that the employee believes her contract has been renewed and the employee continues working after expiry of her contract, the contract is deemed to have been renewed on the same terms as the previous contract for a fixed duration.

In *Moses Choonga v ZESCO Recreation Club*,[2] the Supreme Court held that:

> Since the respondent allowed the appellant to continue his duties for one month after the contract expired due to effluxion of time on 31st July, 2012, it can be implied and properly so, that the contract of employment was extended for the same period and on the same conditions as those contained in the expired fixed term contract of employment.

The above confirms that where an employer does not deny an employee the right to continue working after expiry of his contract, he/she creates a representation or undertaking that the employee has been re-employed on the same terms and conditions.

There is need for legislative reform under Zambian law. Currently, there are no limits on the number of fixed/short/long-term contracts an employer can offer an employee. This means that these contracts can be abused, without giving an employee sufficient job security.

Section 28A - C (1) of the now repealed Employment Act provided as follows:

> 28A. Where a casual employee continues to be employed after the expiration of six months, the employee shall cease to be a casual employee and the contract of service of that employee shall continue but shall be deemed to be a short-term contract having effect from the day following the expiration of the initial six months.
> 28B. Where an employee, who is engaged on a short-term contract, continues to be employed after the expiration of the short-term contract, the short-term contract shall be deemed to be a fixed-term contract.
> 28C. (1) Subject to subsection (2), an employee's fixed-term contract may be renewed for subsequent terms, except that the cumulative duration of the successive fixed-term contracts of employment with an employer shall be as prescribed.

Section 28A, 28B and 28C sought to protect employees on short and fixed-term contracts of employment by providing that the contracts could only be renewed a prescribed number of times before they were deemed to be fixed-term or permanent employment, respectively.

The current Employment Code Act does not replicate Section 28A - C (1) of the repealed Act or make provision for how long-term contracts can be renewed. This has caused employees to suffer anxiety as there is no security of employment where the law does not prescribe a maximum total duration of renewals for fixed-term contracts and setting a permitted number of renewals.

Article 2 (3) of the ILO Convention No. 58 on Termination of Employment, provides that:

> Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

The purpose of this provision is to protect employees against employers who use successive fixed terms to avoid having to give employees valid reasons for dismissal and depriving employees of the benefits of permanent and pensionable terms. For these reasons, it is hoped that the law develops to recognise this principle under international law.

[2]SCZ Appeal No. 168/2013.

Termination v. Dismissal

The first criticism of the Court of Appeal's decision is despite referring to the seminal decision of *Redrildza Limited v. Abuid Nkazi and Others,*[3] the court referred to the dismissals for poor performance as terminations. The *Redrilza* decision aptly guided that

> It is apparent, that the court, in its judgment used the term 'dismissal' and 'termination' interchangeably. This should not have been so, especially that the respondents were not dismissed from employment, but their services were terminated by way of notice.

The Supreme Court further stated that:

> there is a difference between 'dismissal' and 'termination' and quite obviously the considerations required to be taken into account, vary. Simply put, 'dismissal' involves loss of employment arising from disciplinary action, while 'termination' allows the employer to terminate the contract of employment without invoking disciplinary action.

The Supreme court was spot on in the *Redrilza* case when it asserted that dismissal and termination are different and distinguished the two on the basis that dismissal arises from disciplinary action, whilst termination does not. Based on this decision, the Court of Appeal should, notwithstanding the terminology used by the employees or the court below, have referred to the mode of exit of the two employees as dismissals and not terminations.

Dismissal, as guided by the Supreme Court in *Redrilza* is preceded by disciplinary action, which implies fault on the part of an employee. As the employer gave poor or unsatisfactory performance is due in large part to the fault of the employee and requires disciplinary action, dismissal correctly explains the way their employment was ended.

The above perfectly highlights the next criticism of the Court of Appeal namely, the conflation of dismissal for conduct and poor performance. As it relates to the dismissal of the 1st employee, the court below found that the failure to follow correct procedures justified the dismissal for poor performance. This was confirmed by the Court of Appeal in this matter.

Conduct is a valid reason for dismissal where an employee's behaviour is unacceptable to the employer and/or involves a legitimate loss of trust and respect in an employee. Poor performance on the other hand relates to conduct falling short of the standard expected of an employee based on his contract of employment.

Based on the conduct of the 1st employee, the failure to follow prescribed procedures in the recruitment of the account clerk amounted to both poor performance and conduct. The Court of Appeal thus missed a golden opportunity to clearly distinguish between the two valid reasons of conduct and poor performance and illustrate how certain conduct can border on both.

Valid reasons need to be substantiated

[3] SCZ Judgment No. 7 of 2011.

The Court of Appeal correctly held that an employer must give a valid reason prior to dismissal or termination of the contract of employment. This was by virtue of section 36(3) of the now repealed Employment Act which is reflected in section 52(2) of the Employment Code Act. However, the duty on the employer does not end there. A valid reason must be substantiated and proven to be fair and reasonable in the circumstances.

In *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia Limited,*[4] the Court of Appeal dealt with the need to substantiate the valid reason given. The Court of Appeal stated as follows:

> What is of critical importance to note however, is that the reason or reasons given must be substantiated. We recall that our duty as a court is to ensure that the rules of natural justice were complied with and to examine whether there was a sufficient substratum of facts to support the invocation of disciplinary procedures. In other words, we must be satisfied that there were no *mala fides* on the part of the employer. (Our emphasis)

The requirement to give valid reasons prior to termination, in essence also entails the employer substantiating the reason to ensure that it is valid. To be substantiated, the reason must not only be valid but be supported by the substratum of the facts, circumstances and evidence that justifies and support the reason given by the employer when terminating the contract of employment.

For the above reasons it is submitted that where the Court of Appeal held that the reason must be valid, this encompassed the requirement that the reason must also be substantiated.

Guidelines for dismissal based on poor performance

The Court of Appeal also missed a golden opportunity to develop the law in relation to dismissal for poor performance. Apart from stating that prior to dismissal for poor performance, the conduct must be brought to the attention of the employee, nothing more was said. Such guidance would have assisted employers going forward on how to carry out this form of dismissal.

It is submitted that for dismissal for poor performance to be justified, an employer is mandated to give the employee an opportunity to be heard. Merely putting him on notice as to his poor performance is unsatisfactory. This has now been codified by section 52(3) of the Employment Code Act.

Further to the above, dismissal for poor performance entails elements of substantive fairness that the Court of Appeal could have highlighted. These are:

- Ensuring the employee was aware of the standard expected by the employer when performing his/her duties; and
- Giving the employee was given a fair opportunity to meet the standard.

It is only after following these steps and the employee fails to improve within a reasonable time that dismissal for poor performance should be carried out. It should be noted that in cases of serious poor performance, that orders on gross negligence of duty and/or serious

[4] CAZ/Appeal No. 129/2017.

misconduct, the employer would be justified in dismissing the employee with notice or summarily. However, for cases of less serious poor performance, the above steps should have been highlighted given that not all poor performance justifies dismissal.

Justification for dismissal under Zambian Law

Further to the above, it does not appear that the Court of Appeal adequately interrogated whether the failure to follow prescribed procedures in the case of the 1st employee in the circumstances justified dismissal. According to the decisions of *Stockdale v. The Woodpecker Inn Limited and Spooner*[5] and *Borniface Siame v Mopani Copper Mines,*[6] the test for dismissal is the failure of an employee to faithfully discharge his duties to the employer and where such conduct leads to a breakdown of trust and respect.

This decision could have been an opportunity for the Court of Appeal to highlight the law in relation to dismissal and deduce whether the failure to follow the correct processes when recruiting the accounts clerk met the standard set out by the law, namely conduct falling short of the faithful discharge of one's duties.

As with a decision relating to misconduct, there are two steps the employer must satisfy before dismissal. In the case of *Chimanga Changa Limited v Stephen Chipango Ngombe*,[7] the Supreme Court asserted that:

> …(the) employer does not have to prove that an offence (was committed) or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear: an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens.

Based on the above, a key test is that the employer must be satisfied the employee is performing poorly and secondly, the important guideline for determination of the fairness of a dismissal is, whether the employer acted reasonably. In other words, the dismissal must be reasonable fair with respect to the offence. Alternatively, dismissal should be listed as the penalty or sanction for the type of poor performance committed by an employee in the Disciplinary Code of an employer to justify dismissal. This is based on *Lumwana Mining Company Limited* v. *Zebed Mwiche and 15 Others,* [8] These considerations were not espoused by the Court of Appeal, and it would have been helpful had they be highlighted.

Damages

In the case at hand, the Court of Appeal set aside the award of thirty (30) months' salary awarded by the Industrial Relations Division and replaced it with two (2) months' salary as damages for unlawful, termination, mental distress and inconvenience. The Court of Appeal held that

> The award is excessive as the lower court even glossed over the fact that the 2nd respondent's contract of employment was for a fixed duration of two months, renewable, and the

[5] (1967) ZR 128 (HC).
[6] SCZ Appeal No. 74/2013.
[7] (2010) 1 Z.R. 208 (S.C.).
[8] SCZ Appeal No. 107 of 2014.

termination clause provided for only a week's notice or pay in lieu thereof, and yet he was paid a month's pay in lieu of notice.

If the court below has considered these facts, it would have awarded the 2nd respondent reasonable damages. For the preceding reasons, we hereby set aside the said award and instead award the 2nd respondent two months' salary as damages for unlawful termination of employment, mental distress and the inconvenience caused to him by the sudden termination.

A further criticism of the decision of the Court of Appeal is the approach to the award of damages. The traditional approach to damages in the employment law has been to assert that the normal measure of damages is equivalent to the notice period in the employee's contract of employment, or reasonable notice. This was the position in seminal employment law decisions such as *Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others*,[9] *Chilanga Cement Plc v Kasote Singogo*[10] and *Tom Chilambuka v Mercy Touch Mission International*.[11] These seminal decisions were made before the Employment Act was amended in 2015 requiring employers to give a valid reason connected to the employee's capacity or conduct, or the employer's operational requirements. In other words, it is submitted that this position with respect to damages is no longer in keeping with recent developments to the law, specifically the requirement introduced in 2015 that all terminations initiated by the employer must be accompanied by a valid reason.

Previously, an employer could terminate employment for no reason or any reason. In such circumstances, a normal measure of damages equivalent to the notice period was appropriate because notwithstanding any unfair or wrongful dismissal, an employer was entitled to bring the contract to an end without having to give a reason. As such the court could award damages equivalent to the notice period because the employer enjoyed the option to terminate at will and the notice period encompassed the loss to be suffered by an employee. Under the common law, an employer could terminate or dismiss for no reason, and this reflected in the common law remedy of damages equivalent to the notice period. This common law approach was adopted in Zambia and worked well up until an amendment was made to the legislation.

For these reasons, the normal measure of damages being the notice period was the position at common law that should no longer apply due to the current legislative position on the need for valid reasons. The position now is that an employer must accompany any termination with a valid reason, even when terminating with notice or payment in lieu of notice means that the orthodox normal measure of damages does not apply. Therefore, where an employer is guilty of wrongful or unfair dismissal or termination, compensation with notice pay would not be justifiable as an employer is no longer at liberty to terminate the contract without a reason, as was the case before.

To put it differently, the removal of the right to dismiss or terminate without a reason has equally taken away the measure of damages being notice pay. Such a measure of damages should not be available any longer for the reasons mentioned. As such, it is recommended that going forward, the courts do not ascribe a normal measure of damages for unfair and wrongful termination and dismissal – but merely assess the damages due based on the loss suffered by

[9] (2002) ZR 23 (SC).
[10] SCZ Judgment No. 13/2009.
[11] SCZ Appeal No. 171/2012.

the employee and the other factors relating to the employee and how he as (mis)treated by his employer.

Under the law of damages, the courts have awarded up to thirty-six (36) months' salary as damages beyond the notice period in exceptional circumstances. In the case of *Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others***,** the Supreme Court guided that: -

> The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering; and, while there should be compensation over and above the contractual termination benefits already paid, it is beyond the normal measure to equate such damages to the salary and perquisites over a two year period.

Based on the above, it was held that where dismissal or termination is inflicted in a traumatic fashion, the court out to award more than the normal measure of damages. In *Chansa Ng'onga v. Alfred H. Knight (Z) Ltd*, the Supreme Court confirmed the normal measure of damages is the notice period, but it can be departed from if, and only if, an employee can demonstrate special or peculiar circumstances that justify a higher award are specifically pleaded and proved.

In earlier cases such as *Attorney General v. John Tembo*[12] and *First Quantum Mining and Operations Limited v Obby Yendamoh*[13] confirm that an employee must prove the following for the court to awarding damages beyond the notice period: -

- that his/her employment was terminated in in traumatic fashion;
- was the result of the blatant infringement and/or disregard of their rights, the rules of natural justice and/or their contract of employment;
- caused mental anguish, anxiety, inconvenience and stress; and
- the employee's future job prospects and the economy when awarding these damages.

When one applies these established factors to the case at hand, the court's award of two (2) months' salary as damages was wholly inadequate. The court was adamant that the payment of one month in lieu of notice when the contract provided for one week's notice was a material fact in reducing the damages to two (2) months' salary.

It is submitted this consideration on the payment made vis-à-vis the termination clause is irrelevant given that the purpose of damages in employment law is to compensate an employee where the employer has infringed his right, inflicted termination in a traumatic fashion, caused mental anguish, anxiety, stress and inconvenience and there has been a diminution in the employee's job prospects as a results – provided he takes reasonable steps to mitigate his loss. These are the factors based on established case law which the Court of Appeal should have focused on – and had they done so, the award of damages would have exceeded the two (2) months' salary that was granted.

Section 85A of the Industrial and Labour Relations Act provides that:

[12] SCZ Judgment No. 1 of 2012.
[13] SCZ Appeal No. 206/2015.

Where the Court finds that the complaint or application presented to it is justified and reasonable, the Court shall grant such remedy as it considers just and equitable and may -

(a) award the complainant or applicant damages or compensation for loss of employment;
(b) make an order for reinstatement, re-employment or re-engagement;
(c) deem the complainant or applicant as retired, retrenched or redundant; or
(d) make any other order or award as the court may consider fit in the circumstances of the case.

Without a shadow of a doubt, based on section 85A of the Industrial and Labour Relations Act, the court should do what is just and equitable when presented with a Complaint by an employee. As such, it should be noted that when awarding damages, the court ought to enhance damages awarded where the employer disregards the employee's rights.

Further to the above, an employee is implored to provide clear evidence considerations of mental anguish, anxiety, stress, and inconvenience. It is submitted that whilst this view has been supported by the Supreme Court in *Chansa Ng'onga v. Alfred H. Knight*, it is submitted that providing evidence of these considerations is clear from the facts. For example, in the case of the 2nd employee in this case, his dismissal for poor performance caused him stress and inconvenience as he was abruptly deprived of his livelihood.

Whilst providing evidence of anguish, anxiety, stress, and inconvenience are helpful in assisting the court in its award of damages, one could argue that the court should always use its discretion to infer from the facts the clear impact of a wrongful or unfair termination or dismissal on an employee. It is thus no longer tenable for a court to refuse to grant an employee more substantial damages merely because there is no evidence of anguish, anxiety, stress, and inconvenience. A blatant disregard of an employee's rights which drastically affect an employee can be inferred in appropriate circumstances, and this alone, based on section 85A of the Industrial and Labour Relations Act justified a higher degree of damages.

Whereas mental anguish, anxiety, stress, and inconvenience need not always proved for the court to consider them when awarding damages, the diminution of future job prospects should be explicitly pleaded and proven as far as is possible. Whilst mental anguish, anxiety, stress, and inconvenience can be easily inferred from the facts presented by an employee, his/her future job prospects cannot be easily ascertained.

In *Joseph Chintomfwa v Ndola Lime Company Limited,*[14] and subsequently *Dennis Chansa v. Barclays Bank Zambia Plc*[15] the Supreme Court affirmed that limited or non-existent future job prospects must be proven for this to be factored in an award for exemplary damages in employment matters.

The above point is further buttressed by the fact that an employee is mandated to mitigate his loss when his dismissal or termination is alleged to have been unfair or wrongful. In the process of proving attempts to mitigate hi/her loss, an employee is likely to lead evidence of the efforts taken to find alternative employment or alternative sources of income. It is from this evidence that the court will form the basis of scarce future job prospects.

[14] (1999) Z.R. 172 (S.C.).
[15] SCZ Appeal No. 111/2011.

The above notwithstanding, when the court is awarding damages to take into consideration future loss as they did in the *Joseph Chintomfwa* case, the court will likely have to estimate the future loss, most likely by using an intelligent guess. However, as guided above, even the estimation must be based on some objective factors. In both *Joseph Chitomfwa* and *Dennis Chansa,* the court took into consideration the current economic climate and scarcity of jobs. In *First Quantum Mining and Operations Limited v Obby Yendamoh,*[16] the Supreme Court asserted that as time goes along, the award of enhanced or special damages will increase to take into consideration scarcity of employment and the deterioration of the local and global economy.

Therefore, even though future job prospects must be pleaded, the court based on section 85A of the Industrial and Labour Relations Act, should infer from the facts and take judicial notice of certain facts to determine if future job prospects exist following unfair or wrongful termination or dismissal.

For the above reasons, it is suggested that when the opportunity arises either the Court of Appeal or the Supreme Court should revise its guidance with respect to the award of damages in employment matters. The common law position on damages is no longer tenable and needs to be revised. It is submitted that there is no longer a normal measure of damages, but that damages should be assessed solely based on the loss suffered taking into consideration the factors highlighted above. The factors should not be seen as exceptions to the general rule but elements to be used in awarding damages in all cases going forward.

[16] SCZ Appeal No. 206/2015.