

IN THE SUPREME COURT FOR ZAMBIA

SCZ/8/134/2009

HOLDEN AT LUSAKA

Appeal No 126/2009

(Civil Jurisdiction)

BETWEEN:

DOMINIC CHINYAMA

APPELLANT

AND

ZAMBEEF PRODUCTS PLC

RESPONDENT

CORAM: Sakala CJ, Chibesakunda and Mwanamwambwa JJS

On 7th September, 2010, and 29th October, 2013

FOR THE APPELLANT :

**Mr T. Shamakamba of Shamakamba &
Associates**

FOR THE RESPONDENT:

Mr. Robert Mwanza of Robert & Partners

JUDGMENT

Chibesakunda, Ag. C.J, delivered the Judgment of the Court.

Cases referred to:

- 1. *Attorney General v Marcus Kampumba Achiume (1983) ZR 1 (SC)***
- 2. *Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) ZR 1***

In this appeal the Coram which heard the appeal was Sakala CJ, Chibesakunda and Mwanamwambwa Judges of the Supreme Court. Due to the retirement of His Lordship, Mr Justice Sakala, this will be a majority Judgment. Also, it is regretted that this Judgment has



been delayed in being delivered due to circumstances beyond our control.

In this appeal, the Appellant had sued the Respondent as his former employer claiming the following:

- (i) Damages for wrongful and unlawful termination of employment.**
- (ii) A declaratory order that the termination of the Plaintiff's employment was null and void.**
- (iii) Payment of all the Plaintiff's terminal benefits calculated on the basis of Plaintiff's salary on exit plus K1,000,000.00 fixed bonus every month.**
- (iv) In the alternative damages for constructive dismissal.**
- (v) Any other relief the Court deems fit.**
- (vi) Costs.**

Briefly the facts on which there was no dispute are that the Appellant was employed as a Dairy Clerk for the Respondent in Chisamba on 8th March, 2000. His duties included keeping records of animals, stock and dress, and dealing with workers. At the time he used to report to the Dairy Manager. On 21st April, 2004 he was transferred to the Kitwe Processing Plant to be an Assistant to the General Manager. His duties were to attend to court cases and staff matters. He was responsible for ensuring discipline among workers in the Respondent Company. His

salary was K2,500,000, housing allowance K700,000, transport allowance K200,000 and meat allowance K140,000.

On 18th December, 2006, the Appellant was transferred back to Huntley Farm in Chisamba. In his letter of transfer (page 63 and 87) the Appellant was told to report to the Abattoir Manager and that he would retain the same conditions of service that he was at the time enjoying.

The case for the Appellant on which there was dispute was that the letter of transfer had no job title. He testified that when he reported at Huntley Farm on 21st December, 2006 he was assigned by the Assistant Administration Manager to go to the feedlot. The Appellant felt the assignment was a demotion because while in Kitwe he was promoted as Personnel Manager (See salary Adjustment Form page 60). He told the court that he did not go to the feedlot because the job of feeding animals was too low for him. On 22nd December, 2006 he tried to see the Administration Manager Mr Kashila who advised him to wait but he never got back to him. On 27th December, 2006 he attempted to see Mr Grogan, the General Manager. Mr Grogan refused to

see him. On 28th December, 2006 the Appellant returned to Kitwe and on the same day he received a letter accusing him of absenteeism which he denied in his exculpatory letter dated 30th December, 2006 (page 87). On 12th January, 2007 his employment was terminated. Earlier, on 4th January, 2007 he approached the Labour Officer who wrote a letter to Respondent (see page 91) asking the Company to state the Appellant's designation in Chisamba or at least avail him the conditions.

During cross examination, the Appellant admitted that he stayed away from work on 2nd and 3rd January, 2007. When he reported for work on 4th January, 2007 the General Manager Mr Erasmus refused to allow him to work and he stayed home up to 12th January, 2007. He testified that although his pay slip indicated the designation of Administration Manager this was wrong and that he had complained about it to his boss. He testified that his pay slip for January 2006 showed the job title of Personnel Manager.

The Respondent called three witnesses. DW1 (Jacob Johannes Erasmus General Manager for Copperbelt) testified that the

Appellant had been transferred to Huntley Farm in Chisamba and that he ought to have been reporting there for work. He told the Court he did not know where the Appellant had been between 4th and 9th January, 2007 as he was not reporting to him after the transfer. He explained that the Appellant was transferred along with two other workers who had reported for duties. In Cross examination, DW1 told the Court that the Appellant had told him that he encountered problems in Chisamba but he never found out what sort of problems he encountered. He testified that he did not know what the Appellant was charged with nor did he know whether the Appellant was transferred on promotion or demotion or in some other capacity. Neither did he know the reason for the transfer. According to him the transfer was effective 12th December, 2006.

DW2 repeated more or less the testimonies of the Appellant and DW1. He also confirmed that on 21st December, 2006 he saw the Appellant in his office in the afternoon. He confirmed that the Appellant told him that he was transferred to Chisamba from Kitwe and he was to report to the Abattoir Manager. DW2 told

the court that he called the Administration Manager on phone as he was in Kitwe at the time and he instructed that the Appellant should come to see him the following day. He denied the story that he sent the Appellant to the feedlot to feed animals. In Cross examination, he testified that he did not know in what capacity the Appellant was transferred to Chisamba but he was to report to the Abattoir Manager who would tell him what to do. He explained that the Abattoir was where animals were slaughtered, where sausages were made and where chickens and other meats were processed. He testified that there were many Administration Officers at Chisamba and one of them was based at the Abattoir. He told the Court that he did not see the Appellant the following day and he did not tell him that he had some problems.

DW3 was Chalwe Kashila the Administration Manager who testified that he handled human resource matters for the Respondent Company countrywide. He explained that the Appellant was given notice on 12th December, 2006 that he was going to be transferred and that on 18th December, 2006 the transfer was effected. He testified that since the Appellant did not

~~act on the letter of transfer, he was written to on 28th December,~~
2006 and on 12th January, 2007 a letter for summary dismissal was written to him for being absent from work for over 5 consecutive days. In Cross examination, DW3 testified that the Appellant was sent on 5 days leave from 12th December, 2006. He told the Court that the position of Administration Officer was higher than a feedlot clerk and that the transfer did not denote a demotion. He too said when the Appellant arrived in Chisamba he was supposed to report to the Abattoir Manager. He told the Court that the Appellant was an Administration officer at the Kitwe Processing Plant and confirmed that he (the Appellant) was going to maintain the same position. He explained that there was accommodation for him at Chisamba but he was not shown because he did not report for work. He testified that on 22nd December, 2006 he told the Appellant to wait for him but he did not do so. He explained that there were other people who were transferred and were now working in Chisamba. He testified that it was a mistake to refer to the Appellant as Personnel Manager in the salary adjustment form.

The Court on this evidence held that the Appellant was lawfully dismissed in that he absented himself from work from 4th to 9th January, 2007, hence this appeal before this Court.

The Appellant raised seven grounds of appeal. These are:

- 1. The learned trial Judge erred in both law and on fact by failing to consider that the Appellant ground of dismissal for absence from work for 5 days did not take into consideration Saturday or Sunday.**
- 2. The learned trial Judge erred by failing to consider that the Appellant was not assigned any work at Chisamba as he was being referred from one person to another.**
- 3. The learned trial Judge misdirected himself by failing to consider that the Appellant who was not assigned any job at Chisamba was asked to wait by the Administrative Manager.**
- 4. The learned trial Judge misdirected himself by failing to consider that there was a distinction in the letter of transfer as to the description of job to what he was asked to do in Chisamba.**
- 5. The learned trial Judge erred in failing to consider that the other employees transferred together with the Appellant were specifically told the job titles in their letters of transfer and that they knew where to report.**
- 6. The learned trial Judge misdirected himself by failing to consider that in the absence of relevant authorities the Appellant was asked to see, Mr Grogan who is senior to the said authorities should be the best person to direct the Appellant who to see than simply refuse to see him.**

7. The learned trial Judge erred in failing to consider that there was communication between the Appellant and the employer on the 4th and 9th January, 2007.

At the hearing of this appeal both counsel relied on their filed Heads of Arguments. According to the arguments filed by the Appellant the core ground of appeal is that the findings were contrary to the evidence given before the Court. It was argued that had the Court asked the right question as to whether or not the Appellant was absent from work from 4th – 9th January, 2007, the Court would have discovered that the answer to that was negative. According to the Appellant had the Court taken into account his evidence that he arrived at Huntley Farm in Chisamba on the 21st December, 2006 and that he tried to report for duty on the same day. That he contacted DW3 by phone as he was still in Kitwe who told him to see DW2. That DW2 then told him to go to the feedlot and feed the animals and that when he went the following day on the 22nd December, 2006 he was told that the Administration Manager would see him later the Court would not have concluded as it did. The Appellant further argued that had the Court below taken into account this additional evidence that the 24th and 25th December, 2006 were public holidays and that the Appellant

reported on 27th December, 2006 when Mr Grogan refused to see him and on 28th December, 2006 he received a letter asking him to exculpate himself which he did on the 30th December, 2006, and that 2nd and 3rd January, 2007 were weekend days. Then on 4th January, 2007 was the day he saw the Labour Officer, the Court would have agreed with the Appellant that he was only absent for 4 days, that is 1st, 5th, 6th , and 7th. Also the Court should have taken into account of the fact that he, the Appellant even on the pay slip was being described as Personnel Manager. So asking him to go the feedlot was lowering him in his designation and that he was being given different assignments from those he was enjoying in Kitwe as Personnel Manager. So the Court below reached a conclusion which was not supported by the evidence before it.

The Respondents in response began analyzing each ground of appeal. According to them, the grounds were against findings of fact. Citing the cases of ***Attorney-General v Marcus Kampumba Achiume*** and ***Wilson Masauso Zulu v Avondale Housing Project Limited*** in which it was held,

“Before this Court can reverse findings of fact made by a trial Judge, we would have to be satisfied that the findings

in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.”

Counsel urged this Court to dismiss the appeal because according to him even a cursory look at the Appellant’s arguments would establish that none of the principles enunciated in the authorities cited, necessitating reversal of these findings of fact, had been established. Counsel argued that even then the 5 days absenteeism was never denied at trial and no evidence was laid by the Appellant. So he urged this Court to dismiss the appeal with costs.

We have looked at the record of appeal and also the issues raised. We hold the view that there is common ground that the Appellant was transferred to Kitwe. It is common ground that he was transferred back to Chisamba and given a letter of transfer dated 18th December, 2006 which we shall reproduce in full:

“18.12.06

**TO: MR CHINYAMA DOMINIC
KITWE PROCESSING**

FROM: ADMINISTRATION, CHISAMBA

RE: TRANSFER FROM KITWE PROCESSING TO HUNTLEY FARM

This is to inform you that you have been transferred from Kitwe Processing to Huntley farm- Chisamba with immediate effect.

You are to report to the Abattoir Manager and your conditions of service shall be maintained.

**CHALWE KASHILA
ADMINISTRATION MANAGER”**

In cross examination DW3 testified that the Appellant was given 5 days leave before being transferred to Chisamba. So it is common ground that he was transferred to Chisamba on 18th December, 2006.

The Appellant's evidence is that he travelled to Chisamba at Huntley Farm he did not go to see the person he was told to report to. Instead he went to see DW3 but only managed to speak to him on phone, as he was still in Kitwe. DW3 told him to see DW2 who gave him an assignment of feeding animals, a fact which was denied by DW2. The Appellant returned on 27th December, 2006 to see Mr Grogan who refused to see him. We hold that the sequence of events show that the Appellant did not follow the instructions he was given regarding his transfer. We are of the view that since the transfer letter specifically asked him to report to the Abattoir Manager, the Appellant ought to have reported to him. More so that

DW3 in his testimony explained that the Appellant was to retain his position and conditions of service, and that in the Respondent Company, Administration Officers reported to the Plant Manager, who in this case was the Abattoir Manager (page 12 of the record). The Appellant's evidence that he was not even accommodated was disputed. Looking at the catalogue of the events we do not accept that the Respondent did not give the Appellant the same designation in Chisamba as he had in Kitwe. As we have observed earlier the letter of transfer at page 87 was specific and had the Appellant bothered to report to the Abattoir Manager he would have known exactly what his assignment would have been but he opted to stay away or see other senior officials. This position is buttressed by the evidence that the Appellant was not the only one who was transferred. There were other workers who had been transferred and had reported for duties. In any event, contrary to what was stated in the pay statement at page 90, the Respondent witnesses testified that the Appellant was an Administration Officer and not a Personnel Manager.

We are satisfied that the rules of natural justice were observed because the Appellant was given a chance to exculpate himself. We equally find that the Appellant was fairly treated by the Respondent and that he was absent from more than 5 days which under the Paragraph G5 of the Respondent Company's Disciplinary Code was a dismissible offence. We have no reason to disturb the findings of fact. We therefore find no merit in the appeal. We dismiss the appeal and make no order as to costs.



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L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE



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M. S. MWANAMWAMBWA
SUPREME COURT JUDGE