Swarp Spininig Mills PLC v Chileshe and Others.

Supreme Court
Ngulube, C.J., Sakala J.S. and Mambilima, A.J.S.
4th December, 2001 and 6th March, 2002.
(SCZ Judgment No. 6 of 2002)

Flynote

Damages – Mental distress and inconvenience – Power of court to award non pecuniary damages or damages for injured feelings.

Headnote

The appeal was against the quantum of damages awarded and the question was whether the learned trial Judge awarded excessive damages. The respondents were employed by the appellant as security guards. Being dissatisfied with the levels of pilferage going on within the company, despite the presence of the in house security guards, the appellant decided to terminate the services of all their security guards, opting instead to engage the services of external guards from a security company, namely, Coin Security Services.

The respondents were called to a meeting on a Sunday only to be informed they had all lost their jobs.They were each given a letter of termination, a very abrupt and summary termination it was indeed. The respondents launched proceedings for damages for wrongful or unlawful termination of services.The learned trial Judge observed that there was not in this case any true situation of redundancy since other external guards came to do the respondents work.The terminations were found to have been wrongful.

The learned trial Judge assessed the damages equivalent to two years salary and perks, less what had already been paid.The court also took into account the scarcity of jobs and the terms and manner of the terminations. The appellants appealed against the decisions of the learned trial judge.

Held:

(i) The normal measure of damages applies and will usually relate to the applicable contractual length of notice or the national reasonable notice where the contract is silent.

(ii) The normal measure is departed from where the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering

(iii) While there should be compensation over and above the contracture terminal benefits already paid, that is beyond the normal measure to equate such damages to the salary and perquisites over a two year period, was wrong in principle and produced an excessive award.

Cases referred to:

(1) *Chitomfwa v. Ndola Lime Company Limited* SCZ Judgment No. 28 of 1990.
(2) *Addis v Gramaphone Company Limited* [1990] A.C. 488.
(3) *Cox v Phillips Industries Limited* [1976[3 All E.R. 161.
(4) *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354.
(5) *McCall v Abeke* 53 1976 1 QB 585.
(6) *The Attorney-General v Mpundu* (1984) Z.R. 6.
(7) *Miyanda v The Attorney General* (1985) Z.R. 6.
(8) *Kawimbe v Attorney-General* (1974) Z.R. 244.

C.L. Makungu (Ms) of Makungu and Company for the appellant.
L. Matibini of L.M. Matibini and Company for the respondents

Judgment

NGULUBE, C.J. delivered the judgment of the court: The appeal is against the quantum of damages awarded and the question is whether the learned trial judge awarded excessive damages. The respondents were employed by the appellant as Security Guards. Being dissatisfied with the levels of pilferage going on within the company despite the presence of the in house security guards, the appellant decided to terminate the services of all their Security Guards, opting instead to engage the services of external security guards from a security company, namely Coin Security Services. As Mr. Matibini reminded us and as the learned trial Judge found, the employees were called to a meeting on a Sunday only to be informed they had all lost their jobs. They were each given a letter of termination, a very abrupt and very summary termination it was indeed. The meeting was called on 17th October, 1999, and the termination was stated in the letters to take effect the very next day, 18th October, 1999. The letter informed the guards that due to a change of company Security Policy (in reference to the decision to use external services) they had all been laid off. The letter went on to offer a redundancy package of two months salary for each year served; one month in lieu of notice; and accrued leave days.

The workers launched proceedings for damages for wrongful or unlawful termination of services. They were all classified in the management category, according to their letters of employment and however humble their actual positions when the employment letters said:-

"You will not be a member of the Union as this is a Management Post."

The learned trial Judge observed that there was not in this case any true situation of redundancy since other external guards came to do the plaintiff's work. In addition, since the appellants had for whatever reason been classified as being in management, they were entitled to some notice of termination instead of being summarily dismissed. The terminations were thus found to have been wrongful.

In assessing the damages equivalent to two years salary and perks, less what had already been paid, and in awarding a repatriation allowance or, alternatively, the actual provision of physical transport, the court took into account the scarcity of jobs and the summary manner of

the terminations which would render it more difficult for the plaintiff to obtain other work. The Court also cited with approval our sentiments in *Chintomfwa v Ndola Lime Company Limited (1)* in which we approved damages equal to two years' salary plus perks. We considered that job opportunities were then almost nil. In that case, an engineering clerk had been coerced into taking early retirement under a clause in the contract which did not even properly apply. We said that we would depart from recent precedents where damages equal to one year's salary and perks had been given and would ward the same for two years after taking into account of the scarcity of jobs of the kind that plaintiff had been doing. A major argument advanced by Miss Makungu was that it was wrong to simply take the period used in the *Chintomfwa* case without taking account of the circumstances of the particular case and the availability of work of the kind the plaintiffs had been doing. There is merit in this argument. Of course, we have not forgotten Mr. Matibini's counter argument that in Ndola which is proposed as tax free Zone the jobs are nonetheless scarce for Security Guards.

In assessing the damages to be paid and which are appropriate in each case, the court does not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent. However, the normal measure is departed from where the circumstances and the justice of the case so demand. For instance, the termination may have been inflicted in a traumatic fashion which causes undue distress or mental suffering; or in any other situation where it is permissible to depart from the rule in *Addiss v Gramaphone Company Limited (2)* which generally precludes the award of non pecuniary damages like exemplary damages for injured feelings. Thus in *Cox v Phillips Industries Limited (3),* the Queens Bench Division while accepting that *Addiss* restricted damages for wrongful dismissal to some compensation already therein paid (as normal measure) also awarded for vexation, frustration and distress suffered by the employee. Again in *Edwards v Society Of Graphical And Allied Trades (4)*, the damages included an element of the difficulty the dismissal caused to a plaintiff in getting fresh employment.

Exceptions to the ADDIS truly abound. For example, in a case where a landlord was harassing a tenant, in breach of contract, Lord Dennig, MR., was able to asset that:-

"It is now settled that the Court can give damages for the mental upset and distress caused by the defendant's conduct in breach of contract."

See:- *Mccall v Abelesz (5)* at page 594. In this country, we too have recognized this kind of additional damages in cases like *The Attorney-General v Mpundu (6)* And *Miyanda v The Attorney-General (7).* In the case at hand, the learned trial Judge was right to consider the summary fashion of terminating at a meeting called on a Sunday, without any notice at all, and in circumstances making it difficult to explain the loss of employment for the purpose of obtaining alternative similar work. This justified the departure from the normal measure of damages.

The question still remains whether two years was an appropriate period to select. We are bound to agree with Miss Makungu that the Judge ought not to have simply adopted the period in *Chintomfwa* when the circumstances do not lend themselves to the drawing of any parallels. Of course, we do not forget the principle also that this Court does not lightly interfere with assessments of damages for good cause shown, as discussed in cases like *Kawimbe v Attorney-General (8)* cited by Mr. Matibini. Here, the precedent set by this court was incorrectly applied when the learned Judge failed to take account of different levels categories of work involved. Senior managerial jobs cannot be equated with those which are more modest and relatively more abundant and therefore more readily available. The type of work in this case cannot be regarded to be as scarce as that in say *Chintomfwa* or the cases of General Managers and persons at those levels. Here, we do not consider that the job of Security Guard, even if curiously described as belonging to management, can be in the same

league as that in the precedent relied upon. While, therefore, we agree with the Judge that there should be compensation over and above the contractual terminal benefits already paid, that is beyond the normal measure, to equate such damages to the salary and perquisites over a two year period was wrong in principle and produced an excessive award.

Accordingly, we set aside the award of the equivalent of two years' earnings. We should first explain the reduced period we are substituting. The learned trial Judge had directed that the package already paid by the employer should be deducted from the award equivalent to two years' earning. The reduced award we are making cannot be subjected to any deduction for the simple reason that it is intended to be compensation by way of the *Mpundu* type of damages since otherwise the argument that the package paid already encompassed the normal measure of damages was quite valid. Over and above what the company has already paid or intended to pay, therefore, we award the equivalent of six months' earnings, that is salary and perquisites, as *Mpundu* damages. The normal damages we consider to have been prepaid and incorporated in the package already granted by the employer which we do not disturb. Furthermore, we do not disturb the order concerning repatriation. As Mr. Matibini rightly pointed out, the Employment Act makes it compulsory to repatriate pruned staff.

Although the appeal has succeeded to the extent indicated, it is unthinkable to condemn in costs pruned staff who have been compelled to defend themselves in this court. Accordingly, there will be no order for costs.

Appeal allowed to the extent indicated.