IN THE COURT OF APPEAL **CAZ APPEAL NO. 52 OF 2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

HOPE BWALYA **APPELLANT**

AND

BLU-LIFESTYLE LIMITED **RESPONDENT**

CORAM: CHISANGA JP, MAKUNGU AND KONDOLO SC, JJA

On 26th June, 2019 and 2020

For the Appellant : Mr. D.M Chakoleka and Ms. S. Sichalwe of Messrs Mulenga Mundashi Kasonde Legal Practitioners

For the Respondent : Ms. G. Samui – Officer of Zambia Federation of Employers (by Power of Attorney)

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited (1990) S.J. (S.C.)**

2. **Chola Chama v Zesco Limited Appeal No. 215/2016**
3. **Boart Longyear (Zambia) Limited v Austin Makanya Supreme Court Judgment No. 9 of 2016**

LEGISLATION REFERRED TO:

1. **The Industrial and Labour Relations Act, Chapter 269, Laws of Zambia**
2. **The Rules of the Supreme Court 1999 Edition (The White Book)**

TEXT REFERRED TO:

1. **M.N. Howard and Peter Crane. Phipson on Evidence. 14th edition London: Sweet and Maxwell**

This appeal is against the Court's refusal to admit *"without prejudice"* correspondence and the Court's Order to strike out the particular paragraphs of an Affidavit that exhibited the said correspondence.

The Appellant alleged that the Respondent wrongfully terminated her employment on 3rd February, 2017 and she sued for damages in the Industrial Relations Division. Paragraph 14 of her affidavit in support of her Complaint, exhibited correspondence marked *"without prejudice"*. The Respondent objected to the admission of the correspondence on the basis that without prejudice correspondence can only be tendered into evidence with the consent of both parties.

The Appellant sought solace in **Section 85 of the Industrial and Labour Relations Act**, which provides that the rules of evidence are not applicable to the Industrial Relations Division and as such the Court could admit evidence even if marked *"without prejudice"*. In its Ruling, the trial Court cited the law in relation to the admission of evidence *vis a vis* **Section 85** and found that while it was true that the rules of evidence do not apply in that Court, the issue before it was whether or not the rules applied to without prejudice correspondence. The Court made a finding to the effect that such correspondence must not be allowed. The learned trial Judge not only ordered that the piece of evidence that the Appellant sought to adduce, be expunged from the record but also struck out paragraph 14 from the affidavit.

The Appellant, disgruntled with the decision of the lower Court, assailed the ruling on 3 grounds, namely;

1. **The learned High Court Judge erred in law and in fact when he held that the two letters marked "without prejudice" from the Respondent could not be admitted for purposes of showing the manner in which the Complainant was terminated notwithstanding that there**

has never been a dispute as regards the manner in which the Complainant was terminated.

2. **The learned trial Judge erred in law and in fact when he held that the two letters marked "without prejudice" should not be admitted in evidence notwithstanding the fact that there were no negotiations between the parties as to the manner the Complainant was terminated from employment.**
3. **The learned trial Judge erred in law and in fact when he held that the two letters marked "without prejudice" from the Respondent should not be admitted into evidence, thereby allowing the Respondent to prosecute a dishonest case and engage in impropriety contrary to the position not disputed that the Complainant was terminated by way of payment in lieu of notice.**

The Appellants argument under ground 1 is that the mode of termination of her employment was not in dispute and never the subject of negotiation. It was opined that correspondence relating to matters not in dispute was one of the exceptions to the production of correspondence marked, "*without prejudice*".

Counsel for the Appellant quoted **Phipson on Evidence**, as follows;

> ***"Letters and communications are only protected when there is a dispute or negotiations pending between parties and that the letters were bona fide written with a view to compromise".***

Counsel referred to page 74 of the Record, which shows a letter from the Respondent to the Appellant stating that her employment was terminated by notice and another at page 79 which shows that the disagreement between the parties was in relation to payment in lieu of notice and not in relation to the termination itself. It was submitted that the sole purpose for producing the without prejudice correspondence was to show the mode of termination and nothing else. Therefore, the lower Court misdirected itself when it held that the correspondence was inadmissible.

In response to ground 1, the Respondent submitted that the ruling of the lower Court did not delve into the specifics of why it ruled as it did but only upheld the Respondent's argument on public policy and substantial justice of protecting negotiation for *ex-curia* settlement of a dispute. It was further submitted that the lower Court examined the preliminary issue raised and made a

reasoned decision which was firmly in line with the case of **Boart Longyear (Z) Ltd v Austin Makanya** and was therefore on firm ground.

In ground 2, Counsel for the Appellant submitted that the position of the law is that a criterion of admissibility of without prejudice evidence is that in instances where the material concerned does not form part of negotiations, the principle will not apply. He again cited **Phipson on Evidence** and the case of **Chola Chama v Zesco Limited** [2] in which the Supreme Court stated that:

> ***"Where the contents of without prejudice evidence are not in dispute, the rule will not apply".***

It was pointed out that the Appellant expressly stated in her Affidavit, in paragraph 9, that there were no negotiations between the parties regarding the mode of termination of her employment, an assertion which was not rebutted by the Respondent. It was opined that the record reflected that the correspondence between the parties showed that there were no negotiations between them on the mode of separation. It was, on this basis, submitted that this ground be allowed as the trial Judge should not have expunged the two letters thus preventing them from being used as

evidence to prove the mode of termination of the Appellant's contract of employment.

In response to ground 2, the Respondent submitted that the correspondence between the parties covered several things including the attempts to negotiate a settlement over her underpayment of salary in lieu of notice, alleged circumstances that led to termination, alleged denial of natural justice, alleged non-commutation of accrued untaken leave, to list but a few.

Reference was made to the letter from the Appellant to the Respondent on page 112 specifically where it reads,

> ***"With respect to your position denying our client the right to be heard, we have noted that you have proceeded on the basis that our client was dismissed from employment, when that is not the case".***

According to the Respondent, the said letter stimulated the negotiations which culminated in an offer to settle by paying three months' salary in lieu of notice and which offer fell through.

According to the Respondent, the correspondence between the Parties was in fact an attempt to resolve a dispute regarding the Appellant's separation from employment by the Respondent. It was

submitted that all the correspondence should be considered together and the Appellant cannot be allowed to cherry pick sentences and paragraphs of correspondences for her own convenience.

It was further argued that, in any event, the Court below accepted the only relevant and admissible documents before it, the pleadings. The Respondent concluded on this ground by stating that the insistence by the Appellant that there was no dispute as to the manner of separation, flies in the face of the Respondent's Answer which clearly states that the Appellant was summarily dismissed. We were urged to dismiss ground 2.

In support of ground 3, the Appellant argued that by expunging the letters from the Record, the Court not only disregarded **Section 85 (5) of the Industrial and Labour Relations Act** but also allowed the Respondent to prosecute a dishonest case. According to the Appellant, the Respondent in its Answer, at page 39 of the Record of Appeal, stated that it terminated the Appellant's employment by way of summary dismissal without notice. Further, the Respondent also averred that it was erroneously advised that even after summary dismissal, it was under an obligation to pay the Appellant in lieu of notice. This, the Appellant argues, is

contrary to the Respondent's assertion in the letters that the termination was by way of payment in lieu of notice. It was therefore submitted that given the fact that both letters in contention agreed on the mode of termination, it meant that the issue of being erroneously advised was an afterthought concocted to defeat the course of justice which goes to show that the Respondent's pleading is an example of prosecuting a dishonest case.

The Appellant opined that the lower Court allowed the Respondent to prosecute a dishonest case and submitted that the rule on without prejudice correspondence should not apply in such circumstances. Counsel further submitted that according to **Phipson on Evidence** the policy in favour of settlement should not extend to allowing a person who has made an admission in the course of negotiations to enrage the other by subsequently maintaining an opposite case.

It was argued that this was a perfect case where the Court should have applied **Section 85(5)** in so far as non-applicability of rules of evidence was concerned. A plethora of cases were cited to support the position of the law under the said section and we were

urged to find that the lower Court erred in expunging the correspondence from the record.

The Respondent reacted to ground 3 by reiterating that the Record clearly shows that there was no agreement on the Appellant's mode of separation from employment by the Respondent. In a nutshell, the Respondent sought solace in the pronouncements made in **Boart Longyear (Zambia) Limited v Austin Makanya** [3] that the "without prejudice" privilege is a general rule and has exceptions which include misrepresentation, fraud, undue influence, estoppel, perjury, blackmail or other abuse. It was submitted that none of these exist in this case and if the Court proceeds to split hairs by picking apart the expunged exhibits, it will most certainly be acting against the public policy of protecting uninhibited negotiations.

We were urged to censure the Appellant for; the statement in the arguments that the Respondent stated that it was wrongly advised was an afterthought and; the sentence referring to an email terminating the Appellant's employment. It was submitted that these are issues or facts that ought to be determined at trial and not as a preliminary issue. Finally, we were urged to dismiss the appeal.

We have carefully considered the record and are grateful for the spirited arguments for and against the appeal. The three (3) grounds of appeal are interrelated and we shall therefore consider them as one.

The Appellant has consistently argued that there was no dispute or negotiation over the mode of separation and the letters were merely produced to show that the mode of termination was by way of payment in lieu of notice. On the other hand, the Respondent has argued that the letters were used for negotiation purposes and contained much more than the mode of separation and were written with a view of settling the matter outside court.

We have cautiously looked at the contents of the letters as well as the pleadings. The Appellant in her Affidavit in Reply to the Answer at page 58 of the Record, in particular paragraph 14, stated that the Respondent did not summarily dismiss her but paid her in lieu of notice and acknowledged this mode of termination in the letters marked "**HB5**" and "**HB6**".

In chronological order, the first contentious letter was '**HB6**' written on 22nd March, 2016[sic] responding to the Appellants letter dated 2nd March, 2017. In this letter the Respondent stated that the Appellant had assaulted a customer in full view of others

and was, later in the evening, relieved of her duties with immediate effect via email. Further, the Respondent categorically responded to the Appellant's claim and without delving into the details of the letter, made various admissions and offers which offers included insufficient pay in lieu of notice, leave pay and a car loan. In concluding the letter, the Respondent indicated that the Respondent did not harbor any ill feelings and that the letter was written in that spirit.

On 11th April, 2017, the Zambia Federation of Employers wrote to the Appellant's Counsel responding to a letter to them dated 7th April, 2017 in which they remarked that Ms. Bwalya was terminated by way of notice as opposed to summary dismissal which fitted the offence. The letter also referred to aggravating circumstances of breach of contract which included late payment of notice pay and commutation of leave and set off against a car loan.

Our view of the correspondence points to an effort by the Respondent to settle the dispute. They indicated in their correspondence *inter alia*, that the charge which involved attacking a customer warranted summary dismissal and they offered 3

months' salary in lieu of notice despite the fact that the Appellants contract of employment was expiring at the end of the same month.

We have addressed our minds to the holding of the Supreme Court in **Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited** [1] in which it was stated that as a general rule, without prejudice communication or correspondence is inadmissible on grounds of public policy to protect genuine negotiations between the parties with a view to reaching a settlement out of court. The Court went on to cite the case of *Rush and Tompkins Ltd v Greater London Council and Another.* It conceded that this was only but a general rule which meant that there may be situations - such as in the case of a settlement - where the issue for determination demands the production for such without prejudice correspondence. *In casu,* no settlement was reached.

We refer to the provisions of Order **24/5/45 of the White Book** which states that the 'without prejudice rule' governs the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule excludes all negotiations genuinely

aimed at a settlement, whether oral or in writing, from being given in evidence. The Order further states as follows:

> ***"The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. "Without prejudice" material will be admissible if the issue is whether or not negotiations resulted in an agreed settlement ...but in relation to any other issue an admission made in order to achieve a compromise should not be held against the maker of the admission or received in evidence...but the general public policy that applies to protect genuine negotiations from being admissible in evidence is also extended by the Courts to protect those negotiations from being discoverable to third parties...***
>
> ***Any discussions between the parties for the purpose of resolving the dispute between them are not admissible, even if the words "without prejudice" or their equivalent are not expressly used...It follows that documents containing such material are themselves privileged from production."***

The Order provides that documents containing admissions for purposes of settling a matter are generally not admissible. We find that it would be improper to admit the "without prejudice" correspondence in this matter and then select paragraphs and admissions that might suit only one of the parties when the spirit of the correspondence was to arrive at a settlement. The issue as to whether the termination was by way of notice or summary dismissal can be determined without resorting to these documents which contain aspects that have nothing to do with the mode of termination but what the Appellant is or ought to be entitled to, following the termination.

We must hasten to state that it is prudent for Courts to protect privileged information aimed at settling matters *ex-curia* between parties because all manner of offers are made in an attempt to settle matters without recourse to litigation. It is on this basis that we find no merit in this appeal and uphold the ruling of the trial Judge with regard to the without prejudice correspondence.

For avoidance of doubt, the letters and the paragraph in the affidavit introducing the letters are expunged from the record. The

matter is referred back to the Industrial Division for continued trial.

The appeal is dismissed.

Costs are in the cause.

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F.M. CHISANGA
JUDGE-PRESIDENT
COURT OF APPEAL

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE