IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 016/2019**
HOLDEN AT KABWE
(*Civil Jurisdiction*)

BETWEEN:

JUDITH MULENGA MULEMBA MOYO **APPELLANT**

AND

COMMUNITY MARKETS FOR CONSERVATION LIMITED (COMACO) **RESPONDENT**

CORAM: **MAKUNGU, CHISHIMBA, NGULUBE, JJA**
On the 16th October and 23rd October, 2019

For the Appellant: *F.S. Kachamba, T. Wamukwamba, Messrs EBM Chambers*

For the Respondent: *A. Mumba, F. Shipopa, Messrs Nhari Advocates*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Zambia Privatization Agency vs Matale (1995-1997) Z.R.157*
2. *Martin Lukwesa vs Afrox Zambia Limited, Appeal Number 25 of 2011*
3. *Chilanga Cement vs Kasote Singogo (2009) Z.R.122*
4. *Masauso Zulu vs Avondale Housing Project (1982) Z.R. 172*

Legislation referred to:

1. *The Employment Act, Chapter 268 of the Laws of Zambia*
2. *The Industrial and Labour Relations Rules, Chapter 269 of the Laws of Zambia*

1.0 Introduction

1.1 This appeal is from the Industrial Relations Division of the High Court delivered on 15th October, 2018 by the Honourable Mr. Justice E. Mwansa in which the court below dismissed the various claims by the appellant pertaining to her separation from the employment. The appellant had moved the court below seeking the following reliefs-

(i) That she be declared to be still working;

(ii) That she be paid damages for unfair, wrongful and unlawful dismissal;

(iii) Costs.

2.0 Background to the appeal

2.1 The appellant was employed as Human Resource Manager by the respondent on a three year contract which was due to expire on 30th December, 2018. However, by a letter dated 1st November, 2016, the respondent informed the appellant that her position of Human Resource Manager would be declared redundant on 30th November, 2018, because of uncontrollable business operations and she was advised to stay away from work effective 1st November, 2016 as this would be the notice period for the

termination of her employment. The appellant was subsequently paid two months' basic salary for each year of completed service on pro rata basis, one month's salary in lieu of notice, accrued leave days, outstanding repatriation allowance, less statutory deductions such as NAPSA and PAYE and less owings to the company.

3.0 Presentation of Complaint, Answer and the parties' respective affidavit evidence

3.1 The appellant filed a notice of complaint under **Section 85(4) Rule 9 of the Industrial and Labour Relations Rules[2].** The grounds on which the complaint was presented were that by a letter dated 1st November, 2016, the respondent informed the appellant that her position of Human Resource Manager had been declared redundant, effective 30th November, 2016 due to uncontrollable business operations and she was advised not to report for work from 1st November, 2016.

3.2 The appellant stated that she was employed on a three year contract which she did not breach during the term of office, meaning that the employment contract was still continuing. She

further stated that the respondent did not give her any other job when the position of Human Resource Manager was abolished and that as such, the respondent was in breach of contract. The appellant stated that she was the one who implemented the company's redundancy policy as the employer was unable to meet the wage bill. She further averred that her name was not among the staff that the respondent wanted to separate with and that her redundancy was therefore an afterthought done in bad faith. According to the appellant, when she acted as company secretary, the respondent did not make a decision to declare the position of Human Resources Manager redundant and that this was not reflected in the employer's minutes. The appellant contended that her dismissal was wrongful, unlawful and in breach of her contract as she was not offered an alternative job and was not given an opportunity to defend herself.

3.3 In the affidavit in support of complaint, the appellant averred that when she acted as company secretary, no decision was made to declare the position of Human Resource Manager redundant and she therefore, believed that her dismissal was made in bad faith. The appellant further averred that when the respondent declared

her office redundant, she was not offered any other work as permitted by her contract with the respondent. She stated that because she questioned why her supervisor was getting double housing allowance, she was discredited and accused of leaking information in the organisation. Soon thereafter, her position was declared redundant without prior notification and she believed that she was fired. The appellant accordingly averred that the respondent's action was wrongful, unlawful and unfair.

3.4 The respondent filed an Answer in which it stated that the appellant was lawfully declared redundant due to uncontrollable business operations and financial constraints which led to the Board of Directors deciding to downsize its work force. The respondent further stated that due notice of intention to declare some employees redundant was given to the Ministry of Labour and Social Security who acknowledged the respondent's intention to declare some employees redundant. The appellant was duly given notice of redundancy in writing with the requisite payment in lieu of notice.

3.5 The respondent stated that the appellant was duly paid her redundancy pay which she accepted and that there was no breach

of her contract of employment. It was further stated that all employees were amenable to have their contracts of employment terminated by way of redundancy and that she was not treated unfairly in any way.

3.6 The respondent's Chief Operations Officer swore an affidavit in support of the respondent's Answer. He averred that the decision to declare the appellant redundant was made by the Board of Directors of the respondent and that she was not privy to that decision which was made because of the uncontrollable business operations and financial constraints of the respondent and not out of bad faith. The Chief Operations Officer averred that the appellant's contract of employment was not breached in any way and that adequate reasons were given for terminating the appellant's employment by redundancy.

4.0 **Oral evidence deduced in the lower court**

4.1 The appellant gave evidence to the effect that she was employed as Human Resources Manager from 1st December, 2015 to 30th December, 2018, but her contract of employment was terminated on 1st November, 2016. She stated that she was declared

redundant inspite of the fact that part of her salary was funded by the project while the other part was from the business. She contended that she was declared redundant because her relationship with the chief financial officer and the chief operations officer was bad. She prayed that she be reinstated or that she be paid as if she had completed the contract.

4.2 In cross-examination, the appellant stated that because she was declared redundant, the respondent breached her contract and that the termination of her employment was unlawful.

4.3 The respondent's evidence was given by RW1 the Chief Financial Officer, who testified that the appellant's position was declared redundant because of cash flow constraints and the fact that donor funding had reduced. She further stated that the Board of Directors approved that the position of human resource manager be declared redundant and a letter seeking approval was submitted to the labour office, which did not object. RW1 stated that after the appellant was declared redundant, the respondent's human resource functions were outsourced to a consultancy firm and she maintained that the appellant's redundancy was not done in bad faith.

4.4 In cross-examination, RW1 stated that she was not aware that the appellant declared a dispute.

5.0 **Evaluation of the evidence and decision by the lower court**

5.1 On this evidence, the court held that-

5.2 There was nothing wrong with the manner in which the redundancy was communicated to the appellant and that all functions that she performed were outsourced because it was much cheaper than to employ. The court further found that the employer was not obliged to provide the appellant with another job after the position of human resource manager was scrapped and that there was no act of wrong doing or unfairness nor was there wrongful dismissal in the manner in which her employment was terminated. The court found that the redundancy was effected in accordance with the law and dismissed the appellant's claims for lack of merit.

6.0 **The Appeal**

6.1 The appellant, being aggrieved with this decision has come to this court, raising seven grounds of appeal couched as follows-

1. ***That the lower court misdirected itself in law and fact by ignoring the provisions of the contract between the appellant and the respondent which should have been adhered to before the respondent could declare the appellant redundant.***
2. ***The lower court misdirected itself in law and fact by ignoring the fact that the appellant was treated differently from all other employees who were to be declared redundant as her redundancy was kept a secret from her.***
3. ***The lower court misdirected itself in law and fact by ignoring all the evidence which the respondent gave, which indicated the probable reasons why she was declared redundant when she was the one who had been implementing the respondent's downsizing policy.***
4. ***The lower court misdirected itself in law and fact by not considering whether there was an abuse of the use of discretion by the office which decided to terminate the appellant's employment in light of the appellant's testimony against that office.***

5. ***The court misdirected itself in mixed law and fact by ignoring that the appellant in cross-examination showed the respondent contracts of employment signed by the human resource officer after she had her employment terminated and the fact that the signatories on the contracts were not for an outsourced office.***
6. ***The lower court misdirected itself in mixed law and fact by accepting the respondent's testimony that the office of human resource had been outsourced when that was not supported by the evidence.***
7. ***The lower court misdirected itself in mixed law and fact by not considering the fact that the appellant's right to the rules of natural justice had been violated.***

7.0 **The arguments advanced by the parties**

7.1 In arguing ground one, the appellant's position was that she was employed on a three-year contract from the 1st of December, 2015 to 30th December, 2018. The appellant submitted that clause 5.2. was to the effect that she could be required to meet other expectations in the ordinary course of doing her work which the respondent considered necessary or proper in the interest of the

company. She referred to clause 17.3 of the contract which provided that the contract would not be varied, deleted or cancelled unless reduced to writing and signed by or on behalf of both parties.

7.2 The appellant pointed out that the trial court should have satisfied itself that the contract between the parties was not breached and should have inquired whether the contract which was to end on 30th December, 2018 was still running. She further submitted that the respondent ought to have assigned her to perform other tasks other than the ones in the job description to avoid breaching the contract. She contended that the respondent did not invoke all the procedures set out in the manual and the disciplinary code of conduct and did not refer the matter to a tribunal to interpret the contract and prayed that ground one of the appeal succeeds.

7.3 In arguing ground two, the appellant submitted that her position was declared redundant secretly and that she was ambushed by the respondent. She argued that she was not prepared for her redundancy in accordance with Section 26B3 of the Employment Act and that she was discriminated against by the respondent. She prayed that ground two of the appeal succeeds.

7.4 On ground three, the appellant's arguments are that she laid a complaint against RW1 whom she found had been getting a double housing allowance and that as a result, the relationship between her and RW1 was so bad, that she had probable reason not to be objective in her evidence and that as such, RW1's evidence needed to be corroborated. The appellant stated that the court ignored the possible bias of RW1's testimony and did not look for corroborative evidence, which she submitted was a misdirection. The evidence of the Chief Operations Officer Mr Mate should have been corroborated because there was a risk that it would not be objective. No board resolution was exhibited to show that it was resolved to declare the position of human resource manager redundant.

7.5 The appellant further argued that no Board resolution was attached to show that the Board had resolved to declare the position of human resource manager redundant and that since she worked as company secretary on some occasions, she would have known if there was a board resolution to declare her redundant. She contended that the trial court did not take into account the fact that no evidence was produced by the respondent

to show that it had resolved to terminate the appellant's employment and declare the position of human resource manager redundant.

7.6 The appellant contended that the respondent did not cease to require the services of a human resources officer as the office continued to operate even after the appellant had been declared redundant. She argued that **Section 26B(2)** of the **Employment Act** obligates the respondent to discuss with the appellant before effecting a redundancy. She produced two contracts in favour of Jackson Mukupa and Bernard Mutale, which were executed by the human resource officer after she was allegedly declared redundant. She argued that this was proof that the human resource office was still functioning and that no evidence was tendered to the court to show that the human resource functions had been outsourced. She prayed that the appeal be allowed with costs.

7.7 At the hearing of the appeal, Mr Kachamba, on behalf of the appellant relied on the heads of argument that were filed into court.

7.8 The Learned counsel for the respondent, Mr Mumba sought leave to file the respondent's heads of argument out of time, which was duly granted. They were filed and he relied on them.

7.9 Responding to ground one, the respondent's counsel referred to Clause 18.1 of the Contract of Employment which provides that-

> ***"This contract shall be terminated by either the employer or the employee for any reason by giving one month's written notice or one month's salary in lieu of notice."***

7.10 The respondent contended that the appellant's employment was terminated by the giving of notice to declare her redundant and that she was then paid in lieu of notice. We were referred to the case of **Zambia Privatization Agency vs Matale**[1] where the Supreme Court held that-

> ***"The payment in lieu of notice was a proper and lawful way of terminating the respondent's employment on the basis that in the absence of express stipulation, every contract of employment is determinable by reasonable notice."***

7.11 It was submitted that the respondent gave reasons for its decision to terminate the appellant's contract of employment by way of redundancy as it was facing challenges such as uncontrollable business operations and had financial constraints, hence the decision to reduce its labour force.

We were further referred to the case of **Martin Lukwesa vs Afrox Zambia Limited[2],** where the Supreme Court held that-

> ***"In this case, the respondent chose to terminate the respondent's employment by way of redundancy in line with clause 31.1 of the handbook. He was paid his benefits pursuant to clause 31.3."***

7.12 In the Lukwesa case referred to above, the court found that there was no breach of the appellant's conditions of service as the respondent complied with the applicable conditions of service and gave the proper termination package by payment of the stipulated package under clause 31.3. The court went on to dismiss the appeal.

7.13 The respondent's counsel submitted that this matter is on all fours with the Martin Lukwesa case. Counsel outlined the appellant's separation package as-

1. Two months basic salary per each year of service completed pro rata;
2. One month's pay in lieu of notice;
3. Accrued leave days outstanding;
4. Repatriation allowance (if applicable);
5. Less statutory deductions (NAPSA, PAYE);
6. Less owings to the company (if any).

The respondent submitted that the appellant's contract of employment was terminated in accordance with the law and that as such, the learned trial Judge was on firm ground when he held that all relevant provisions in the contract of employment and the law were properly followed in effecting the appellant's redundancy.

7.14 It was further argued that the court below dealt with clause 5.2 of the contract of employment on pages J3 and J4 of the Judgment. It was contended that the learned Judge interpreted clause 5.2 to mean that the respondent had no obligation to provide alternative

employment in the event that the appellant's contract was terminated.

7.15 In responding to ground two, it was submitted that the court below addressed the manner in which the redundancy was communicated. Counsel submitted that **Clause 26B(2)** of the **Employment Act** only applies to oral contracts of employment.

7.16 Counsel then pointed out that the invocation of Section 26B of the Employment Act by the appellant in support of ground 2 of her appeal constituted a blatant misdirection as the section is not applicable to the appellant who was employed on a written contract. We were urged to dismiss the second ground of appeal for lack of merit.

7.17 Responding to ground three of the appeal, the respondent submitted that it had uncontrollable business operations and financial constraints which led the Board of Directors to downsize its workforce as a means of redressing the situation. It was contended that there was no other reason why the appellant was declared redundant and that the Board of Directors was not barred from declaring her position redundant. It was further

submitted that there was no need for corroboration in respect of the respondent's second witness because the circumstances and the evidence of the other witness was supporting evidence. We were urged to dismiss the third ground of appeal.

7.18 Responding to ground four, it was submitted that the learned trial Judge was on firm ground when he did not consider whether there was an abuse of the use of discretion by the respondent as this lacked merit. And it was reiterated that Section 26B of the Employment Act is inapplicable to this case.

7.19 Responding to ground five it was submitted that the respondent scrapped the position of human resource manager and that no one was employed to perform the function of the appellant's previous position. It was contended that the allegations by the appellant that the position of human resource manager was not declared redundant was unfounded as the respondent reduced its workforce for economic necessity. Counsel contended that the appellant failed to prove on a balance of probabilities that the position of human resource manager at the respondent was still operating as, it was outsourced. We were urged to dismiss ground six of the appeal for lack of merit.

7.20 Counsel further submitted that ground seven of the appeal had been abandoned as it was not argued in the heads of argument. We were urged to dismiss the appeal with costs to the respondent.

Mr Kachamba made viva voce submissions in reply to the respondent's heads of argument. He referred to clause 17.3 of the Contract of Employment which stated that-

> ***"No agreement varying, adding or deleting from or cancelling this contract shall be effective unless reduced to writing and signed by or on behalf of both parties."***

7.21 Counsel argued that the contract of employment should not have been arbitrarily terminated and that in so doing, the respondent breached the contract, thus making the appellant entitled to damages.

Regarding clause 5.2 which provided that-

> ***"....the employee will be required to meet other expectations in the ordinary course of doing his work which the employer's management consider***

necessary or proper in the interest of the organization,"

It was submitted that the respondent did not consider the possibility of giving another function to the appellant and that the lower court erred when it stated that the respondent was not obliged to consider the appellant for another job.

7.22 On ground two, Counsel submitted that the appellant was treated differently from the other employees as she was not given notice of redundancy. The rules of natural justice were not followed as no notice of redundancy was given to the appellant. Counsel contended that the appellant and the chief financial officer of the respondent were not on good terms because the appellant was the one who revealed that she was getting double housing allowance and that as such, her evidence needed to be corroborated.

7.23 Counsel argued that the grounds on which the appellant was declared redundant were wrong since her position continued to be in existence. The decision to declare the appellant redundant was not taken by the Board of Directors and was made by someone

who did not like the appellant. We were urged to allow the appeal for the afore stated reasons.

8.0 **Consideration of the appeal by this court**

8.1 We have examined the Judgment of the court below, the evidence which the two parties placed before the trial court and the arguments which were canvassed in this court on behalf of the parties.

8.2 The documentary evidence which was deployed before the court below shows that the appellant served under a written contract and written terms and conditions of employment. The appellant's contract of employment formed part of the record of proceedings in the court below.

8.2 We will deal with grounds one, two, three and four together as they are interrelated.

Clause 18 of the appellant's contract of employment provides for Termination of Employment. Clause 18.2 of the contract states that:

18.2 ***"Notwithstanding anything in this agreement, the employer will be entitled to terminate this contract***

without notice for any reason recognized by law as being sufficient for the summary termination of a contract of employment."

Further, Clause 18.3 states that:

18.3 ***"Nothing in this contract shall be construed as impairing the rights of the employer to terminate this contract in accordance with the general grounds of termination under the law."***

8.3 Having highlighted Clauses 18.2 and 18.3 above, it is clear that the employment contract did provide for termination of the contract without notice for any reason recognized by law for the summary termination of the contract of employment. It is further not in dispute that the appellant received a letter terminating her contract of employment on 1st November, 2016, on grounds that her position of human resource manager had been declared redundant, effective 30th November, 2016.

8.4 Prior to the receipt of this letter, the appellant, who was human resource manager wrote a letter to the Labour Commissioner at the Ministry of Labour and Social Security on 31st August, 2016,

informing the Labour Commissioner that the respondent intended to carry out a reduction of staff pursuant to **Section 26B** of the **Employment Act**[1] due to cash constraints. The Ministry of Labour then acknowledged the respondent's intention to declare some employees redundant and the exercise was duly implemented.

8.5 Having observed that the appellant's contract of employment provided for termination, which could even be effected by either party by giving one month's written notice or one month's salary in lieu of notice, we are of the view that the respondent was within its rights when it wrote the letter dated 1st November, 2016, informing the respondent that her contract of employment had been terminated by way of redundancy. We do not find any provisions of the employment contract that were not adhered to prior to declaring the appellant redundant.

8.6 We refer to **Section 26 B(3)** of the **Employment Act** which enacts as follows:

> ***"An employee whose contract of employment has been terminated by reason of redundancy shall-***

(a) Be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater; and

(b) Shall be paid the redundancy benefits no later than the last day of duty of the employee provided that where an employee is unable to pay the redundancy benefits on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy benefits are paid."

8.7 The evidence on record is that the appellant was duly paid her dues after the said redundancy. She however, contends that she was treated differently because her redundancy was kept a secret from her. There is incontrovertible evidence on record that the appellant was the one who conducted the redundancy exercise for the employees who the respondent declared redundant, starting with writing the letter to the Labour Commissioner on 31st August, 2016. She was therefore well aware of the exercise and that it was due to the respondent facing financial constraints.

8.8 In the case of **Chilanga Cement v Kasote Singogo**[3], the Supreme Court discussed and guided on the steps an employer is required to put in place in an effort to mitigate the impact of redundancy on an employee.

The Supreme Court stated that:

> 4. ***"Redundancies are planned activities. Being a planned activity, the employee needs to be prepared for the loss of her job; reasonable measures should be taken to include notices and consultations which are so vital to the planning process."***

8.9 From the analysis of the evidence given above and the fact that the appellant was in charge of implementing the redundancy of the employees, the appellant was well aware of the restructuring and redundancy process that the respondent was undertaking and that there was a possibility of redundancies throughout the organization.

8.10 We therefore do not agree with the assertion that the appellant was treated differently from other employees because she was in

a particularly privileged position of human resource manager and was well aware of the company's position and redundancy exercise. Being the implementer of the same, it is proper to conclude that her name could not have been included on the list of employees who were declared redundant.

The appellant, having been employed under a written contract of employment cannot invoke **Section 26B** of the **Employment Act**.

8.11 The appellant contended that the evidence of the respondent's witness, RW1 needed to be corroborated because, she had a bad relationship with the her since she was the one who revealed that the witness was getting double housing allowance. However, we do not find any merit in this assertion by the appellant because the downsizing and redundancy exercise commenced on August, 31, 2016.

The appellant further alleged that the respondent's Chief Operations Officer was also against her because she was accused of leaking information in the organization.

As was held by the Supreme Court in the case of **Masauso Zulu v Avondale Housing Project**[4],

"He who alleges must prove."

8.12 We are not convinced that the appellant proved that she was declared redundant in bad faith because of animosity between her and the Chief Operations Officer and Chief Financial Officer, respectively, as the redundancy exercise was on going. Having said that, we cannot fault the lower court for not considering whether there was an abuse of the use of discretion by the office which decided to terminate the appellant's employment. We do not find merit in grounds one, two, three and four of the appeal and they are dismissed.

8.13 On whether the position of human resource officer was still functioning after the appellant had been declared redundant and whether the human resource office's functions had been outsourced, we refer to page 117 of the record of appeal, particularly the evidence of RW1, who stated that after the appellant was declared redundant, the human resource function was outsourced to ORBS consultancy.

8.14 RW1 stated that the consultants were retained at K3,100.00 per statutory payments, payrolls run and tip off. In cross-examination

RW1 stated that the Board of Directors recommended that the human resource manager be declared redundant. She further stated that the appellant was one of the 18 employees who were up for being declared redundant.

8.15 We have perused the record from the court below and have not found any evidence that proves that the human resource function was performed by other people in the respondent after the appellant's employment was terminated. Further, the appellant did not prove that the human resource function was not outsourced, to rebut RW1's evidence. We find no merit in grounds five and six of the appeal and they are dismissed.

8.16 On whether the appellant's right to the rules of natural justice had been violated, we are of the view that the appellant was not charged with any offence and as such, there was no need to give her an opportunity to be heard. We are of the view that no rules of natural justice were breached in respect of the appellant. Ground seven of the appeal accordingly fails.

8.17 We are of the view that the respondent was under no obligation to offer the appellant another job after she was declared redundant.

9.0 **Conclusion**

9.1 All the seven grounds of appeal having been dismissed, the net result is that this appeal fails in its entirety and it is accordingly dismissed for lack of merit. We direct that each party bears its own costs.

C.K. MAKUNGU
COURT OF APPEAL JUDGE

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE