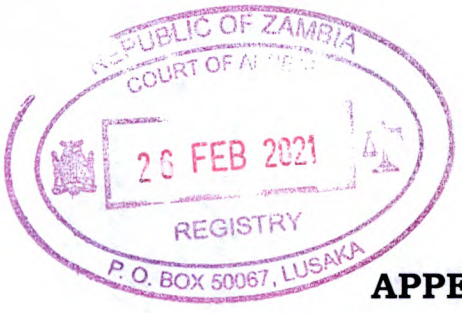
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 192/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

KENNEDY BORN KAUKA **APPELLANT**

AND

LUSAKA APEX MEDICAL UNIVERSITY LIMITED **RESPONDENT**

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**
On 16th and 26th February, 2021

For the appellant: *Ms. M. Kapapula of SLM Legal Practitioners*

For the respondent: *No appearance*

J U D G M E N T

MULONGOTI, *JA delivered the Judgment of the Court.*

cases referred to:

1. ***Redrilza Limited v* Abuid Nkazi and others *-SCZ Judgment No. 7 of 2011***
2. ***Zulu and another v Barclays (Zambia) Limited -SCZ Judgment No. 17 of 2003***

3. ***Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami-SCZ Appeal Number 28 of 2003***
4. ***Attorney General v John Tembo- SCZ Judgment No. 1 of 2012***
5. ***Contract Haulage v Mumbuwa Kamayoyo-SCZ Judgment No. 2 of 1982***
6. ***Agholor v Cheesebrough Ponds Zambia Limited (1976) ZR 1 HC***
7. ***Shilling Bob Zinka v Attorney General (1990-92) ZR 73 (SC)***
8. ***Richard Jackson Phiri v The Attorney General (1988-89) ZR 121 (SC)***
9. ***Zambia National Provident Fund v Chirwa (1986) ZR 70 (SC)***

Legislation and works referred to:

1. ***The Employment Act, Chapter 268 of the Laws of Zambia***
2. ***Winnie Sithole Mwenda and Chanda Chungu 'A Comprehensive Guide to Employment Law in Zambia, University of Zambia Press, 2021, page 170***
3. ***N. M Selwyn,* Selwyn's Law *of Employment', 14th edition, Oxford University Press***

1.0. Introduction

1.1. This is an appeal against the decision of Chisunka J, which dismissed the appellant's case for damages for wrongful and unfair dismissal.

1.2. The learned Judge found that the appellant was not dismissed but terminated in line with the common law principle that a master can terminate the employment contract at any time for any reason or no reason at all.

2.0. **Background**

2.1. The appellant, Kennedy Born Kauka instituted legal proceedings in the Industrial Relations Division against the respondent, the Lusaka Apex Medical University. The appellant alleged that the respondent dismissed him without charging him or affording him an opportunity to be heard. Therefore, his dismissal was wrongful and unfair as it was contrary **to section 26A of the Employment Act** and the rules of natural justice.

2.2. The appellant consequently claimed damages for unfair and wrongful dismissal and for mental emotional distress, anguish and anxiety.

2.3. The respondent denied the appellant's claims. In its Answer to the appellant's claims the respondent averred that the appellant was terminated for being absent from work for over four weeks.

3.0. **Evidence Adduced at Trial**

3.1. The appellant testified that he was initially employed by the respondent as a Coordinator and Lecturer in Physiotherapy on

19th February, 2013. In January, 2015 he was suspended and charged with two offences involving examination malpractices by asking for sexual favours in exchange for a supplementary examination and in lieu thereof a bribe of K2,000.00 cash, from a named female student.

3.2. He exculpated himself and appeared before a disciplinary tribunal which exonerated him on 15th July, 2015. He was informed that he was reinstated in his capacity as Coordinator but in Medical Education department. The letter of reinstatement also stated that his supervisor would be Professor Mudenda.

3.3. In August, 2015 the appellant was summarily dismissed for being absent for four weeks. The appellant denied being absent and testified that during the four week period, he met once with Professor Mudenda who gave instructions that he be given a job description and an office. However, this was never done despite him making numerous follow ups until he was terminated without being heard.

3.4. When cross-examined, he testified that he had no written proof to show that he was making follow ups because he did not

realise that it was important to do so. He had attempted to see Professor Mudenda about the job description but he was unavailable. And, that he did contact the chief administrator, verbally.

3.5. RW1, the respondent's legal advisor testified that after reinstatement, the appellant never reported for work for close to four weeks. This prompted the respondent to terminate his employment in line with common law as he was considered to have absconded and he never even bothered to accept reinstatement in writing. RW1 revealed that at the time the respondent did not have conditions of service in place. Hence, it's resorting to common law.

3.6. According to RW1, had the appellant reported, he would have been shown his office.

3.7. When cross-examined, RW1 testified that he was informed that the appellant did not report after reinstatement. And that, the appellant was not given an opportunity to exculpate himself because he had disappeared.

4.0. **Considerations and Decision of the Court Below**

4.1. The trial Judge noted the appellant's contention that the termination of his employment was contrary to the rules of natural justice and was in effect a dismissal. According to the learned Judge, this introduced a cause of action for wrongful termination which was not the case before him, as it is predicated on malafides on the part of an employer in invoking a termination clause. The respondent did not invoke any termination clause.

4.2. The trial Judge therefore, resorted to common law and found that a master can terminate a contract of employment at any time, even summarily for any reason as long as it is done within the confines of the contract.

4.3. Guided by the Supreme Court decision in the case of **Redrilza Limited v Abuid Nkazi and others**[1] that dismissal involves loss of employment arising from disciplinary action while termination does not, the Judge concluded that the appellant was terminated because no disciplinary action was invoked. Had he

been disciplined without being heard, the rules of natural justice would come into play.

4.4. Relying on the **Redrilza Limited v Abuid Nkazi and others**[1] case and **Zulu and another v Barclays (Zambia) Limited**[2], the Judge found that the respondent had an option to invoke disciplinary action or to terminate by notice. The respondent elected to invoke the inherent right of a party to terminate the contract and opted not to discipline the appellant. The learned Judge reasoned that this was within the ambit of the law. Accordingly all of the appellant's claims were dismissed.

5.0. **The Appeal**

5.1. Dissatisfied with the Judgment, the appellant appealed to this Court and raised two grounds of appeal as follows:

1. ***"The court below erred in law and in fact when it found that that the termination of the Complainant's contract within the ambit of the law without due regard to the provisions of section 26A of the employment Act Chapter 268 that proscribes the termination of an employment contract on grounds related to conduct or performance of an employee without affording the employee an opportunity to be heard on charges laid against him/her; and***
2. ***The court below erred in law and fact when it held that the respondent's action amounted to termination and not dismissal of the Complainant despite evidence of the***

termination letter being cited at pages 4 and 5 of the judgment, which confirmed that the termination was on grounds of intolerable misconduct."

6.0. **The Arguments**

6.1. In support of the appeal, the appellant filed heads of argument dated 28th October, 2019.

6.2. On ground one, the appellant argues that the learned Judge erred in law and fact when he held that his termination was within the ambit of the law as the finding was contrary to **section 26A of the Employment Act (now repealed)** which provided that:

"An employer shall not terminate the services of the employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."

6.3. That this provision is synonymous with the latin maxim ***"audi alteram partem"*** which entails affording a party the right to be heard before a determination is made in his matter. The appellant was accused of absconding from work and was dismissed without being heard, contrary to **section 26A**.

6.4. Reliance was placed on the Supreme Court decision in the case of **Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami**[3] which holds that:

> ***"The old fashioned language of master and servant is out of place in many of the employment situations. In many cases, the terms governing employment, indicate that there is a right to natural justice and a right not to be thrown out of work, except on some rational grounds; and some explicable basis which is reasonable in the circumstances."***

And in **Attorney General v John Tembo**[4] that:

> ***"There was maladministration as the respondent was neither charged, nor given an opportunity to exculpate himself over the allegations that he had absented himself from work without official leave for a continuous period of ten days or more. There was a blatant disregard of the respondent's conditions of service and the rules of natural justice. The respondent's dismissal from employment was thus wrongful."***

6.5. Additionally, that in **Contract Haulage v Mumbuwa Kamayoyo**[5] the Supreme Court illuminated that:

> ***"Where there is a Statute which specifically provides that an employee may only be dismissed if certain procedures are followed then an improper dismissal is null and void: and where there is some statutory authority for certain procedures relating to dismissal, a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in those circumstances is null and void".***

Learned counsel concluded that the appellant's dismissal was null and void as it contravened **section 26A**.

6.6. On ground two, the appellant argues that the Judge erred when he held that the appellant was terminated and not dismissed, yet the termination letter confirmed termination was on grounds of intolerable misconduct. This entails he was dismissed and not terminated. The case of **Agholor v Cheesebrough Ponds Zambia Limited**[6] was cited to support the argument that where a master *"dismisses"* a servant, he terminates the contract summarily without any notice on the grounds of misconduct, negligence or incompetence. Since the appellant was dismissed, he should have been afforded an opportunity to exculpate and defend himself of the allegations of abscondment.

6.7. The respondent filed a notice of non-attendance and submitted that it would rely on the Judgment of the lower court on appeal.

6.8. At the hearing of the appeal the appellant's counsel placed reliance on the appellant's heads of argument. In augmenting she submitted that the appellant was serving under an oral

contract as the respondent's had not put conditions of service in place. As such **section 26A** comes into play.

7.0. Considerations and Decision on appeal

7.1. We shall deal with the two grounds of appeal simultaneously as they are interlinked. The cardinal issue the appeal raises is whether the appellant was dismissed contrary to the rules of natural justice.

7.2. The Supreme Court in **Redrilza Limited v Abuid Nkazi and others**[1] observed that a dismissal is usually preceded by disciplinary action unlike a termination. We note in *casu*, that the respondent stated in the letter that the appellant was being terminated for not reporting for duty. It is clear that the reason was not substantiated as no disciplinary proceedings were instituted. The appellant was terminated summarily. The trial Judge found that this was lawful under common law and was in line with the Supreme Court decision in **Redrilza Limited v Abuid Nkazi and others**[1] and **Zulu and another v Barclays (Zambia) Limited**[2].

7.3. In **Zulu and another v Barclays (Zambia) Limited**[2] case, the Supreme Court held that the employer had three options to discipline the employees; through its internal procedures, report them to the police and or terminate by notice as it did. The termination by notice was invoked after the disciplinary charges and suspension were lifted. The employees felt aggrieved and sued the bank contending that they were unfairly terminated as no reasons were given for their termination and that they were not afforded an opportunity to be heard. Commenting on **section 26A** which was akin to **Article 7 of International Labour Organization Convention 158** the Supreme Court observed thus:

> ***"The gist of these two provisions is that the conduct or performance of the employee which is questioned must arise or relate to his work and he must be given an opportunity to be heard and this has nothing to do with the notice clause that may be in the contract. Neither do these provisions call for reasons for terminating employment. In other words, the employee is notified of his questionable conduct related to his work and is given an opportunity to explain and it is then up to the employer to decide. The provisions do not set any standard or proof, they merely emphasize on the employee being given an opportunity to defend himself...The lower court's findings were further strengthened on its misdirection that the above provisions require reasons for terminating of employment to be given. That is the law."***

Thus, the Supreme Court held that termination by notice without reason was proper even after initially charging and suspending the employees. We must hasten to state that the decision was handed down in 2003 when the law allowed termination by notice without advancing any reasons. In 2015 the law was amended to make it mandatory for employers to terminate by notice with valid reasons. (The requirement to advance reasons was maintained in the **2019 Employment Code Act**)

7.4. The case in *casu* arose before the amendments which are therefore inapplicable as the law does not operate in retrospect. The appellant was terminated for not reporting for work or for abscondment, which speaks to misconduct on his part but the appellant did not invoke disciplinary charges, which was wrong. We agree with Ms. Kapapula that the appellant was therefore dismissed and not terminated.

7.5. We note the appellant's submissions on ***"audi alteram partem rule"*** that each side be heard and no man be condemned unheard. This is what the concept of natural justice is all about.

Audi Alteram Partem rule is closely connected with the latin maxim *"nemo judex in causa sua"* –that no man be Judge in his own cause.

7.6. At common law as observed by the trial Judge, a master is not bound to observe the rules of natural justice before dismissing a servant. We opine that in *casu*, the appellant cannot be said to be a servant. As observed by the Supreme Court in **Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami**[3] the language of master and servant is archaic and not commonly used in modern times. Furthermore, the respondent having charged the appellant and afforded him the right to be heard when he was charged in 2015, cannot now turn to common law. It was absurd for the respondent to act as it did. We note that the facts revealed that the appellant had a written contract as evidenced by his letter of appointment. The evidence also revealed that the conditions of service were being developed. Therefore, **section 26A** is not applicable as it related to oral contracts.

7.7. Be that as it may, notwithstanding that **section 26A** applied to oral contracts in **Shilling Bob Zinka v Attorney General**[7] the Supreme Court elucidated thus:

> **"Principles of natural justice on English law-legally are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be judge in his own cause, that is an adjudicator shall be disinterested and unbiased *(nemo judex in causa sua)*; and that no man shall be condemned unheard, that is parties shall be given adequate notice and opportunity to be heard *(audi alteram partem)*."**

7.8. We opine that it was encumbered upon the respondent to hear the appellant before penalizing him. The learned authors of *'A Comprehensive Guide to Employment Law in Zambia'* conclude that the **Shilling Bob Zinka v Attorney General**[7] case, laid down the general rule that nobody should be condemned without being afforded an opportunity to be heard.

7.9. Therefore, having afforded the appellant the opportunity to be heard when he was charged on 2015, the respondent was reasonably expected to act likewise in future. It is only natural and fair that an erring employee is charged in writing and given an opportunity to exculpate himself. According to the learned author **Selwyn's Employment Law**, once the charges are reduced in writing, the employee has time to prepare his case and to even consult or seek legal advice. Thus, had the appellant been charged and appeared before the disciplinary tribunal like was

the case in 2015, he would have prepared his case and his witnesses to whom he purportedly reported and was told that there was no job description and office for him.

Similarly, the respondent would have countered that by calling witnesses perhaps Professor Mudenda to confirm if indeed the job description and office were prepared for the appellant and he opted to abscond. Regrettably, the respondent dismissed him summarily, instantly and relied on hearsay evidence of its legal advisor that he was told that the appellant had absconded from work.

7.10. It is settled law that it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the Court is to examine if there is necessary disciplinary power and if it was properly exercised. This was the *ratio decidendi* in **Richard Jackson Phiri v The Attorney General[8]**. We are of the considered view that the respondent's actions were contrary to this well established principle and that the disciplinary power was not properly exercised.

7.11. We are alive that the Supreme Court has held in a plethora of cases like **Zambia National Provident Fund v Chirwa**[9] that where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is subsequently dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity.

7.12. On the facts of this case, it is clear that there was a dispute as to whether the appellant absconded or not. He contends that he was not given an office and a job description for his new role as Coordinator for Education. Additionally, that he was reporting and made follow ups all to no avail. He mentioned that he met Professor Mudenda once and also the chief administrator. RW1, on the other hand testified that, the appellant only reported once and then absconded for more than four weeks and he never accepted his new role as he never responded to the letter of reinstatement. And that, the respondent opted to summarily terminate the appellant because they could not find him.

7.13. As aforestated it is in dispute whether the appellant absconded. The issue of him not responding to the letter of reinstatement is immaterial as the said letter did not state that he should accept his new role in writing. No evidence was adduced that he could not be found other than RW1's word in court. It is also mind boggling that the respondent managed to deliver the letter of termination but claims that it could not charge him because he could not be found.

7.14. In light of the foregoing we find merit in the two grounds of appeal. We find that the dismissal was wrongful as the appellant was not given an opportunity to be heard, contrary to the rules of natural justice. The trial Judge's finding that the appellant was lawfully terminated under common law was not supported by the evidence, as the respondent, even though it was still developing its conditions of service had acted in line with the rules of natural justice by charging and instituting disciplinary proceedings against the appellant in 2015. It was therefore, expected of the respondent to do the same in future for all employees for that matter.

7.15. We find that the appellant's dismissal was both wrongful and unfair. We award three (3) months salaries as damages with interest at short term deposit rate from the date of Complaint to date of Judgment and thereafter at Bank of Zambia current lending rate till payment in full. The other claims were not substantiated and were properly dismissed by the trial Judge. The appeal is therefore allowed. Each party to bear own costs.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE