

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2022/HP/0403

BETWEEN:

KABWE MKANDAWIRE

AND

ZAMBIA RAILWAYS (2014) LIMITED



PLAINTIFF

DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THE 11th DAY OF
DECEMBER, 2023

For the Plaintiff : Mr W. Siyumbano, Messrs Mutemwa Chambers

For the Defendant : Mr C. Nkumbwa, Messrs Dzekedzeke and Company

J U D G M E N T

CASES REFERRED TO:

1. *Swarp Spinning Mills Plc v Sebastian Chileshe and others* 2002 ZR 23
2. *Jonathan Musialela Ng'uleka v Furniture Holding Limited* 2008 ZR 19
3. *Kabawe Kisembo v Georgina Kisembo* SCZ/8/49/2010 Appeal No 23/2010
4. *Attorney General v Chibaya and Four others* Appeal No 70/2011
5. *Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited* SCZ Appeal No 117/2013
6. *Phillip Mutantika and another v Kenneth Chipungu* SCZ No 13 of 2014
7. *Care International Zambia Limited v Misheck Tembo* Appeal No 57/2016
8. *Sarah Aliza Vehnik v Casa Dei Bambini Montessori Zambia Limited* CAZ/Appeal No 129/2017
9. *MP Infrastructure Zambia Limited v Matt Smith and another* Appeal No 102/2020
10. *Habuce Farms Limited v Tabishbai Galum Isap Hola and another* Appeal No 218 of 2020
11. *David Banda v the Attorney General* Appeal No 233/2020

LEGISLATION REFERRED TO:

1. The Employment Code Act No 3 of 2019

OTHER WORKS REFERRED TO:

1. A Comprehensive Guide to Employment Law in Zambia, by Winnie Sithole Mwenda and Chanda Chungu University of Zambia Press, 2021

1. INTRODUCTION

1.1 The controversy in this matter centres on the right to security of employment for an employee who is on probation. Thus, Kabwe Mkandawire, suing Zambia Railways (2014) Limited, a company that is incorporated in Zambia, by Writ of Summons which is accompanied by a statement of claim and the other requisite documents claims:

- i. *An Order that Zambia Railways (2014) Limited's termination of his employment amounts to unfair termination.*
- ii. *An Order that Kabwe Mkandawire's employment was wrongfully terminated.*
- iii. *An Order that Kabwe Mkandawire be deemed to have successfully completed the probationary period and accordingly be confirmed.*
- iv. *Damages for unfair and wrongful termination of fixed-term contract of employment as follows:*
 - (i) *Salary amounting to ZMW840, 693.00;*
 - (ii) *Leave days amounting to ZMW44, 912.77;*
 - (iii) *Airtime allowance amounting to ZMW16, 625.00;*

(iv) Housing allowance amounting to ZMW145, 967.50;

(v) Transport allowance amounting to ZMW87, 580.50;

(vi) Meal allowance amounting to ZMW23, 275.00;
and

(vii) Gratuity amounting to ZMW145, 967.50.

v. Damages for shock and mental suffering.

vi. Interest.

vii. Costs.

viii. Further or other relief.

2. STATEMENT OF CLAIM

2.1 In setting out the basis for his claims, Kabwe Mkandawire states that he is a Zambian citizen and a Human Resources Practitioner. He avers that Zambia Railways (2014) Limited employed him on 19th July, 2021, as a Supervisor Human Resources and General Services, on a Three (3) year fixed-term contract, with a probationary period of Three (3) months.

2.2 He goes on to state, that he discharged his duties professionally and honourably, and he also ensured strict adherence to the Zambia Railways (2014) Limited's rules and regulations, as well as the applicable statutory law at all times. However, prior to the end of his probationary period, Kabwe Mkandawire was served a letter by Zambia Railways (2014) Limited, terminating his employment.

- 2.3 He alleges that this was done in contumelious disregard of the letter and spirit of the ***Employment Code Act, No 3 of 2019***, as no reasons were advanced for the termination of his employment. It is also his averment, that efforts that were made by him to resolve the termination of his employment, proved futile, as his letters went un-responded to.
- 2.4 Kabwe Mkandawire also contends that Zambia Railways (2014) Limited did not take the mandatory assessment of himself, as an employee who was on probation, whose results should have been communicated to him before the end of the probationary period. It is further his averment that he had a legitimate expectation that his employment would run its' course, and that Zambia Railways (2014) Limited would observe the provisions of the law when terminating his contract of employment.
- 2.5 He states that this was also in view of the fact that he quit his previous job, in Order to take up the employment with Zambia Railways (2014) Limited. Kabwe Mkandawire also contends that Zambia Railways (2014) Limited did not respond to his letter of demand on his employment being terminated. He alleges that he suffered shock and mental torture as a result of the termination of his employment.

3. DEFENCE

- 3.1 Zambia Railways (2014) Limited in defence, denies that Kabwe Mkandawire discharged his duties professionally and honourably as alleged. It states that his performance was

unsatisfactory. It is admitted that Kabwe Mkandawire was served a letter terminating his employment before the end of his probation, the contention being that this was done in line with the provisions of the ***Employment Code Act No 3 of 2019***.

- 3.2 The defence is further that contrary to the assertions made by Kabwe Mkandawire, he was in fact given reasons for the termination of his employment. No comment is made to the assertion that efforts by Kabwe Mkandawire to engage Zambia Railways (2014) Limited on the reasons why his contract of employment was terminated proved futile, as that is within his peculiar knowledge.
- 3.3 It is also Zambia Railways (2014) Limited's defence that contrary to Kabwe Mkandawire's assertion, he was assessed for suitability for the job. In that regard, it is stated that the Chief Executive Officer of Zambia Railways (2014) Limited held a meeting with Kabwe Mkandawire, where the results of his performance were reviewed, and the reasons for the termination of his employment were communicated to him.
- 3.4 The defence also alleges that the ***Employment Code Act No 3 of 2019*** does not prescribe the manner and form of assessment, and the attendant communication of the same. The averments relating to legitimate expectation that the employment contract would run its' course are said to be within Kabwe Mkandawire's peculiar knowledge. Zambia Railways (2014) Limited admits that it was served a letter of

demand by Kabwe Mkandawire, and states that it responded to the same by way of letter dated 20th January, 2022.

- 3.5 No comment is made to the assertion that Kabwe Mkandawire suffered shock and mental torture as a result of the termination of his employment.

4. EVIDENCE LED AT TRIAL

- 4.1 At trial, only Kabwe Mkandawire testified as the only witness for his case. Zambia Railways (2014) Limited did not call any witnesses.

PW1-KABWE MKANDAWIRE

- 4.2 Kabwe Mkandawire produced his witness statement as his testimony before the Court. The evidence contained in that witness statement, is that he was employed by Zambia Railways (2014) Limited on 19th July, 2021 as Supervisor Human Resource and General Services on a Three (3) year fixed-term contract. He added that the contract provided that he was to serve a period of Three (3) months as probation.
- 4.3 Pages 1-6 of Kabwe Mkandawire's bundle of documents was identified as the said contract of employment. As pleaded in the statement of claim, the evidence that was given, was that Kabwe Mkandawire discharged his duties professionally and honourably, and he ensured the adherence to the rules and regulations for Zambia Railways (2014) Limited, as well as the applicable statutory laws.
- 4.4 However, shortly before the probation period came to an end, Kabwe Mkandawire was served a letter terminating his

employment in contumelious disregard of the letter and spirit of the **Employment Code Act No 3 of 2019**. He identified pages 7-8 of his bundle of documents, as the letter that terminated his employment. Kabwe Mkandawire alleged that no reasons for the termination of his employment were given, and efforts that he made to obtain the reasons for the termination of his employment from Zambia Railways (2014) Limited, proved futile, as the letter that he wrote, which is at page 9 of his bundle of documents, and the appeal which is at page 10 of the said bundle of documents went unresponded to.

4.5 The assertion was also that Kabwe Mkandawire was not assessed in his performance, as per the mandatory requirement, whose results should have been communicated to him before the expiration of the probation period. Kabwe Mkandawire's testimony was also that he had a legitimate expectation that his contract of employment would run the full course, and that at the very least, Zambia Railways (2014) Limited would observe the provisions of the law when terminating his contract of employment.

4.6 He alleged that as result of the termination of his employment, he suffered shock and mental torture.

CROSS EXAMINATION OF KABWE MKANDAWIRE

4.7 In cross examination, Kabwe Mkandawire testified that he was currently unemployed. He agreed that when Zambia Railways (2014) Limited terminated his contract of employment, he was on probation. He also testified that

under the ***Employment Code Act No 3 of 2019***, probation cannot exceed Three (3) months. It was further his evidence in cross examination, that at the end of the probation period, an employer could either confirm an employee or terminate their employment.

- 4.8 Kabwe Mkandawire still in cross examination, agreed that during probation, One (1) days' notice to terminate a contract of employment suffices. He also agreed that there was such notice in his bundle of documents. Kabwe Mkandawire was however not certain whether under the ***Employment Code Act No 3 of 2019***, the manner of communicating the termination of employment of an employee who is on probation is provided.
- 4.9 He could not answer whether a person who is on probation can claim on a contract of Three (3) years, prior to being confirmed. It was Kabwe Mkandawire's testimony that the probation period of Three (3) months could be extended for another Three (3) months. He agreed that an employer who was dissatisfied with the performance of an employee who was on probation, could terminate the contract of employment.
- 4.10 Kabwe Mkandawire concluded the cross examination by stating that when one completed a period of probation, they expected to be confirmed, and that he had agreed to Clause 14 of the contract of employment that provided for probation.

RE-EXAMINATION

4.11 The clarification that Kabwe Mkandawire gave, was that according to the ***Employment Code Act No 3 of 2019***, assessment had to be done before termination of a contract of employment, which had to be communicated to the employee.

4.12 That marked the close of Kabwe Mkandawire's case.

5. DECISION OF THIS COURT

5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

5.2 It is not in contention, that Zambia Railways (2014) Limited employed Kabwe Mkandawire as Supervisor Human Resource and General Services on 19th July, 2021, on a fixed term contract for a period of Three (3) years. It is further not in contention that Kabwe Mkandawire was to serve Three (3) months' probation on that contract of employment.

5.3 The facts that are further not in dispute, are that on 8th October, 2021, Kabwe Mkandawire's contract of employment was terminated, which was during the period of his probation.

FACTS IN DISPUTE

5.4 It is in dispute whether Kabwe Mkandawire's contract of employment was unfairly and wrongfully terminated, and as such he is entitled to be deemed to have successfully completed his probation, and he is entitled to be paid damages for unfair and wrongful termination of his contract of employment, and damages for shock and mental suffering.

ANALYSIS

- 5.5 In his testimony, Kabwe Mkandawire told the Court that on being employed, he discharged his duties professionally and honourably, and he ensured the strict adherence to the Rules and regulations at Zambia Railways (2014) Limited and the applicable statutory laws. However, he was served a letter terminating his employment, which was in contemptuous disregard of the letter and spirit of the ***Employment Code Act No 3 of 2019***.
- 5.6 It was also Kabwe Mkandawire's testimony, that no reasons for the termination of his employment were given, and that no assessment to determine the suitability of his employment was done, which was communicated to him before the end of the probation period.
- 5.7 In his submissions, Kabwe Mkandawire refers to ***Sections 27 (2) and (3) of the Employment Code Act No 3 of 2019*** as making mandatory provision, that an employee who is on probation must be assessed and the results of such assessment communicated to such employee before the end of the probation period. He states, relying on the case of ***Phillip Mutantika and another v Kenneth Chipungu*** ⁽⁶⁾ that where a provision is couched in mandatory terms, it is obligatory.
- 5.8 He also relies on the case of ***MP Infrastructure Zambia Limited v Matt Smith and another*** ⁽⁹⁾ stating that the Court of Appeal in that matter, dismissed the assertion that the 2nd Respondent's work performance was reviewed, when the Appellant had not produced the work appraisals in evidence.

- 5.9 Thus, in this matter, paragraphs 8 and 9 of the defence which alleged that the Chief Executive Officer of Zambia Railways (2014) Limited met with Kabwe Mkandawire where the results of the performance appraisal, and the reasons for the termination of his employment were communicated to him, and that the ***Employment Code Act No 3 of 2019*** does not prescribe the manner and form of assessment, as well as the attendant communication of the same, lacks merit.
- 5.10 On that basis, it is contended that Kabwe Mkandawire's termination of employment was unfair, as the contract of employment at page 4 of Zambia Railways (2014) Limited's bundle of documents provided that it could only terminate his contract of employment in a lawful manner. Further at page 5 of the said bundle of documents, under "Governing Law", it provided that the contract of employment was governed by the laws of Zambia, which included the ***Employment Code Act No 3 of 2019***.
- 5.11 Kabwe Mkandawire contends that Zambia Railways (2014) Limited understood that it had to abide by the ***Employment Code Act No 3 of 2019***, as in the letter terminating his employment, which is at page 7 of his bundle of documents, it gave him Twenty-Four (24) hours' notice to terminate his employment. However, Zambia Railways (2014) Limited failed to adhere to the provisions of ***Section 27 (2) of the said Act***, which was fatal.
- 5.12 Reference is made to ***Sections 52 (1) and (2) of the Employment Code Act*** as providing for the manner in which

a contract of employment terminates. The case of ***Sarah Aliza Vehník v Casa Dei Bambini Montessori Zambia Limited*** ⁽⁸⁾ is relied on, as having held that under ***Section 36 of the Employment Act Chapter 268 of the Laws of Zambia***, which was in force then, an employer was required to give reasons for terminating an employee's employment, unlike before.

5.13 The submission is that ***Section 36 of the Employment Act*** was very similar in provision to ***Section 52 of the Employment Code Act No 3 of 2019***.

5.14 On the damages that Kabwe Mkandawire claims, the submission is that these are enhanced damages at Thirty-Six (36) months salaries for the wrongful and unfair termination of his employment. Relied on as authority to support the same, is the case of ***Attorney General v Chibaya and Four others*** ⁽⁴⁾, stating that the Court in that matter held that:

“If a fixed term contract is wrongfully terminated before it ends by effluxion of time, all the employee may be entitled to is damages for breach of contract.”

5.15 The contention is that going by the above, Kabwe Mkandawire is entitled to enhanced damages, as not only was the termination of his employment done with undue distress or mental suffering, but no reason was advanced for the said termination. He alleges that the termination was done at the whims and caprices of management at Zambia

Railways (2014) Limited, as all efforts to get the said management to furnish him with the reasons for the termination of his employment through letters were not responded to.

5.16 Reliance is placed on the case of ***Swarp Spinning Mills Plc v Sebastian Chileshe and others*** ⁽¹⁾, which case held that:

“(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.”

5.17 Further reliance in that regard, is placed on the case of ***David Banda v the Attorney General*** ⁽¹¹⁾ in which an award of Thirty-Six (36) months salaries was enhanced to Forty-Two (42) months, as damages for wrongful dismissal, in view of the oppressive treatment that the Appellant was subjected to, as well as the harsh socio-economic situation in the country, and the high rate of unemployment.

5.18 The submission is also that Kabwe Mkandawire is entitled to the payment of allowances that he used to receive at the time his employment was terminated. The case of ***Jonathan Musialela Ng’uleka v Furniture Holding Limited*** ⁽²⁾ is called to aid as authority, having held that:

“Awards for compensation or damages should include allowances and any other perks that the aggrieved party was entitled to at the time of termination.”

5.19 It is also submitted that in the case of ***Care International Zambia Limited v Misheck Tembo*** ⁽⁷⁾, the Supreme Court stated that:

“Unfair dismissal is a creature of statute. Unfair dismissal is therefore a much more substantial right for the employee and the consequences for an employer of dismissing unfairly are usually more serious than those which attend to wrongful dismissal.”

5.20 Zambia Railways (2014) Limited on the other hand, submits that Kabwe Mkandawire in his testimony told the Court that his contract of employment was terminated whilst he was still serving on probation. Cognisance is taken of the provisions of ***Section 27 (2) of the Employment Code Act No 3 of 2019*** on the requirement that an assessment of an employee who is on probation has to be done, and the results thereof communicated to such an employee, before the end of the probationary period.

5.21 However, Zambia Railways (2014) Limited contends that the said provision does not mandate an employer to communicate the results of the probation in writing, as it is open ended. Therefore, by implication of the law, an employer is at liberty to choose the method of communicating the results of such assessment, as the employer-employee relationship is regulated by the sanctity of contract.

- 5.22 The case of ***Habuce Farms Limited v Tabisbhai Galum Isap Hola and another*** ⁽¹⁰⁾ is relied on authority in that regard. Further reliance is placed on the contract that governed the employment relationship between the parties, and the submission is that in line with that contract, the contract of employment could be terminated in any manner in which an employment contract can lawfully be terminated.
- 5.23 Consequently, the submission is that, communication of the assessment that was done on Kabwe Mkandawire, who was on probation, could have been done orally, in writing or by other conduct.
- 5.24 On the claim that Kabwe Mkandawire should be deemed to have successfully completed the probation, and be accordingly confirmed, it is repeated that Kabwe Mkandawire by his own testimony, stated that his contract of employment was terminated whilst he was on probation. Reliance is placed on ***Section 27 (3) of the Employment Code Act***, as providing that during the period of probation, if an employer assesses that an employee is not suitable for the job, the employer shall terminate the contract of employment by giving the employee Twenty-Four (24) hours' notice.
- 5.25 It is submitted that the spirit of a probationary period, is to determine the suitability of an employee for the job. Thus, it is not automatic that an employee who is serving on probation should be confirmed at the end of the probationary

period. The submission is further that the law gives an employer Two (2) options at the end of the probationary period, that is to confirm or to terminate an employee's contract of employment.

5.26 That in this case, Kabwe Mkandawire's contract was terminated by giving Twenty-Four (24) hours' notice, as required by the law. It is therefore Zambia Railways (2014) Limited's submission, that as it complied with the law in terminating Kabwe Mkandawire's contract of employment, there was no unfair and wrongful termination.

5.27 The provisions of **Section 27 (1) of the Employment Code Act No 3 of 2019** are cited, with the submission being that it provides that an employee may not be employed on probation for a period exceeding Three (3) months.

5.28 Therefore, the probation period is limited to Three (3) months, and it is not tied to the entire period of the contract of employment, until an employee is confirmed in that position. Thus, any breach of contract during the period of probation is limited to damages for the Three (3) months period.

5.29 The submission is also that gratuity is not payable to an employee who is on probation, as during that period, an employee's suitability for the job is being assessed. It is further submitted that paying gratuity to an employee who was on probation amounts to unjust enrichment.

5.30 As for the claim for damages for shock and mental suffering, Zambia Railways (2014) Limited submits that Kabwe

Mkandawire did not adduce any evidence to support that claim. It stresses the position of the law that at the end of a probationary period, an employee may either be confirmed or terminated, and awarding damages would open the flood gates for litigation in employment law, which would defeat the spirit of the law regarding probation.

- 5.31 The case of ***Kabwe Kisembo v Georgina Kisembo*** ⁽³⁾ is stated as having held that arguments and submissions at the bar, spirited as they might be, cannot be a substitute for sworn evidence. As such, Kabwe Mkandawire not having provided any evidence of shock and mental suffering, that claim should fail.

DECISION

- 5.32 It is trite that a contract of employment like any other contract, is governed by its' terms and conditions. It can be written or oral, and the principle of freedom to contract applies to employment contracts. However, for employment contracts, it is noteworthy that they are also subject to employment law.
- 5.33 The learned authors, ***Winnie Sithole Mwenda and Chanda Chungu*** in the book, ***A Comprehensive Guide to Employment Law in Zambia, University of Zambia Press, 2021*** at page 26 state that:

“Terms imposed by statute can be referred to as default rules that apply to all applicable contracts of employment, unless otherwise agreed. The terms provided by the relevant legislation are

regarded as setting out the basic minimum or floor of conditions of employment for protected employees. Employers are permitted, if not encouraged to provide better conditions than those set out in the statutes.”

5.34 Accordingly, **Section 127 of the Employment Code Act No 3 of 2019** is as follows in provision:

“127. Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.”

5.35 That said, the contract of employment that Kabwe Mkandawire signed with Zambia Railways (2014) Limited on 15th July, 2021, which was effective 19th July, 2021, and which is at pages 1-6 of Kabwe Mkandawire’s bundle of documents, shows that it contained the terms and conditions of his employment. Clause 1 of that contract, provided that he would serve on probation for a period of Three (3) months from the date of engagement.

5.36 The contract of employment is silent on appraisal or assessment of Kabwe Mkandawire during the period of his probation.

5.37 **Section 27 of the Employment Code Act No 3 of 2019** states that:

“27. (1) An employee may be employed for a probationary period, not exceeding three months,

for the purpose of determining that employee's suitability for appointment.

(2) An assessment of an employee shall be taken by the employer during the probationary period and the result of the assessment shall be communicated to the employee before the end of the probationary period.

(3) Where, during the probation period, an employer determines after an assessment that an employee is not suitable for the job, the employer shall terminate the contract of employment by giving the employee at least twenty-four hours' notice of the termination.

(4) An employer who is satisfied with the performance of an employee after a probation period shall notify the employee, in writing, of the confirmation of employment, except that where the employer does not notify the employee, in writing, of the confirmation, the employee shall be confirmed in the position from the date of the expiry of the probation period.

(5) A probationary period under subsection (1) may be extended for a further period not exceeding three months.

(6) An employee shall, unless the contract of employment or collective agreement provides otherwise, have the same rights and obligations

during the probation period as an employee who has successfully completed the probation period.

(7) An employee on probation may terminate the contract of employment by giving the employer at least twenty-four hours' notice of the termination.

(8) An employee who is re-employed by the same employer for the same job within a period of two years from the date of termination of the contract of employment with that employer shall not be subject to probation, where the termination was not performance related."

5.38 A careful reading of the above Section, reveals that it provides among others, that an employee may be employed on probation, which probation shall not exceed a period of Three (3) months. However, that period may be extended by the employer, for a further period of Three (3) months. The Section also provides that an employer must conduct an assessment to determine an employee's suitability for the job during the probationary period, and inform the employee of the results of such assessment before the expiration of the probation.

5.39 The law in that Section, is also that if an employer's assessment, is that the employee is not suitable for the job, they shall terminate the employment of such employee by giving Twenty-Four (24) hours' notice. Where however, an employer determines that the employee is suitable for

employment, they must notify such an employee in writing, confirming the employment.

- 5.40 If they do not do so, after the expiration of the probation period, the employee will be deemed to have been confirmed.
- 5.41 In this matter, Kabwe Mkandawire was written the letter which is at page 7 of his bundle of documents on 8th October, 2021, terminating his contract of employment. That letter was written during the period of his probation, and it gave him Twenty-Four (24) hours' notice to terminate his employment. The letter does not refer to any assessment of Kabwe Mkandawire's suitability for the job or the reasons why his contract of employment was terminated.
- 5.42 The contention by Zambia Railways (2014) Limited is that its' Chief Executive Officer, met with Kabwe Mkandawire at which meeting, Kabwe Mkandawire was informed of the assessment, and the reasons for the termination of his employment.
- 5.43 It is noteworthy that **Section 27 (2) of the Employment Code Act No 3 of 2019** does not specify the manner of assessment of an employee who is on probation or how the communication of the outcome of the assessment should be made to an employee.
- 5.44 However, the object of probation of an employee was confirmed in the case of **Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited** ⁽⁵⁾, as being as a test period to assess whether an employee is fit for the job. This has been incorporated in **Section 27 (2) of the Employment**

Code Act No 3 of 2019. It is only where an employer decides to confirm an employee, that under **Section 27 (4) of the Act**, they are required to give notice of such confirmation in writing.

5.45 Zambia Railways (2014) Limited in its' defence stated that its' Chief Executive Officer informed Kabwe Mkandawire on the outcome of the assessment, and the reasons for the termination.

5.46 Under **Division 7.2 of the Employment Code Act No 3 of 2019 in Section 95** it provides that:

“95. (1) An employer shall ensure that there exists in the undertaking an employment policy, procedure and code, including an HIV and AIDS policy, a health and wellness policy, harassment policy, performance management policy, grievance procedure and code of conduct.

(2) An employer shall not, in any employment policy, produce or practice discrimination directly or indirectly against an employee or prospective employee.

(3) An employer shall bring to the attention of each employee under the employer's direction, the policy, procedure and code under subsection (1).”

5.47 Pursuant to the above, it was incumbent for Zambia Railways (2014) Limited to bring to Kabwe Mkandawire's attention, the requirements that he needed to satisfy for purposes of the assessment, that it was required to conduct

on his suitability for the job. That would have ensured a reasonable and objective assessment.

5.48 It is however noteworthy that the above provision does not make particular reference to bringing to the attention of such the performance management policy to an employee, who is on probation. The provision also does not refer to performance standards that an employee is required to meet.

5.49 **Section 27 (6) of the Employment Code Act No 3 of 2019** provides that an employee who is on probation, unless the contract of employment or the collective agreement provides otherwise, is entitled to the same rights and obligations during probation, as an employee who has successfully completed the probation period.

5.50 Therefore, the provisions on termination of a contract of employment for an employee who is on probation, should be read together with the provisions of **Section 52 (1) and (2) of the said Employment Code Act No 3 of 2019**, which require an employer to give a valid reason for the termination of an employee, which is related to the employee's conduct or capacity, or the employer's operational requirements, where the employer initiates the termination of the contract of employment.

5.51 Consequently, in this case, Kabwe Mkandawire was entitled to be given a valid reason in line with the afore, when his contract of employment was terminated during the period of his probation.

- 5.52 In terms of the burden of the proof, it is trite that he who alleges must prove. Kabwe Mkandawire has relied on the case of ***MP Infrastructure Zambia Limited v Matt Smith and another*** ⁽⁹⁾ stating that the Court of Appeal in that matter, held that the Appellant could not rely on the defence that the Respondents had been appraised, when the appraisals were not produced before Court.
- 5.53 In that case, the 1st Respondent was permanently employed while the 2nd Respondent was employed on a fixed term contract for two months on 15th January, 2015 and 9th April, 2015 respectively. On 15th May, 2016, their contracts of employment were terminated without according them opportunity to be heard, and without following the grievance and disciplinary code.
- 5.54 The trial Court found that the 2nd Respondent's termination was unlawful, as no reasons for the termination were given, while for the 1st Respondent, it was found that valid reasons for the termination were given.
- 5.55 On appeal, the Court of Appeal agreed with the trial Court, that no reasons were given for the termination of the 2nd Respondent's employment, and that while the Appellant had argued that appraisals of his performance were done, they were not produced in evidence. Thus, the appeal failed in that respect.
- 5.56 In this matter, while there was a termination, it was at the stage of Kabwe Mkandawire's probation. I have already highlighted that the law in ***Section 27 (2) of the***

Employment Code Act No 3 of 2019 mandates an employer to do an assessment of an employee who is on probation, and to communicate the results of such assessment during the period of the said probation. However, the manner of assessment is not prescribed, and neither is the communication of such assessment.

5.57 Thus, where an employment contract is silent on the same, any manner of assessment and communication to an employee who is in probation, as long as it is done, suffices. To that extent, the case of **MP Infrastructure Zambia Limited v Matt Smith and another** ⁽⁹⁾ while having held that no appraisals were produced to justify the assessment of unsatisfactory performance, is distinguishable from this case, as such is not prescribed.

5.58 Kabwe Mkandawire has not rebutted the assertion that he met the Chief Executive Officer of Zambia Railways (2014) Limited who advised him on the outcome of the assessment and the reasons for the termination of his employment.

5.59 Thus, while the letter terminating his employment did not give the reasons for his termination, in view of the fact that the law in **Section 27 (2) of the Employment Code Act No 2 of 2019** does not prescribe the manner of assessment or the mode of communication of such assessment, and Kabwe Mkandawire's contract of employment having been silent on the same, it cannot be said that Zambia Railways (2014) Limited breached the provisions of **Section 27 (2) of the**

Employment Code Act in terminating Kabwe Mkandawire's contract of employment, whilst he was on probation.

5.60 Based on that, the claim that the termination was unfair, and wrongful fails. The claim that Kabwe Mkandawire be deemed to have successfully completed the probationary period equally fails.

6. CONCLUSION

6.1 Those claims having failed, the claim for damages as stated also fails, as well as those for damages for shock and mental suffering, and they are dismissed. This matter having arisen out of an employment contract, where Kabwe Mkandawire lost the said employment during the probation period, I order that each party bears their own costs of the proceedings. Leave to appeal is granted.

DATED AT LUSAKA THE 11th DAY OF DECEMBER, 2023

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

