

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 144/2018**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

**MACHA MAKALA**

**AND**

**ROAD TRANSPORT AND SAFETY AGENCY**

**CORAM: MAKUNGU, SICHINGA AND NGULUBE, JJA.**

*On 20<sup>th</sup> March and 27<sup>th</sup> June, 2019.*

**For the Appellant:** *R. Mainza, Messrs Mainza and Company*

**For the Respondent:** *D. Kalima, In House Counsel.*



**APPELLANT**

**RESPONDENT**

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## **J U D G M E N T**

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

**Cases referred to:**

- Attorney -General v Richard Jackson Phiri (1988-89) ZR121.*
- William Steven Banda v Chief Immigration Officer and Attorney-General (1993-1994) ZR 80.*
- Zesco v David Muyambango (2006) Z.R. 22.*
- Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172.*

**Works referred to:**

- Black's Law Dictionary, 10<sup>th</sup> Edition, Bryan A Garner, Thomson Reuter Minesotta, USA, 2014.*

## **Introduction**

The appeal emanates from a Judgment of the Industrial Relations Court delivered on the 8<sup>th</sup> August, 2017.

By that Judgment, the appellant's claim against the respondent was for a declaration that the purported termination of the appellant's contract of employment was wrongful, null and void and an order that the respondent reinstates the appellant. In the alternative, that the appellant be awarded damages in lieu of reinstatement as well as damages for wrongful termination of contract, with costs. The court found that the appellant's dismissal was not wrongful and declined the notion that the respondent needed to substantiate the allegations through a retrial of the disciplinary case in court. The court dismissed the appellant's case for lack of merit.

## **Background to the appeal.**

The appellant was employed by the respondent as a registry clerk on 17<sup>th</sup> September, 2007 and was subsequently transferred to the respondent's Mazabuka office in the same capacity. On 28<sup>th</sup> November, 2008, the station manager, Luckie Simwanda, on

behalf of the respondent charged the appellant with the offence of fraudulently registering a motor vehicle, VM Combi, which bore the number ACK 6028, without proper authority. She was also suspended from employment for allegedly registering the motor vehicle, and introducing the said vehicle onto the respondent's computer system.

On 2<sup>nd</sup> December, 2008, the appellant appeared before a disciplinary committee comprising of the chairman, Mr. Martin Mbangi and two members. The appellant contended that the disciplinary committee did not call any witnesses to prove the allegations against her and she was summarily dismissed. On 22<sup>nd</sup> December, 2008, the appellant lodged an appeal against her summary dismissal with the chief executive officer of the respondent and on 16<sup>th</sup> July, 2009, the appeals committee upheld the decision of the disciplinary committee and confirmed the summary dismissal.

The appellant lodged a complaint in the Industrial Relations Court on 18<sup>th</sup> August, 2009, seeking a declaration that the purported termination of her contract of employment was wrongful, null and

void. She further sought an order of reinstatement and in the alternative, damages for wrongful termination of contract, with costs.

She contended that she was wrongfully dismissed as the alleged offence of fraudulent registration of motor vehicle registration number ACK 6028 without proper authority was not proved by the respondent. She further contended that she could not have registered the motor vehicle in Mazabuka as the station was not a registration centre. The motor vehicle was registered in Ndola where the white book, physical report, computer form and form RL3 were issued manually, since registration is done manually while conversion is effected on the computer.

The appellant stated that a team of police officers who travelled from Ndola to Mazabuka to conduct an investigation were satisfied that the conversion was not done fraudulently. At the hearing, the disciplinary committee denied her an opportunity to call witnesses and therefore breached the rules of natural justice.

The respondent, in its affidavit in opposition to notice of complaint sworn by Lukie Simwanda, an officer of the respondent, averred

that the motor vehicle audit trial indicated that the appellant purported to convert motor vehicle registration number ACK 6028 on 11<sup>th</sup> June, 2008. It was averred that the motor vehicle could not be subjected to a conversion as the procedure was meant for registration of motor vehicles that had old registration books in order to issue them with computerized registration books. It was further averred that the motor vehicle in issue was imported into the country in or about June, 2008 and was not one that could have been the subject of a conversion and that the motor vehicle's registration number ACK 6028 was a current registration serial number issued at Ndola after the manual registration number had been done away with.

Lukie Simwanda averred that the office in Ndola then blocked the registration of the motor vehicle because it was realized that customers' duty was not paid and that the appellant failed to produce manual documents which she claimed were the authority she used to convert the motor vehicle. He contended that this confirmed that she intended to fraudulently register the motor vehicle.

He averred further that the Zambia Police subsequently discovered that the motor vehicle was reported stolen in South Africa and it was then returned there. The appellant was charged with the offence of dishonest conduct and dismissed in accordance with the disciplinary and grievance procedure.

### **Determination of the matter by the High Court**

At the hearing of the matter, the appellant gave sworn evidence that she only changed the manual white book of the motor vehicle to a computerized registration and did not fraudulently register the motor vehicle in question. She was unable to explain the fact that the vehicle appearing in the register on the number ACK 6028 was an ERF truck while the one she converted in Mazabuka was a VW combi. She further stated that the white book and form RL3, relating to the VW combi whose conversion she worked on in Mazabuka were not availed to the disciplinary committee because both documents went missing and could not be traced by the time the matter was before the said committee. The appellant stated that she discovered that the documents were missing when police officers went to her office to conduct investigations. She was aware

that her supervisor at the time, Bestain Chanda was charged with the same offence as she was and that he was also dismissed from employment.

The respondent called three witnesses in Defence of its case. The first witness, RW1 was **Crebby Mumbuna**, whose testimony was to the effect that on 6<sup>th</sup> June, 2008, while he was regional manager at Ndola, a client went to the office to register her vehicle, an ERF truck whose particulars were entered into the respondent's system. After assigning a number, it was discovered that the system number was already in use. When RW1 conducted a search, he found that the number was used at a station that had no authority to register a motor vehicle, this being Mazabuka. He further stated that the appellant introduced the vehicle into the system, and that it was not a conversion because the vehicle in issue was not previously registered manually and could therefore not be issued with a registration certificate. He further stated that only Ndola, Lusaka and Livingstone offices were registration centres at the time.

The second witness for the respondent, RW2, was **Alfred Hankonde** who defined conversion of a motor vehicle and stated that it was mandatory for a Road Transport and Safety Agency (RTSA) officer conducting a conversion to physically inspect the vehicle against the particulars on the application form. He further stated that the form and the inspection report are then passed on to the station manager for authorization before the registration or conversion can be effected. He stated that the transactions that the appellant carried out were authorized by her supervisor Bestain Chanda.

The third witness, RW3, was **Bestain Chanda** whose testimony was that on 11<sup>th</sup> June, 2008 he was the acting station manager at Mazabuka. The appellant went to his office with forms for the conversion of a motor vehicle from a manual white book to a computerized one. He stated that no payment was required. There were no examiners at Mazabuka, so the physical inspection of the motor vehicle could only be done at the Ndola station. A month later, police officers went to his office to inquire about the vehicle which the appellant made a conversion on and it was then

discovered that the documents relating to the said conversion were missing. He was later charged with the offence of dishonest conduct and fraudulent registration and later dismissed.

The lower court made the following findings of fact-

1. That on 28<sup>th</sup> November, 2008, the appellant was charged with the offence of fraudulently registering motor vehicle registration number ACK 6028 without proper authority and suspended from duty pending investigations in the matter.
2. She wrote an exculpatory letter denying the charge.
3. She appeared before the disciplinary committee on 2<sup>nd</sup> December, 2008 for a hearing.
4. The appellant was dismissed on 2<sup>nd</sup> December, 2008 after the said hearing.
5. She appealed the said dismissal to the chief executive officer of the respondent but was unsuccessful.

The lower court considered the appellant's contention that as a registry clerk, her responsibility was to convert and not register motor vehicles and that, according to the appellant, during the

disciplinary hearing, no witness was called to substantiate the charge of fraudulently registering the motor vehicle, ACK 6028.

The court also examined the respondent's submissions and evidence that the appellant was lawfully dismissed in accordance with the disciplinary and grievance procedure code as she was charged with the offence of dishonest conduct after having fraudulently introduced motor vehicle number ACK 6028 on the RTSA system. The respondent contended that the said vehicle was not a subject of conversion as it was imported into the country in June, 2008 so it was not a vehicle which had an old registration book that would undergo the process of conversion.

The court was of the view that the evidence did not support or demonstrate a breach of contract in the manner that the appellant was dismissed. The court concluded that no evidence was led to show that the respondent acted in bad faith or with malice when the disciplinary process was embarked on.

On the contention by the appellant that the respondent did not call any witnesses at the disciplinary hearing to substantiate the allegation of fraudulent registration, the court relied on the case of

the **Attorney -General v Richard Jackson Phiri**,<sup>1</sup> where it was stated that once the correct procedures have been followed, the only question which arises for consideration is whether there were facts established to support the disciplinary measures, since any exercise of power would be regarded as bad if there was no substratum of facts to support it.

The court found that the disciplinary power was exercised in due form and dismissed the appellant's action in its totality.

### **Grounds of appeal to this court**

Dissatisfied with the Judgment of the lower court, the appellant filed a memorandum of appeal with three grounds of appeal couched as follows-

- (i) The Court below misdirected itself in law and fact when it held that it was a common law position that the employer does not have to prove that an offence took place and satisfy himself beyond all reasonable doubt that the employee committed the act in question.

- (ii) The court misdirected itself in law and in fact when it declared the notion that the respondent needed to substantiate the allegations levelled against the appellant.
- (iii) The court misdirected itself in law and in fact when it held that the function of the court was limited to examining whether there was disciplinary power and to examine whether such power was exercised in due form and when it further held that it was satisfied that there was nothing untoward in the respondent's act to dismiss the appellant.

### **Arguments by the parties before this court**

In arguing the three grounds of appeal, it was submitted that the lower court misdirected itself by holding as follows:

***“It is a common law position that the important thing is that the employer does not have to prove that an offence took place, or even satisfy himself beyond all reasonable doubt that the employee committed the act in question.”***

The appellant's counsel contended that this holding was against the Supreme Court decision in **Attorney General vs Jackson Phiri**<sup>1</sup> which the lower court cited. It was submitted that the employer is legally obliged to prove by way of evidence the

allegations levelled against the employee during the disciplinary hearing. Counsel contended that it is not enough for the employer to simply prove that the disciplinary procedures were followed.

Counsel further submitted that it is the duty of the court to ascertain whether there were facts established to support the disciplinary measures as any exercise of powers will be regarded as bad if there is no substratum of facts to support it. It would be unjust for the court to only consider whether the disciplinary authority went through the proper motions and followed the correct procedure without considering the validity of the exercise of the disciplinary powers. It was argued that the appellant was found guilty of fraudulently registering motor vehicle numbers ACK 6028 in the absence of evidence as no witnesses were called at the disciplinary hearing to support the allegation of fraudulently registering the motor vehicle.

We were referred to the case of **William Steven Banda vs Chief Immigration Officer and Attorney-General**,<sup>2</sup> where the Supreme Court held that-

***“The Appellate Court will not interfere with the findings of fact of the lower court unless it is apparent that the trial court fell into error.”***

We were urged to uphold the appeal in its entirety with costs to the appellant.

The respondent filed heads of argument in response to the appellant’s arguments. Responding to ground one, Counsel submitted that despite advancing the argument, the appellant avoided making reference to the standard of proof in matters of this nature. The lower court properly directed itself with regards to the standard of proof in labour matters and found that the employer acted reasonably in dismissing the appellant. We were urged to dismiss ground one of the appeal for lack of merit.

Responding to ground two, Counsel submitted that the lower court did not say that the respondent was not required to substantiate the allegations against the appellant. The function of the court is to look at the evidence that was before the disciplinary committee and to establish whether there was a substratum of facts to support the disciplinary measures. Counsel argued that the question that needs to be answered is whether the employer did

substantiate the facts before the disciplinary committee to warrant the appellant's dismissal. Counsel submitted that contrary to what the appellant's Counsel stated, the minutes of the disciplinary hearing were produced in evidence and form part of the record of appeal on pages 79 and 80 and the minutes indicate the decision which that committee arrived at as well as the basis for the decision.

We were referred to the of **Zesco v David Muyambango**,<sup>3</sup> where the court stated 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.”***

Counsel further submitted that the lower court was on firm ground when it declined the notion that the respondent needed to substantiate the allegation through some kind of a retrial of the disciplinary case in court. We were urged to dismiss ground two of the appeal.

Responding to ground three, it was submitted the court did not misdirect itself when it held that its function was limited to

examining whether there was disciplinary power and to examine whether the power was exercised in due form. The lower court concluded that there was nothing untoward in the respondent's dismissal of the appellant. We were therefore urged to dismiss ground three of the appeal and dismiss the whole appeal for lack of merit.

**Determination of the appeal by this court**

We have considered the evidence on record, the arguments by the parties and the judgment appealed against. We shall deal with the three grounds of appeal together. Arising from the said grounds of appeal and the submissions of the parties, the main issue that we have formulated for our determination is whether the learned trial Judge was correct to find that the appellant was wrongfully dismissed on the basis that she fraudulently registered motor vehicle registration number ACK 6028 without proper authority. This court must also determine whether the court erred when it stated that an employer does not have to prove that an offence was committed but should only examine whether the disciplinary committee had the power to act and exercised the power properly.

It is trite that in proceedings for wrongful dismissal, the role of the court is to determine whether the correct procedure was followed when dismissing an employee and where applicable, whether the disciplinary committee had valid disciplinary powers. The court may also have to consider the substratum of facts to support the decision made.

A perusal of the record shows that the appellant was charged with the offence of fraudulently registering a motor vehicle registration number ACK 6028 without proper authority. Black's Law Dictionary defines fraud as –

***“A knowing misrepresentation of the truth or concealment of material fact to another to act to his or her detriment.”***

Fraud consists of some deceitful practice or wilful device resorted to with intent to deprive another of his right or in some manner to do him an injury. We note that when the appellant was charged, she exculpated herself by way of letter dated 28<sup>th</sup> November, 2008 in which she basically denied the charge and stated that she did not register the motor vehicle but merely did a conversion.

During the hearing of the disciplinary case as well as the hearing of the matter in court, the appellant could not provide the committee and the court with the documents relating to the alleged conversion because she stated that they went missing. In her letter of 28<sup>th</sup> November, 2008, to the human resources manager, on page 31 of the record of appeal the appellant stated that-

***“As far as I am concerned, I did not register the vehicle, it was conversion. If the owner of the vehicle had a motive behind, it was not to my knowledge.”***

She denied registering the vehicle at her station and that Mazabuka was not a registration centre. Going by the evidence of the respondent's witnesses, however, it is evident that the appellant did not follow procedure when she went ahead to introduce the motor vehicle, ACK 6028 onto the respondent's computer system. At the disciplinary hearing, the appellant acknowledged that the registration number for the vehicle in issue was new and did not require any conversion. The disciplinary committee found that there was overwhelming evidence to prove that the appellant fraudulently registered the motor vehicle and she was found with a case of dishonest conduct. The appellant

admitted in evidence-in-chief that she was the first person to key in the information of the vehicle on the respondent's system. Thereafter, she printed the registration certificate of the motor vehicle.

The evidence of RW1, Crebby Mumbuna, was that he discovered that the appellant registered the motor vehicle in issue fraudulently on 6<sup>th</sup> June, 2008. He also noticed that the number plate series was a current one at the time. Conversion meant that a motor vehicle that was previously registered under a manual system would be transferred to an electronic registration. He stated that it was impossible to do a conversion on the vehicle because it was a current number and had not been registered previously.

RW2, **Alfred Hankinde's** testimony was that conversion is a process where someone is changing a motor vehicle white book from manual registration for it to be computerized. He further stated that it was mandatory for an officer of the respondent doing a conversion to physically inspect the vehicle against the particulars on the application form. The inspection report and the

form would then be passed to the station manager for authorization before the conversion would be effected.

RW3, Bestain Chanda, the former acting station manager at Mazabuka, who also happened to be the appellant's supervisor at the time testified that on 11<sup>th</sup> June, 2008, she went to his office with some documents which required approval, these being a white book, an application form for conversion as well as a report. He stated that he relied on the appellant's experience and explanation about the transaction and authorized the conversion.

A month later, police officers from Ndola went to the Mazabuka station to conduct investigations over the conversion that the appellant did on motor vehicle number ACK 6028. When they demanded to see the physical documents relating to the conversion, he discovered that they were missing. He and the appellant were then charged with the offence of dishonest conduct and fraudulent registration of a motor vehicle and they were subsequently dismissed.

Going by the evidence of RW1 and RW2, it is evident that the appellant did not follow procedure to effect the conversion of the

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motor vehicle under registration number ACK 6028. She did not even conduct an inspection of the motor vehicle as she was required to. As per RW1's evidence, the number plate ACK 6028 was not for the motor vehicle that the appellant did a conversion on as it was for an ERF truck.

The procedure for doing a conversion of a motor vehicle was outlined by RW1 and RW2 and it required the verification of the motor vehicle by the appellant doing a physical inspection of the motor vehicle and verifying the documentation with the Ndola office which was a registration centre. The respondent's excuse of having done a conversion which was authorized by the acting station manager without doing a physical inspection did not hold water because she was not doing this for the first time and was very conversant with the procedure.

The appellant prepared and submitted the forms and report which were authorized for conversion by the station manager and the number plate later turned out to be for another vehicle, an ERF truck. Although the respondent did not call any witnesses at the disciplinary hearing, we are satisfied that the respondent's

disciplinary body had valid powers to act and that they exercised those powers validly and observed the rules of natural justice.

On the argument that the court misdirected itself in law and in fact when it held that it was common law position that the employer does not have to prove that an offence was committed and to satisfy himself beyond all reasonable doubt that the employee committed the act in question, we are of the view that the evidence of RW1, Crebby Mumbuna and RW3, Alfred Hankonde showed that the appellant did not follow procedure when she effected the conversion of a vehicle that she did not inspect as she was required to do. When she appeared before the disciplinary committee, she had no documents relating to the said transaction because they allegedly went missing. Having found that the appellant did not follow procedure in the aforementioned transaction, we are of the view that the employer did in fact prove the offence of fraudulently registering the motor vehicle in issue, as the said VW combi was found to be a stolen motor vehicle which was eventually returned to South Africa.

In addition, the investigation report by the Zambia Police which appeared on page 44 of the record of appeal states that the motor vehicle, VW Combi, registration number ACK 6028, was registered by the appellant and her supervisor Bastian Chanda. When the Police went to the Mazabuka office of the respondent, all records relating to the vehicle were found missing.

From the foregoing, it is our considered view that the charges against the appellant were substantiated, thus leading to her dismissal.

In an employer/employee relationship, the onus of proving that the employee was wrongfully dismissed is on the employee. The burden does not shift to the employer. This is aptly stated in the case of **Masauso Zulu v Avondale Housing Project Limited**<sup>4</sup> where the Supreme Court stated that-

***“Where a plaintiff alleges that he has been wrongfully or unfairly dismissed as any other case where he makes an allegation, it is generally for him to prove those allegations.”***

## Conclusion

We are of the view that there is overwhelming evidence to show that the appellant fraudulently registered the stolen motor vehicle using the registration number of an existing vehicle, an ERF truck. In the case of the **Attorney General v Richard Jackson Phiri**,<sup>1</sup> the Supreme Court held that it was not the function of the court to act as an appellate tribunal for the disciplinary committee. *In casu*, there was a substratum of facts that supported the disciplinary charge and the respondent followed the disciplinary procedure and subsequently dismissed the appellant.

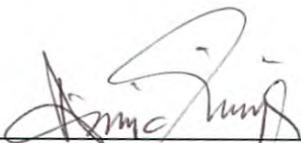
On the totality of the evidence on record, we find that there is no merit in this appeal. It is accordingly dismissed with costs to the respondent which shall be taxed in default of agreement.




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C. K. MAKUNGU

**COURT OF APPEAL JUDGE**




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D.L.Y. SICHINGA

**COURT OF APPEAL JUDGE**




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P.C.M. NGULUBE

**COURT OF APPEAL JUDGE**