

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

**CAZ Appeal No. 107/2021
CAZ/08/103/2021**



BETWEEN:

**IAN CHIPASHA MPUNDU
AND**

APPELLANT

ROAD TRANSPORT AND SAFETY AGENCY

RESPONDENT

CORAM : Chishimba, Sichinga and Sharpe-Phiri JJA

On 23rd March, 2023 and 21st July, 2023

For the Appellant : Mr. K. Mwale of Messrs. K. Mwale & Co.

For the Respondent : Mr. A. Tembo, In-House Counsel

J U D G M E N T

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1) Zambia National Provident Fund v Chirwa (1986) ZR 70
- 2) The Attorney-General v Richard Jackson Phiri (1988 - 1989) Z.R. 121
- 3) Chimanga Changa Limited v Stephen Chongo Ngombe (2010) 1 ZR 220
- 4) Supabets Sport Betting v Batuke Kalimukwa Selected Judgment No. 27 of 2019
- 5) Bank of Zambia v Kasonde (1995 - 1997) ZR 238
- 6) Gerald Musonda Lumpa v Maamba Collieries Limited (1988 - 1989) ZR 217
- 7) Sara Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited CAZ Appeal No. 129 of 2017
- 8) Contract Haulage Limited v Mumbuwa Kamayoyo (1982) Z.R. 13
- 9) Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) ZR 22

- 10) *Gunton v London Borough of Richmond* (1980) 3 ALL E.R. 577
- 11) *Khalid Mohamed v The Attorney-General* (1982) Z.R. 49

LEGISLATION REFERRED TO:

- 1) The Employment Code Act No. 3 of 2019 of the Laws of Zambia

OTHER WORKS REFERRED TO:

- 1) W. S. Mwenda & C. Chungu, 2021. A Comprehensive Guide to Employment Law in Zambia. UNZA Press, Lusaka
- 2) N. M. Selwyn, 2006. Selwyn's Law of Employment, 14th Edition, Oxford, Oxford University Press.
- 3) Ian Smith and Gareth Thomas, 2008. Smith's and Wood's Employment Law, 9th Edition, Oxford, Oxford University Press

1.0 INTRODUCTION

- 1.1 At the time we heard the appeal, we sat with Judge Sichinga J.A who has since proceeded on long leave. This is a majority decision. This appeal is against the judgment of the Hon. Mrs. Justice G. C. Chawatama dated 22nd February 2021 in which she dismissed the claims by the appellant for wrongful dismissal, embarrassment, mental anguish, and gratuity.

2.0 BACKGROUND

- 2.1 The appellant was employed by the respondent as a revenue officer in December 2009 and was dismissed in July 2019 after being charged with dishonest conduct. The appellant subsequently commenced an action against the respondent

seeking damages for wrongful dismissal, damages for embarrassment and mental anguish caused by the wrongful dismissal, gratuity, interest on sums due, costs and any other relief the court may deem fit.

- 2.2 The respondent in its defence refuted the claims by the appellant pleading that he was dismissed after being for dishonest conduct under the disciplinary code.

3.0 EVIDENCE ADDUCED IN THE COURT BELOW

- 3.1 The matter proceeded to trial before the learned judge in the court below. Ian Chipasha (PW1) testified that he was employed by the Road Transport and Safety Agency (the Agency) as a revenue officer on 12th December 2009 and was in charge of three cashiers. The revenue collected from the cashiers had to be banked within 24 hours. As the Kitwe station was undergoing renovations at the time, he operated from a container.
- 3.2 On 16th May 2019, a complaint was raised by the enforcement officers that on their return from operations in the evening, they did not find the guards and police officers detailed to secure the premises. On the same evening, the appellant did not see any

guards at the premises but found one at the gate. Being concerned with the safety of the money collected that day, he decided to secure and lock it in the container instead of the main safe. He placed one key for the safe in the container and left the other key in the other office where the safe was. He left the premises between 19:30 and 20:00 hours.

3.3 The next day, he met a Mr. Munamwinga from the revenue monitoring unit who asked to be shown the safe. The appellant told him that he had one key for the safe. He proceeded to retrieve the other key from the container and the money he had locked in the container. In the presence of Clement Chiwawa, the safe was opened. The appellant retrieved a sealed plastic Armaguard bag containing the sum of K9608.00 and deposit slips.

3.4 On 28th May 2019, the appellant was charged by the Manager and asked to exculpate himself for the offences of failure to follow established channels or procedures, and dishonest conduct contrary to Clauses 18(22) and 18(40) of the RTSA Disciplinary Code. He exculpated himself in a letter dated 10th May 2019 and appeared before the disciplinary committee

which, on 11th July, 2019, recommended dismissal. His appeal against the dismissal was rejected by the appeal committee.

3.5 In cross-examination, the appellant conceded that it was mandatory to keep money in the safe and that on 16th May, 2019 he had not keep money in the safe. He also conceded that he had not informed his supervisor that he was afraid to leave the money in the safe that evening.

3.6 Munamwinga Mukwanka (DW1) is a revenue officer with the Agency under the monitoring unit. He testified that on 17th May, 2019 he was carrying out routine inspections at the Kitwe office. He observed the appellant arrive at about 08:45 hours carrying a bag. He asked the appellant to take him to the safe. The appellant told him that there was no money in the safe as it was all in the bag he was carrying. That he, the assistant station manager, and the appellant opened the safe and inspected it. They found no money inside the safe.

3.7 In the presence of the assistant manager, the appellant was asked where the money was. He stated that it was in his bag in an Armaguard Transit Bag. (The said bag contained two deposit

slips for K660.00 and for K8,390.00 as well as cash in the sum of K2,750.00.)

3.8 The revenue officer stated that government revenue in the Agency was to be secured in the bag provided by the agency and secured in the safe. In cross-examination, he stated that though he did not testify before the disciplinary committee, a report of what transpired was submitted to the committee.

3.9 Ezekiel Moyo (DW2) is a human resources officer with the Agency. He testified that upon receiving a complaint from DW1, about the appellant he instituted investigations regarding the complaint. The manager informed DW2 that the revenue monitoring team had also generated a report about its findings. Thereafter, a disciplinary hearing was held which found that the appellant had moved money from the respondent's premises. This amounted to dishonest conduct under the RTSA Disciplinary Code, and the appellant was dismissed.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge found that the appellant had not raised any issue with the disciplinary procedure employed against him nor concerning the powers of the respondent to discipline him. The

court noted that in his exculpatory letter, the appellant did not mention anything concerning the issue of removing revenue from the respondent's premises in response to the allegations in the charge sheet. The appellant only gave an explanation as to why he had not followed the laid down procedure of securing the revenue in the safe provided by the Agency for that purpose.

- 4.2 The court found that the appellant did not deny failing to follow the laid down mandatory procedure of securing money in the safe. The learned Judge considered the case of **Zambia National Provident Fund v Chirwa** ⁽¹⁾ that:

"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also 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 is nullity."

- 4.3 As regards arguments by counsel that no documentary evidence was tendered and no witnesses were called to substantiate the allegations against the appellant, the court below took the view that this was a sharp diversion from what was pleaded. Further, a reading of clause 8.9 of the disciplinary code revealed that

there is no obligation on either party to call witnesses. The clause gives an opportunity to call witnesses so that the full facts and circumstances will be adduced in as fair a manner as reasonably possible.

- 4.4 The learned Judge reasoned that in a disciplinary hearing, the employee is given an opportunity to explain the charges preferred against him, and in so doing, may call witnesses. For authority, the lower court relied on **The Attorney-General v Richard Jackson Phiri** ⁽²⁾ where the Supreme Court said that:

"The major ground of appeal was that the trial commissioner had erred when he found that the discharge was wrongful. It was pointed out that, in accordance with the procedures laid down, the charges were preferred, and the plaintiff given every opportunity to be heard in his own defence. We agree that once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same. ..."

- 4.5 The court further considered the case of **Chimanga Changa Limited v Stephen Chongo Ngombe** ⁽³⁾ and found that the respondent had clearly demonstrated the facts which supported

the disciplinary measures, being that the appellant had not followed the laid down procedure for handling revenues and that the act of removing money from the respondent's premises amounted to dishonesty. Consequently, no injustice arose.

- 4.6 Having failed to prove the case of wrongful dismissal, the other claims could not stand and were dismissed for want of merit.

5.0 GROUND OF APPEAL

- 5.1 Aggrieved with the decision of the lower court, the appellant has appealed on the following grounds:

- 1) *The court below erred in law and fact when it concluded at page J21 of the judgment, that the appellant had failed to exculpate himself on the allegation of removing revenue from the respondent's premises.*
- 2) *The court below erred in law and fact when it concluded at page J22 of the judgment that there was no need for the respondent to substantiate the allegations against the appellant at the disciplinary hearing which formed the basis for the appellant's dismissal; and*
- 3) *The court below erred in law and fact when it concluded and held at page J23 of the judgment that the respondent had clearly demonstrated the facts which supported the disciplinary measures which were that the appellant did not follow the laid down procedure for handling and further that the act of removing revenue from the respondent's premises was a conduct of dishonesty.*

6.0 **APPELLANT'S HEADS OF ARGUMENTS**

6.1 The appellant filed heads of argument dated 21st May, 2021. In ground one, the appellant submits that the court below erred in holding that the appellant failed to exculpate himself on the allegation of removing revenue from the respondent's premises. That **section 52(5) of the Employment Code Act No. 3 of 2019** now places the burden of proving that the termination of a contract of employment was fair and for a valid reason on the employer. The said section 52(5) provides as follows:

(5) An employer shall bear the burden of proof that the termination of a contract of employment was fair and for a valid reason.

6.2 The appellant placed reliance on the case of **Supabets Sport Betting v Batuke Kalimukwa** ⁽⁴⁾ where the Supreme Court guided that some claims of unfair dismissal may be upheld on the basis that there was improper exercise of power by the employers in that the reasons given for the dismissals were found not to have been supported by the relevant facts.

6.3 The case of **Bank of Zambia v Kasonde** ⁽⁵⁾ was cited where the supreme court held that the respondent was wrongfully

dismissed because the disciplinary procedure was not followed and ordered the rarely granted order of reinstatement.

6.4 In *casu*, it was contended that the finding by the trial court that the appellant admitted to removing revenue from the agency premises is contrary to the appellant's pleading of innocence at the disciplinary hearings and at trial. That the appellant provided credible evidence of how revenue was secured on the agency premises and the reasons why he felt the safe was not secure enough on the material day. However, the trial court placed little or no weight on this testimony thereby finding that the appellant was guilty of misconduct without the need for evidence.

6.5 The appellant maintained that under the new employment law, the burden lies on the employer to substantiate the allegations i.e., of the appellant's removal of the money from the agency premises, which burden the respondent failed to discharge.

6.6 Ground two and three were argued together, the gist of which is that the respondent needed to substantiate the allegations of dishonest conduct against the appellant at the disciplinary

hearing. The appellant cited the provisions of **sections 52(1) and (2) of the Employment Code** which provide as follows:

- (1) A contract of employment terminates in the manner stated in the contract of employment or in any other manner in which a contract of employment is deemed to terminate under this Act or any other law, except that where an employer terminates the contract, the employer shall give reasons to the employee for the termination of the employee's contract of employment; and*
- (2) An employer shall not terminate a contract of employment of an employee without a valid reason for the termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.*

6.7 The appellant referred to the learned authors **W. S. Mwenda & C. Chungu. 2021. A Comprehensive Guide to Employment Law in Zambia. UNZA Press, Lusaka**, at page 170, where they consider section 52 cited above, and assert that an employer is required to give a valid reason related to conduct or capacity of the employee or operational requirement of the employer for the termination which must also be substantiated. It was contended that this signifies a marked departure from the holding in **Gerald Musonda Lumpa v Maamba Collieries Limited** ⁽⁶⁾ where an employer had no obligation to give a reason

prior to the dismissal nor to substantiate the reason given for the dismissal.

- 6.8 The decision of this court in **Sara Aliza Vekhnik v Casa Dei Bambini Montessori Zambia Limited** ⁽⁷⁾ was referred to in which we held that that the reasons for the dismissal must be substantiated and that the duty of the court is to ensure that the rules of natural justice are complied with and to examine whether there was a sufficient substratum of facts to support the invocation of disciplinary procedures. That the court must be satisfied that there were no mala fides on the part of the employer.
- 6.9 It was contended in this case that the respondent breached the law when it proceeded to dismiss the appellant without substantiating the allegations at the disciplinary hearing. There was no evidence or substratum of facts tendered by the respondent pointing to the guilt of the appellant. Reference was made to the disciplinary committee's report and the appeals committee's report. In addition, that the reports by DW1 and the human resource department were not availed to the appellant to enable him to adequately prepare his defence.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent filed heads of argument on 6th August, 2021. Counsel submitted that the appellant had admitted in his exculpatory letter and testimony in the court below, to failing to secure government revenue in a safe. Hence confirming that he failed to follow the mandatory laid down procedure of his employer. In the second instance, the appellant failed to give a proper reason for not securing government revenue. The respondent contends that the facts that supported the disciplinary measures taken against the appellant who removed the revenue from the premises were clearly demonstrated. That DW1 also testified that the appellant did not secure the collected government revenue in the safe and had removed it from the respondent's premises. DW1 saw the appellant arriving with the said revenue in a bag.

7.2 The respondent had also shown that the dismissal was fair and that a valid reason was given. Further, it was submitted that an investigation was carried out and a report submitted to the respondent resulting in a charge being drawn up against the appellant to exculpate himself. In the exculpatory letter, the

appellant admitted that he did not secure the revenue in the safe that was provided. Therefore, it is misconceived for the appellant to argue that the court below did not consider section 52(5) of the Employment Code when the judgment clearly stated that the respondent demonstrated that the appellant admitted to not following the laid down procedure.

7.3 The case of **Contract Haulage Limited v Mumbuwa Kamayoyo**

⁽⁸⁾ was cited where it was held that:

Where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is ultra vires; and where there is some statutory authority for certain procedure 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.

7.4 In response to grounds two and three, the respondent submits that the offences for which the appellant was charged and dismissed were fully substantiated. This is because the appellant admitted having failed to follow the mandatory procedure of securing the government revenue in the safe as per his testimony in cross-examination. The respondent went on to

refer to the evidence by DW1 who saw the appellant come out of his motor vehicle with a bag containing government revenue, not secured in the safe as required. The offence committed by the appellant was substantiated, a report by DW1 was submitted. DW1 was called by phone during the disciplinary committee hearing, for which testimony was not contested by the appellant.

- 7.5 In a nutshell, the respondent argues that it had demonstrated the facts that facts supported the disciplinary measure taken against the appellant and that the allegations had been substantiated by the evidence of DW1 and DW2. Reliance was placed on the case of **Zambia National Provident Fund v N. Y Chirwa** cited by the court below. The respondent further cited the case of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango** ⁽⁹⁾ 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. The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised in due form.

7.6 Therefore, the disciplinary committee had the necessary powers to act, the appellant having been charged with an offence, which he admitted. The said power was exercised properly as the respondent acted within its disciplinary code and the statutory requirement when dismissing the appellant.

8.0 DECISION OF THE COURT

8.1 We have considered the appeal, the authorities cited, and the arguments advanced by learned Counsel. It is not in dispute that the appellant was charged with the offences of failure to follow established channels or procedures and of dishonest conduct contrary to clauses 18(22) and 18(40) of the Respondent's disciplinary code. The appellant appeared before the disciplinary committee to exculpate himself and was dismissed upon recommendation.

8.2 The issues raised for determination in this appeal are as follows:

- (i) Whether the appellant was wrongfully dismissed.
- (ii) Whether there was a substratum of facts established to support the disciplinary hearing and dismissal of the appellant.

8.3 This appellant contends that his dismissal was wrongful. In other words, the action is founded on wrongful dismissal. The learned author, **N. M. Selwyn, 2006. Selwyn's Law of Employment, 14th Edition, Oxford, Oxford University Press. paragraph 15-16, at page 387** states that the sole issue to be determined in an action for wrongful dismissal is whether or not the employer has broken the contract of employment. Therefore, an action for wrongful dismissal is concerned with the form and not the substance of the dismissal. It is essentially procedural, and largely dependent upon the actual terms of the contract in question.

8.4 Thus, if a contract is for a fixed term or is expressly stated to be terminable only in certain ways, and it's terminated before the term expires or in an improper way, that may be wrongful dismissal.

8.5 A dismissal may also be wrongful, as alleged in this case, where the facts do not justify such an action. We refer to the learned authors, **Ian Smith and Gareth Thomas. 2008. Smith's and Wood's Employment Law, 9th Edition, Oxford, Oxford University Press at page 434.** Dismissal may also be wrongful

where the employer terminates the employment without carrying out the disciplinary procedure incorporated into the employee's contract. See the case of **Gunton v London Borough of Richmond** ⁽¹⁰⁾,

8.6 In *casu*, the evidence on record shows that on 16th May, 2019, the appellant did not deposit the agency revenue in the safe on the respondent's premises. It was not in dispute that when the appellant arrived at work the following day and disembarked from his vehicle, he was met by DW1. DW1 testified that the appellant had a bag which contained an Armaguard bag in containing the said money,

8.7 When DW1 asked the appellant where the revenue money was, he stated that it was in the bag. A verification of the contents of the safe confirmed that there was no money in it. On 17th May, 2019, the Station Manager charged the appellant with two offences under the RTSA Disciplinary Code being failure to follow established procedures under clause 18(22) and dishonest conduct under clause 18(40).

8.8 In his exculpatory letter dated 30th May, 2019, the appellant argued that the agency premises were undergoing renovations;

- that the security team was not alert which instilled fear in him
- and prompted him to find other ways of securing the revenue;
- and that the Armaguard secure bag and serial number was not tampered with on the material day.

8.9 A reading of the exculpatory letter shows that the appellant implicitly admitted to not securing the revenue in the safe. During the disciplinary hearing, the appellant indicated to the committee that he secured the money in the container from where he retrieved it.

8.10 In its observations, the committee found that the appellant had removed the revenue collected on 16th May, 2019 from the company premises, did not follow laid down procedure of securing government revenue by failing to keep it in the safe that was provided, and that contrary to procedure, kept both keys to the safe. On this basis, the committee recommended that the appellant be dismissed from employment for dishonest conduct pursuant to clause 18(40) of the RTSA Disciplinary Code.

8.11 In ground one, the appellant contends that the burden of proving the case against him lies on the respondent as

employer, in terms of **section 52(5) of the Employment Code**.

That it was for the respondent to demonstrate that the termination of the contract of employment was fair and for a valid reason.

8.12 In the case of **Khalid Mohamed v The Attorney-General**, ⁽¹¹⁾

the court held that:

“A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.”

Therefore, in accordance with **section 52(5) of the Employment Code**, the respondent had a duty to prove that the appellant's termination of employment was fair and for a valid reason.

8.13 The case of **Attorney General v Richard Jackson Phiri** ⁽²⁾

guides that:

“... the court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or just or reasonable. In a case such as this, the court ought to have regard only to the question whether there was power to intervene, that is to say, the question whether the Public Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.”

The Supreme Court then stated that:

“... once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures.”

8.14 It was not in dispute that the appellant did not secure the revenue in the safe but elsewhere. While the position taken by management was that the money left the premises, the appellant stated that it was in the container on the premises. Following the disciplinary hearing, the committee was satisfied that the appellant not only failed to secure the revenue in the safe but had taken it off the premises.

8.15 We hold the view that the respondent did prove that there was a valid reason for the termination of employment and that a valid reason was given for the dismissal. Having held the above,

the next issue to be determined is whether there was a substratum of facts to support the charges against the appellant.

8.16 We hold that there was a substratum of facts to support the charges against the appellant. The court below cannot be faulted for finding that the appellant failed to prove his claims. The appellant admits failing to secure the company revenue as mandated. He was seen with the money in the Armaguard bag in his possession the next day when he reported for work. We hold the view that the dismissal was not wrongful.

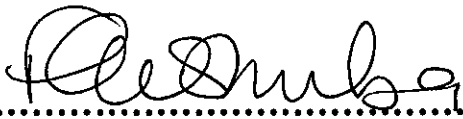
8.17 In ground two, the appellant faults the finding of the lower court that there was no need for the respondent to substantiate the allegations against the appellant at the disciplinary hearing. Further the court below is faulted for holding that a perusal of clause 8.9 of the disciplinary code does not impose a duty on either party to call witnesses. It was up to either party to call witnesses if they so desired. We do not find merit in the contentions for reasons earlier stated.

8.18 Further the evidence shows that the appellant did not follow procedure when he failed to secure the revenue of the

respondent in the safe that was provided and that he removed it from the company premises. By so doing, he failed to follow the laid down procedure for handling revenue which amounted to dishonesty as per the charge. Therefore, we are of the view that a substratum of facts existed to support the charges and the dismissal of the appellant from employment.

9.0 **CONCLUSION**

9.1 Having held that the dismissal was not wrongful, and that there were facts established to support the disciplinary measures i.e., substratum of facts, we dismiss the appeal and uphold the judgment of the lower court. Each party shall bear their own costs.



F. M. Chishimba

JUDGE PRESIDENT



D. L. Y. Sichinga

COURT OF APPEAL JUDGE



N. A. Sharpe-Phiri

COURT OF APPEAL JUDGE