IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 227 of 2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SAMPA JOSEPH LUWISHA **Appellant**

AND

INDO ZAMBIA BANK LIMITED **Respondent**

Coram: Chashi, Muzenga and Patel, JJA

on 19th September & 2nd October 2023

For the Appellant: Mr. S.M. Lungwebungu with C. Mapani
Messrs. Lungwebungu Legal Practitioners

For the Respondent: Mr. S. Kapampa
In House Legal Counsel

JUDGMENT

Patel, JA, delivered the Judgment of the Court

Cases referred to:

1. Galaunia Farms Limited v National Milling Corporation Limited (2004) Z.R 1
2. Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172
3. Susan Mwale Harman vs Bank of Zambia- SCZ Appeal No. 191 of 2015
4. Ridge v Baldwin (1964) A.C. 40.
5. Sarah Aliza Vekhnik v Case Dei Bambini Montessori Zambia Limited CAZ No. 129 of 2017.
6. Whittaker v Whittaker (1939) 3 ALLER 839.
7. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R 70 (SC).
8. Undi Phiri v Bank of Zambia (2007) Z.R. 186.
9. Zambia Telecommunications Company Limited v Mirriam Shabwanga and Others SCZ No. 78 of 2016.
10. Zambia Electricity Corporation Limited v Muyambango (2006) Z.R 22.
11. Care International Zambia Limited vs Misheck Tembo- SJZ No.56 of 2018.
12. Pramesh Bhai Patel vs Rephidim Institute Limited SCZ Judgment No. 3 of 2011.
13. Atlantic Bakery Ltd v Zambia Electricity Supply Corporation Limited- SJZ No. 61 of 2018.
14. Richard Chama & 213 others vs National Pension Scheme Authority - SCZ/8/230/2012.
15. Mazoka & others v Mwanawasa & others (2005) Z. R. 138.
16. Murray & Roberts Constructions Limited and Another v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited- SCZ Appeal No. 141/2016.
17. Amiran Limited v Robert Bones-SCZ Appeal No. 42 of 2010.

18. Zambia National Commercial Bank vs Joseph Kangwa-SCZ Appeal No. 54 of 2008.

19. Kansanshi Mining Plc v Mathews Mwelwa CAZ Appeal No. 103/2019

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

2. The Court of Appeal Rules Statutory Instrument No. 65 of 2016.

Other Works:

1. 'A Comprehensive Guide to Employment Law in Zambia', Cases and Materials Revised edition Justice Dr. W.S Mwenda and Chanda Chungu.

2. The Learned Authors of Phipson on Evidence, 17th edition (London, Thomson Reuters (Legal) Limited 2010.

3. The Learned Authors of Charlesworth on Negligence.

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of *Nkonde J* as he then was, of the High Court, Industrial Relations Division delivered on 4th June 2021.

1.2 It is noted that the Complainant in the Court below, commenced an action against the Respondent, by way of Notice of Complaint and Affidavit in Support, appearing at *pages 37 to 80* of the Record of Appeal. The Complainant being dissatisfied with the Judgment, has launched this appeal. In this Judgment, we will refer to the Parties as Appellant and Respondent respectively, as they appear in this Court.

2.0 BACKGROUND

2.1 By his Notice on Complaint, the Appellant commenced his action against the Respondent on 6th May 2020 *(pages 37 to 38 the Record)* seeking the following reliefs:

(i) An order that the purported discharge of the Complainant was wrongful and unfair;

(ii) An order for payment of all outstanding salary arrears to the Complainant;

(iii) An Order for damages for wrongful and unfair dismissal;

(iv) An order for reinstatement;

(v) An order for costs incidental to these proceedings;

(vi) Any other relief the Court may deem fit and just.

2.2 On 2nd June 2020, the Respondent did file its Answer along with its supporting Affidavit. This was seen at *pages 84 to 125* of the Record of Appeal.

2.3 The Appellant filed its opposing affidavit on 14th July 2020 which is noted at *pages 126 to 131* of the Record of Appeal.

2.4 Also noted is the appointment of Counsel by its Notice dated 4th March 2021 and the submissions dated 15thApril 2021 at *pages 132* and *133 to 146* of the Record of Appeal respectively.

2.5 The Respondent's submissions (*to the Court below)* are noted from *pages 1 to 9* of the Respondent's Supplementary Record of Appeal dated 20th October 2021.

3.0 DECISION OF THE COURT BELOW

3.1 The trial Judge considered the issues in dispute surrounding the discharge of the Appellant from employment by letter dated 20th February 2020 on thirty (30) days' notice, following two separate charges levelled against the Appellant on 20th December 2019 and 29th January 2020. The Appellant appealed against his discharge on 27th February 2020 which discharge was upheld by the Respondent's Managing Director by its letter dated 8th April 2020.

3.2 At the end of the trial, the learned Judge, having heard from the Appellant (*Complainant*) and four witnesses for the Respondent identified one main issue which required the determination of the Court as follows:

(a) *"Whether the Respondent had just cause and acted reasonably in terminating the Complainant's Contract of employment by discharge. "*

3.3 Having considered the evidence adduced at the trial and applying his mind to the authorities cited, the trial Court found that though the Appellant was not furnished with particulars of the abusive and insulting language used, it was obvious from his exculpatory letter that he knew who the accusers were. In the second charge levelled against the Appellant, the Court found that he knew his accusers and admitted to wrongdoing in the two incidents, the subject of the two charges against him.

3.4 In his final analysis of the complaint and issues before him, the Court below found that the Appellant had failed to prove his case and the Lower Court dismissed the complaint as being without merit. The now impugned Judgment is at pages *8 to 36* of the Record of Appeal.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 The Respondent filed its heads of argument on 26th October 2021. These too, have been duly considered, and will not be recast save for emphasis where appropriate.

7. HEARING OF THE APPEAL

7.1 At the hearing of the appeal, counsel opted to rely on their respective heads of argument filed before Court and briefly augmented their arguments. It is noted with concern that Counsel seized with conduct grappled with the issue of whether the complainant (as he was in the Court below), had been dismissed, discharged or had his services terminated. For this same confusion, they appeared to have placed reliance on the provisions of the **Employment Code**[1], though not appearing to understand its applicability to the appeal in *casu*.

7.2 Be that as it may, we will analyze the appeal as presented and note that the Respondent's internal Grievances and Disciplinary Code also appears to lend confusion to the various disciplinary methods available under the said code. The said Code appears as exhibit **CW4** from *pages 99 to 115* of the Record of Appeal.

8.0 DECISION OF THIS COURT

8.1 We have duly considered the arguments filed and submissions made in support of the appeal.

From the onset, and as observed above, we note that the Appellant appears to use the terms 'discharge', 'dismissal' and 'termination' interchangeably. We also note that the Appellant seeks to question whether the 'termination' of the appellant was fair and for valid reason, for which it refers to the burden placed on the Respondent pursuant to **section 52** of the **Employment Code**[1].

We have noted that the Respondent's Grievances and Disciplinary Procedure Code at *page 99* of the Record of Appeal, refers to 'Discharge' as a form of disciplinary action under *clause 5* of the said Code. See *page 104* of the record of Appeal.

Clause 5.7 states as follows:

"Discharge: Termination of employment by the Bank by giving due notice (30 days) or payment in lieu of notice."

8.2 It is common cause that the Appellant was an employee of the Respondent Bank, as a messenger on permanent and pensionable basis from 2004 and assumed the position of Clerk in October 2006 till the date of his discharge, serving at different branches of the Respondent with his last station being at Chilanga Branch.

8.3 We have considered the grounds of appeal as argued by the Appellant who began with *ground 3*. This deals with the issue of burden of proof which according to **section 52 (5) of the Employment Code**[1] places the burden on an employer and not an employee. The section provides as follows:

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

8.4 Counsel for the appellant has argued that the trial Court erred in law and fact by shifting the burden to the complainant in referring to the concluding words of the Judge at *page 36 (J29)* when he said:

"In a nutshell, I find and determine that the Complainant has failed to prove his case, against the Respondent, on a balance of probabilities and the same is dismissed for lack of merit."

8.5 In opposing this ground of appeal, the Respondent has countered that the obligation placed by **section 52 (2)** of **The Act**[1], upon the employer, is an obligation to terminate contracts of employment fairly and only for valid reasons, relating to capacity or conduct of the employee or based on the operational requirement of the company. The requirement incumbent on an employer, is to show that the termination of a contract of employment was fair and for a valid reason. We have also noted the emphasis placed by the Appellant on the shift in the burden as provided by the Act and have considered extracts from the authorities cited, namely, **Charlesworth on Negligence**[3], and **Phipson on Evidence**[2].

8.6 In addressing our mind to this ground of appeal, we have noted (subject to our observation above), that the Court below did find that the Appellant (*in the first charge*), was given 5 charges, details of which are on *page 32* of the record of appeal. The Court found that having answered the said 5 charges, in writing, by his letter of 24th December 2019 at *page 47* of the Record, the Disciplinary Committee considered the charges and the exculpatory letter, and found him guilty on charges 1, 2, 3 & 5, and different sanctions were applied to correspond to the charges.

8.7 It is also noted that on 16th January 2020, the Appellant caused to be sent to his Supervisor and Branch Manager, WhatsApp messages, which formed the basis of the *second charge* against him on 29th January 2020. He wrote a letter on 31st January 2020, exculpating himself. He was finally discharged by letter dated 20th February 2020, which discharge was upheld by the Managing Director by letter dated 8th April 2020. We have noted from the Record of proceedings in the Court below that the trial Court did consider the charges against the Appellant, heard evidence and made findings of fact. These are noted at *page 31 to 33* of the Record of Appeal.

8.8 Having considered the findings made by the lower Court, we are of the view that the Court fully considered and analysed the obligations placed upon the Respondent as to fairness and validity of reason for the discharge of the Appellant. We find the words of the lower Court quoted above, at *paragraph 8.4*, to have been quoted out of context and in isolation. We do not agree with the argument that the Lower Court approached this matter on the wrong basis.

8.9 It is trite, that other than proving a valid and fair reason for the termination of employment, which is the evidential burden, the main burden of proof still rests with the Appellant on all other issues in contention. The Respondent has called in aid the decision of the Supreme Court in the case of **Galaunia Farms Limited v National Milling Corporation Limited**[1] when the Court stated:

"A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment."

8.10 We find that this is not a proper case for us to interfere with the findings of fact by the Court below, as they are neither perverse nor against the evidence placed before the lower Court. In support of this principle, we are guided by noted decisions in the cases of **Wilson Masauso Zulu vs Avondale Housing Project Limited**[2] and **Susan Mwale Harman vs Bank of Zambia**[3]

We have no hesitation in dismissing *ground 3* of the appeal as being devoid of merit.

8.11 In arguing *ground 1* (original numbering), the Appellant has argued that the trial Court erred in holding that the Appellant knew the nature of the allegation against him of using abusive and insulting language to fellow employees although the Court had noted he had not been furnished with particulars or details of the actual words used. In advancing this line of argument, the Appellant has submitted on the failure of the Respondent to comply with the tenets of natural justice, not limited to giving an adequate hearing, but also notice of the charges to be met. They have referred to the all-time cited decision of **Ridge v Baldwin**[4] and has also referred us to our decision reached in the case of **Sarah Aliza Vekhnik v Case Dei Bambini Montessori Zambia Limited**[5]. They also seek to rely on **section 52 (3)**[1] of The Act. They have also placed reliance on the case of **Whittaker v Whittaker**[6] on the principle to provide particulars and details in the charge.

8.12 We intend to analyze this ground and will start from the last cited authority of **Whittaker vs Whittaker**[6] on the need to provide particulars. It is not disputed that particulars are designed to give the opposite party full notice of what is alleged in order that s/he can make a full defence. The charge,

(one of five charges), as per the *Charge Letter* of 20th December 2019, the subject of this ground of appeal, (noted at *page 45*) reads as follows:

''Charge 1: Using Abusive or Insulting Language to a fellow employee(s) or customer(s) (2.8 of the Code).
Specific Details:
On 19th December 2019, you used abusive or insulting language to your fellow employees, namely Mr. Vincent Kawala and Mr. Mukuka Chilangwa. This was witnessed by Mrs. Liza Moyo an Officer at the Branch.''

8.13 In response, the Appellant defended his position against the said charge as is noted from *page 47* of the record of appeal.

8.14 We are of the considered view that the correct approach to answer this ground, is to determine whether there was sufficient detail in the charge so as to allow the Appellant to appreciate and fully respond to the charge. From the detail provided, we have noted that the date of the incident was stated, the employees stated to have been abused were named, and the name of the person that witnessed the incident is also stated. The nature of the charge was stated, and the section of the disciplinary Code was clear. On the response tendered by the Appellant, it is equally clear that he knew full details of this particular charge when he wrote his exculpatory letter.
We do not find that the Appellant suffered any prejudice, or at all, nor did he ask for details if he had in fact failed to understand the charge against him.

8.15 We are also fortified in arriving at our decision by quoting the words of the Apex Court in its decision in the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[7]:

''where it is established that an employee committed an offence for which the appropriate punishment is dismissal and is in fact dismissed, there is no injustice that will arise from a failure by the employer to comply with the disciplinary procedure laid down in the contract and such employee has no claim on that ground for wrongful dismissal.''

The Court went further to say that:

"Where an employee has committed a dismissible offence and he has been dismissed, the fact that there is failure to comply with a procedure prescribed for dismissing him does not make the dismissal ispo facto invalid. The critical issue here, as we see it, is not whether or not there was a set procedure for dismissal which may or may not have been followed. It is whether there was a dismissible offence committed by the employee."

8.16 It is noted that the holding above rationalizes that even where there may be procedural error in the disciplinary process, as long as no injustice was suffered by the Appellant as he did commit an offence for which the penalty is dismissal. The Learned Authors of **'A Comprehensive Guide to Employment Law in Zambia'**[1] at page 250 in referring to the **Chirwa** case, state as follows:

"The seminal Yekweniya Mbiniwa Chirwa case makes it clear that where an employee is dismissed for misconduct or other serious offence, rules of procedure play a secondary role and there is no doubt that failure to comply with the disciplinary procedure does not negate a justified dismissal of an employee who has committed an offence for which dismissal is the appropriate punishment".

8.17 This holding has been repeated in other decisions rendered by the apex Court such as **Undi Phiri v Bank of Zambia**[8] and **Zambia Telecommunications Company Limited v Mirriam Shabwanga and Others**[9] In the latter case, the Supreme Court held as follows:

*"The substratum of facts, in our view, supported the decision reached by the appellant to dismiss the respondents for an offence whose penalty was a dismissal, thereby rendering any procedural flaws in the minutes irrelevant....As we have stated in **Chirwa** case, when it is established that an employee committed an offence for which the appropriate punishment is dismissal and is in fact dismissed there is no injustice that will arise from a failure by the employer to comply with the disciplinary procedure laid down in the contract, and such an employee has no claim on the ground for wrongful dismissal or the declaration that the dismissal was a nullity.'*

8.18 The Supreme Court in the case of **Zambia Electricity Corporation Limited v Muyambango**[10] stated as follows:

"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 properly."

8.19 On a proper conspectus of the circumstances that led to the appellant's dismissal, the argument that there was a breach of the rules of natural justice, simply by not repeating and or recasting the offensive words, alleged to have been used by the Appellant, against his former colleagues, does not find favour with us. The principle of law, that there is need to establish a substratum of facts to support the disciplinary measure taken against the employee, is well supported by the facts of this case. This ground of appeal is rejected as it is an afterthought and a creation of counsel to re-write the facts to arrive at a favorable position for the Appellant. *Ground 1* is equally devoid of merit and dismissed.

8.20 In advancing *ground 2*, the Appellant has argued that the trial Court placed itself as an appellate tribunal of the Respondent. We must state that we have great difficulty in appreciating this ground of appeal. We have carefully studied the words attributed to the Court below and which form the substance of this ground of appeal. At *pages 35/36* of the record of appeal, the Trial Court noted as follows:

"I have looked at the contents of the WhatsApp messages to his supervisor, RW3, and I find that the same was not an innocent expression of the disappointment to the Supervisor and the Disciplinary Committee correctly exercised its powers to accordingly charge the Complainant and discharge him from employment as the second breach, as per the Disciplinary Code. I must as well stress that to write a WhatsApp message to the Supervisor

even if by way of expressing disappointment over disciplinary matters is nowhere part of the grievance procedure in the Disciplinary Code that was exhibited to the affidavit in support of the Complaint (by the Complainant himself).''

8.21 Our attention has been drawn by the Respondent, to the subtle distinction in unlawful vis unfair dismissal as explained by the learned Justice Dr. W.S Mwenda in her book **Employment Law in Zambia: Cases and Materials**[1] as follows:

''Unlike unlawful dismissal, unfair dismissal is a creature of statute...unlike unlawful dismissal which looks at the form (of the dismissal), unfair dismissal looks at merits (or substance) of the dismissal....under unfair dismissal, the Court will look at the reasons (for purposes of determining whether the dismissal was justified or not.)''

The Apex Court in its recent decision in the case of **Care International Zambia Limited vs Misheck Tembo**[11] endorsed the above principle.

8.22 We are at pains to understand how the Trial Court was expected to analyze the evidence before it on a claim of *unfair dismissal,* without looking at the merits of the dismissal itself. Courts do not operate in a vacuum and trial courts not only look at the Pleadings, but the evidence also tendered in court, the demeanor of witnesses before embarking on an analysis of the totality of the evidence to consider the claims of the Parties. We accept the submission of the Respondent, that both cases cited by the Appellant under this ground of appeal, dealt with wrongful dismissal and are consequently misapplied under this ground of appeal.

We also note that in the Court below, the Appellant claimed both for wrongful and unfair discharge as well as for wrongful and unfair dismissal, (*paragraph 2.1 i above*) and should not use the portion of the Judgment that analyzed the ground of unfair dismissal to attempt to fit it within their argument for wrongful dismissal.

Ground 2 is equally dismissed.

8.23 Ground 4 of the appeal assails the Judgment of the Court below for failure to award terminal benefits and places reliance on **section 54 (1) (c) of The Act[1].** The Respondent has countered this argument primarily on the basis that the relief was not claimed. The Respondent has further submitted that the Appellant was employed under a permanent contract of employment as defined under **section 3 of the Act[1]**, which is distinguishable from a contract of employment of fixed duration envisaged under **section 54 (1) (c) of the Act [1]** and is not entitled to any gratuity or other terminal benefits.

8.24 An immediate perusal of the reliefs claimed in the Complaint at *page 38* of the Record of Appeal, confirms that there is no claim for terminal benefits. In his own evidence the Appellant admitted that he was not owed any salary arrears, nor did he want to be reinstated. It is an established principle of law that a matter not raised in the Court below, cannot be raised as a ground of appeal on appeal. The law is settled and a case in point is the cited decision in the case of **Pramesh Bhai Patel vs Rephidim Institute Limited[12]**. **Order X rule 20 of the Court of Appeal Rules[2]** is equally instructive.

8.25 It is also a settled position of law that a Court ought to confine its decision to the questions raised in the pleadings. We have been invited to consider the holding of the Apex Court in the cases of **Atlantic Bakery Ltd v Zambia Electricity supply Corporation Limited**[13] and **Richard Chama & 213 others vs National Pension Scheme Authority**[14] which reaffirms the position at law.

8.26 It is obvious that the learned trial Judge could not have made any pronouncements regarding the entitlement or otherwise of the Appellant to terminal benefits as the same was not pleaded. How then, could the Judge in the court below be faulted for failing to address that issue? We are of the considered view and the law is settled that a Court will not make awards in excess of what has been claimed and pleaded. It is trite law that the function of Pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate. This principle was reiterated by the Supreme Court in the case of **Mazoka & Others vs Mwanawasa & Others**[15].

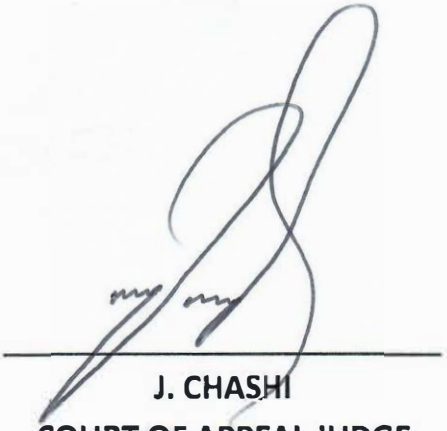
8.27 A further decision of the Supreme Court which reaffirms this principle, is the case of **Murray & Roberts Constructions Limited and Another v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited**[16]**.** The Apex Court went further and reminded trial courts to desist from making decisions on matters not canvassed by parties, under the guise of 'inherent jurisdiction'.

We have no hesitation in dismissing *ground 4*.

9. CONCLUSION

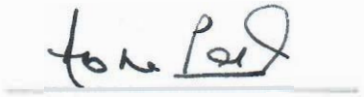
9.1 The appeal having been unsuccessful; we dismiss it in its entirety.

9.2 On the issue of costs and based on settled authorities in the cases of **Amiran Limited v Robert Bones**[17], **Zambia National Commercial Bank v Joseph Kangwa**[18] and **Kansanshi Mining Plc v Mathews Mwelwa**[19], we will abide with our usual pronouncement for matters emanating from the Industrial Relations Division, and order that Parties bear their own costs.



J. CHASHI
COURT OF APPEAL JUDGE

K. MUZENGA
COURT OF APPEAL JUDGE



A. N. PATEL, S.C.
COURT OF APPEAL JUDGE