IN THE HIGH COURT FOR ZAMBIA **2009/HK/72**

AT THE KITWE DISTRICT REGISTRY

(Civil Jurisdiction)

BETWEEN:

VICTOR CHIZAWU **APPELLANT**

AND

NDOLA CITY COUNCIL **RESPONDENT**

Before the Honourable Madam Justice C.K. Makungu

For the Appellants : Messrs. William Nyirenda & Co.

For the Respondent : Legal Counsel of Ndola City Council

J U D G M E N T

Cases referred to:

1. **Attorney General v Ndlovu (1986) ZR 12**
2. **Attorney General vs Achiume (1983) ZR 1**
3. **Attorney General V Richard Jackson Phiri (1988 – 89) ZR**, 121
4. **Kankomba and others v Chilanga Cement Plc 2002 ZR 129**
5. **National Breweries Ltd V. Philip Mwenya (5) SZC No. 28 of 2002**
6. **National Breweries Ltd V. Philip Mwenya SZC No. 28 of 2002**

Legislation referred to:

1. **Local Government Act Cap 281 of the Laws of Zambia**

This is an appeal against the decision of the Provincial Local Government Appeals Board, Copperbelt Province (the Appeals Board) upholding the dismissal of the appellant from employment by the respondent.

The grounds of appeal are as follows:

1. That the Appeals Board had by its secretary predetermined the fate of the Appellant or was prejudicial and notified the whole world the fate of the appellant before and notwithstanding the appellant's appeal thereto.
2. That the presence of the members of the Integrity Committee on both the Respondent's Establishment Committee and the Respondent's meeting negatively influenced the respondent's decision and was in itself unlawful being contrary to the rules of natural justice.
3. That the appellant did not and there is no proof that the appellant did demand or receive money from individuals so purported by the respondent. Neither is there any proof of the appellants falsification of the respondent's documents or at all. The respondents finding are without basis and unreasonable.
4. The appellants did not alter or falsify any documents belonging to the respondent at all. There is no proof that the appellant did so.

Learned counsel for the appellant Mr.Bota filed written submissions in support of the appeal on 29th September, 2010 and did not make any verbal submissions. On the first ground of appeal he submitted that there was a newspaper article showing that the Board Secretary of the Provincial Local Government Appeals Board Mr. S. F. Sakala had given notice to the

public of the dismissal of the appellant and yet he was due to sit in the tribunal that dismissed the appellant. He is the one who signed the letter dated 30th December, 2008 on behalf of the provincial Local Government Appeals Board upholding the dismissal. The letter is on page 22 of the record of appeal.

On the second ground of appeal Mr. Bota argued that it is observable that members of the Integrity Committee also sat in the Establishment Committee before which the appellant appeared to answer charges page 39 of the record indicates that Mr. A. Mwansa was in attendance of the Establishment Committee meeting on 18th December, 2007. He is the one who had written to the appellant on 27th November, 2007 an invitation to appear before the integrity committee as can be seen on page 43 of the record. Mr Bota stated that this meant that the Integrity Committee was both the prosecutor and Arbiter, which is contrary to the rules of natural justice.

Mr Bota argued the third and fourth grounds of appeal together. His contentions were that eh appeals Board affirmed the respondents grounds of dismissal which were stated in the dismissal letter on page 40 of the record of appeal that the appellant was involved in the illegal allocation and sale of plots in Ndeke Township without following laid down established Council procedures which borders on abuse of authority, bribery, corruption and uttering or justifying Council documents. However, there was no proof of the allegations.

Mr Bota pointed out that the letter from the Town Clerk to the Appellant dated 28th November, 2007 which is effectively the interdiction letter on pages 176 to 181 of the record of appeal outlined the plots purportedly allocated by the appellant. Page 180 sets out the amounts of money involved per plot. He submitted that there was insufficient evidence linking any wrong doing to the appellant. All that the respondent had against the appellant as evidence were interview Report Forms, purportedly signed by respective interviewees which are on pages 151,153, 155, 157,159,161, 163 and 165 of the record of appeal.

Mr. Bota further submitted that the Appeals Board's made baseless observations that:

- The dismissal was within the powers of the council.
- Procedure was followed.
- There was sufficient evidence that the appellant was involved in the illegal allocation of plots.
- That the council was justified in taking the penalty.

Mr Bota urged the court to interfere with the Appeals Board's decision on the basis of the following cases:

Attorney General v Ndlovu (1) where it was held that:

> "*where it is unmistakable from the evidence itself and the unsatisfactory reasons given for accepting it, that the trial court could not have taken proper advantage of having seen and heard the witness, this is ground for disturbing the findings of fact."*

In **Attorney General vs Achiume** [(2)] it was held that:

> " *The appeal court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse o made in the absence of any relevant evidence upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make"*

Mr. Bota also cited the case of **Attorney General V Richard Jackson Phiri,** [(3)] which was an appeal from an administrative tribunal comparable to the Appeals Board where he said the supreme Court laid down the law with more precision when Nguluba DCJ said at page 125 that:

> " *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 facts to support the same. Quite clearly, if there is no evidence to sustain charges leveled 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"*

Mr Bota further submitted that the appellants in his exculpatory letter dated 6th December 2007 on pages 183 - 184 of the record pointed out the charges leveled against him. In his letter of appeal he raised specific and pertinent issues (see pp 24-25 of the record) which were glossed over by the Respondent in its response on pages 29 & 30 of the record.

He urged the court to note the appellants explanation on pages 24 to 25 of the record that:
He was a signatory to the Respondent's documents including letter of offer for plots and charge of ownership. There was no proof that the appellant received money from individuals in Ndeke Township. He did not sign anywhere. The interview forms were just statements from individuals without any proof. Several individuals made claims without any corroboration. No altered or falsified documents were ever shown to the appellant. Even the Appellate tribunal did not receive any altered documents. The appellant referred to nonexistent subdivisions. Mr Bota was of the view that all that was unrebutted.

He further submitted that the respondent's process was on inquisition in which anyone who was mentioned by a member of the public to have collected money was by that mere fact condemned as a malefactor whose defence and whose recourse to the academic exercise that could not possibly yield any reprieve no matter what. This is contrary to the law of that: "*he who alleges must prove*" which was affirmed by the Supreme Court in the case of **Kankomba and others v Chilanga Cement Plc** **(4).** He prayed that the appeal be upheld and the respondent be condemned in costs.

Learned Counsel for the Respondent submitted in writing that the secretary of the Local Government Appeals Board did not pre-determine the fact of the appellant, neither did he prejudice the outcome of the appellants cause as the Appeals Board is made up of an uneven number of members which is seven, including the secretary of the Board whose role is merely to record minutes. Mr Mumba stated that the Appeals Board reached its decision by majority vote pursuant to section 100 (1) (a) (b) of the **Local Government Act Cap(1)** which provides:

> "*Any decision of a Board shall require the support of a majority vote of all members present at that meeting of the Boar* …."

a) If upon any question the votes of the members are equally divided, the chairman shall have a casing vote etc."

Mr. Mumba therefore submitted that the secretary of the Board has no power to influence the decision of the Board. It is clear from paragraphs 5 of the affidavit in opposition in opposition to application to admit fresh evidence filed herein on 1st June 2010 which was sworn by Alex Mwansa, that the role of secretary of the Board was performed by a Mr. F. Kalanga as the Secretary of the Board was requested to recuse himself by the appellant in view of the newspaper article page 19 of the record of appeal i.e minutes of the meeting of the Board indicate "Mr. F. Kalanga Secretary."

On second ground of appeal counsel for the Respondent submitted that the dismissal of the appellant was based on findings of fact by the Establishment Committee of the Respondent and finally endorsed by the full council. Mr. Mumba quoted part the minutes of the Special meeting of

the Establishment Committee held in the Council Chambers, Civic Centre, Independence Way on 18th December 2007 at 09:00 hours which are on pages 4 - 6 of the record of appeal as follows:

> "*The Director of Administration reported that the Integrity Committee had conducted its findings regarding illegal allocation of land and the subsequent demolishing of structures in Ndeke. He went on to report that the developers had come voluntarily to give evidence on how they had obtained land from the officers."*

The Director of Administration further stated that officers mentioned as having been involved namely; Messrs. S. Sikaona, B.Mazuba, V. Chizawu, J. Choolwe, Mr.I.Katwishi, T.Mugala, T.Mukasu, F.Sichilongo, A Chalwe, had since been charged and thereafter accorded an opportunity to be heard against the evidence provided by the affected developers.

The Director of Administration concluded by saying that the officers involved all denied having illegally allocated land as evidenced in their exculpatory statement and that in line with the law of natural justice, witnesses were also called to testify.

Upon giving a brief, the chairman requested that that officers involved be called and be given a chance to exonerate themselves from the allegations leveled against them. After dire debate, it was recommended that,

a) Messrs.Sikaona, V.Chazawu, A.Chalwe, J.Choolwe(Mrs), I Katwishi, T.Mugala, F Munkasu be summarily dismissed from services on account of forgery, bribery, corruption, abuse of office, falsifying council documents and failure to observe established procedures.

b) Mr. B. Mazuba was demoted from the position of Assistant Architect to Senior Engineering Assistant on salary scale LAT 4”

Mr. Mumba further submitted that the Appeals Board rightly found that the dismissal was within the powers of Ndola City Council. However, this court may reverse the findings of basis of the case for **Zulu vs Avondale Housing Project**[5] if it is satisfied that the finding were either perverse made in the absence of any relevant evidence or upon a misapprehension of facts or evidence on record.

He argued in the alternative that even if procedure was not followed by the Respondent the dismissal should not be declared a nullity because there was overwhelming evidence that the appellant committed the offence which led to his dismissal. In support of these arguments he relied on the case of **National Breweries Ltd V. Philip Mwenya** [6] where it was held that:

> “*where an employee has committed an offence for which he can be dismissed no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity*”

Mr Mumba added that the Appeals Board does not follow strict court procedures like a court of law, thus it only had to be satisfied that the respondent had followed procedure and acted within powers. Mr Mumba submitted further that both the council and the Appeals Board have powers pursuant to the section 99 and 100 of the Local Government Act[1] all

clause 31 of statutory instrument No.115 of 1996 to discipline erring officers.

On the third ground Mr. Mumba argued that that there was sufficient evidence upon which the tribunals findings were based. Some witnesses confirmed that the appellant demanded and received money from them. To fortify this argument he referred to interview report forms made by the Integrity Committee which are on record.

On the fourth ground Mr. Mumba contended that the appellant used minute number 145/12/04 as an authority for the allocation of plots in Ndeke that number is exhibited on pages 2 and 3 of the Supplementary Bundle of Documents and it has to do with the creation of plots in Masala to be advertised and lock up stalls to be allocated to “Town Boys”. Those minutes have nothing to do with allocation of plots in Ndeke. Therefore the appellant fraudulently used the said minute to disguise his illegal activities. Mr Mumba therefore prayed for the dismissal of the appeal.

Having read the whole record of appeal and having considered the submissions made by both advocates the following are my views:

On the first ground of appeal it is not in dispute that there was a newspaper article in which the secretary of the Local Government Appeals Board was quoted to have said that since council employees had been dismissed from employment on a date before the appellants appeal was heard by the Board. In my view that was not tantamount to predetermination of the appellant’s fate but a true statement that the appellant had been dismissed

by the respondent. Such a statement would not prejudice the appeal. The appellant has not mentioned the ways in which that publication might have prejudiced the appeal. It is evidenced that the Appeals Board had given the appellant a chance to be heard. The Appeals Board did not allow the usual Board Secretary to sit in the meeting where the appellants case was being deliberate because the appellants had requested him to recuse himself. That is why one Mr. F. Katanga had taken his place in that meeting. I accept Mr. Mumba's submissions that the major role played by the secretary of the Board is to write minutes and that the secretary of the Appeals Board Mr. S. F. Sakala signed the letter upholding the dismissal because he was performing his duty.

As regards the second ground of appeal, the appellants contention that a Mr. A. Mwansa sat in the Integrity Committee as well as the Establishment Committee has not been disputed by the Respondent. However, it is clear from the record that the appellant was given an opportunity to be heard at all stages of the disciplinary proceedings. There was ample evidence that he was involved in the illegal allocation of plots and had pecuniary gain out of the illegal transactions. In my view the respondent was not prejudiced by Mr Mwansa's presence in the two committees. As a result he did not complain about that before he was dismissed.

Coming to the third and fourth grounds of appeal, I am applying the case of the **Attorney General v Richard Jackson Phiri**[(3)] and **Zulu v Avondale Housing Project**[(5)]. I *a*ccept Mr Mumba's submission that the Appeals Board was under no obligation to apply strict rules of evidence like a court of law. In my view the appellant had abused his office because he had no

authority at that time from the full council to allocate the said plots and the fact that he obtained money from those transactions which he did put in the Council cofers was rightly interpreted as bribery and corruption I find that there was insufficient proof of falsification of council documents and forgery.

According to the conditions of service for non unionised 1996 on pages 45 to 82 of the record of appeal schedule of offences and penalties, for failure to comply with established procedures, a first offender like the appellant would be severely reprimanded and not dismissed. For abuse of office/bribery and corruption in a first offender should be summarily dismissed. For falsifying council documents, a first offender should be summarily dismissed. Therefore, the appellant was properly penalized for abuse of office/bribery and corruption.

The interview report forms that were relied upon by the Respondent sufficed as evidence against the appellant. It is not in dispute that the complainants did exist. The appellant as complained that he was not allowed to cross examine them, but the record of appeal does not show that he was stopped from cross examining the witnesses. Even if he did not cross examine the witnesses, it is clear that the rules of natural justice were complied with.

It was not in dispute that the appellant was signatory to the respondent's documents including letter of offer for plots. That did not entail that he was empowered to illegally allocate plots. The individuals who alleged that they paid the appellant for the plots illegally allocated to them were actually in

possession of the plots. Some of them had eve started developing the land. So their evidence was corroborated. The appellant failed to show that he was not involved in the said allocations and he did not show that the transactions were genuine. The respondent did not sign anywhere for the money that he unlawfully obtained from those people and did not issue them with official receipts because the transactions were not genuine. He could not put in writing that which he wanted to hide from his employer.

The respondent might have referred to non-existent subdivision. That does not alter the facts that the appellant was guilty of some offence for which he was supposed to be disciplined.

According to section 99 and 100 of the Local Government Act Cap and clause 31 of statutory instrument No. 115 of 1996 the respondent and the Appeals Board have powers to discipline erring officers.

For the foregoing reasons the Appeals Board was on firm ground when it upheld the Respondents decision.

I find no merit in all the grounds of appeal and dismiss the appeal with costs which should be agreed upon or taxed in default of agreement.

Dated this ……..day of ……..2011.

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C.K. MAKUNGU
JUDGE

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