

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2012/HK/164

BETWEEN:

ANORD KABUYANA	-	1ST PLAINTIFF
ANTHONY MALUNGA	-	2ND PLAINTIFF
AND		
ZAMBIA REVENUE AUTHORITY	-	DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 31st day of May, 2013.

For the Plaintiffs: Mr. G. Nyirongo, Messrs Nyirongo and Company

For the Defendant: Mrs. K.H. Ngwira – Legal Officer, Zambia Revenue Authority

JUDGMENT

Cases referred to:

1. Zambia Electricity Supply Corporation Limited v. Muyambango (2006) Z.R. 22,
2. The Attorney General v. Richard Jackson Phiri (1988) (1989) Z.R 121

The Plaintiffs took an action against the Defendant for damages for wrongful and unlawful dismissal, and for payment of terminal benefits accrued to them for the period they served as employees of the Defendant. In the alternative they sought an order of re-instatement. In their joint statement of claim the Plaintiffs pleaded that they had been honest and faithful employees of the Defendant. On or about 2nd August, 2011 the Plaintiffs were suspended from employment for alleged failure to follow laid down channels or procedures and for dishonest conduct on their part. On 22nd August, 2011 their contracts of employment were terminated. On 7th September, 2011 they were both informed that their appeals against dismissal were unsuccessful. They further pleaded that they believed that the Defendant's officers acted maliciously in terminating their

contracts of employment as the Defendant could not prove the alleged disciplinary offences on the part of the Plaintiffs. They stated that following their dismissals the Defendant had refused to pay the Plaintiffs the terminal benefits accrued to them during the period of service.

For the Defendant, it was pleaded that the Plaintiffs' dismissal was as a result of their dishonest conduct. This was after the Defendant's Disciplinary Committee found them guilty of failure to follow established channels or procedures and dishonest conduct. The Defendant pleaded that the procedure set out in the applicable Grievance and Disciplinary Procedures Code was strictly followed and adhered to before arriving at the decision to summarily dismiss the Plaintiffs. The Plaintiffs, in exercise of their right of appeal, appealed to the Defendant's Commissioner General against the decisions to summarily dismiss them; that the Plaintiffs' individual appeals were heard by the Defendant's Appeals Committee which upheld the decision to summarily dismiss them. The Defendant denied that the Plaintiffs' contracts of employment were wrongfully or unlawfully terminated. The Defendant further pleaded that based on the evidence that was adduced before both the Disciplinary Committee as well as the Appeals Committee the charges leveled against the Plaintiffs were proved. Lastly, the Defendant denied that it had refused to pay the Plaintiffs their terminal benefits, but stated that these would be paid less their indebtedness to the Defendant.

It is common cause from the pleadings and evidence adduced at the trial, including the documents produced, that the two Plaintiffs were employees of the Defendant as Security Guard and Revenue Clerk respectively based at Kitwe. On 27th May, 2011 they were individually charged in writing with two offences, namely;

- "1. Failure to follow lawful instructions, established channels or procedures, as per clause 22 of the Disciplinary and Grievance Procedure Code.**
- 2. Dishonest conduct**

- (a). ***Accepting or offering bribe (s) in respect of any Authority business; as per clause 40 Part iv of the Disciplinary and Grievance Procedure Code.***
- (b). ***Corruption – an act or conduct done in exchange for personal monetary or material gain; clause 40 Part v of the Disciplinary and Grievance Procedure Code.***
- (c). ***Abuse of Office – use of one’s position, authority and office resources for personal monetary and material gain; Clause 40 Part ix of the Disciplinary and Grievance Procedure Code”.***

In respect of the 1st Plaintiff, the statement of offence reads;

“This morning, you intercepted a Tax Payer who was on the queue waiting for Tax Payer Services to open. You convinced her that you are in a position to offer the services that she wanted but much faster. Working in conjunction with Mr. A. Malunga (the 2nd Plaintiff), You caused Motor Vehicle Tax Clearance Certificate to a Ms. Sebean Mayimbo owner of Tax No. MUF 593 to be issued. This you did despite knowing full well as a Guard you have no authority or role to play in the issuance (of) a tax clearance. You also are aware that Mr. A. Malunga has no authority to issue a tax clearance certificate. You demanded and received K300,000 from this tax payer knowing full well that Zambia Revenue Authority does not charge for such services or indeed any services at all”

The statement of offence in respect of the 2nd Plaintiff reads;

“This morning, you working in conjunction with Mr. Kabuyana (the 1st Plaintiff) issued a Motor Vehicle Tax Clearance Certificate to Ms. Sebean Mayimbo owner of Taxi No. ACM 5455, Fleet No. MUF 593. This you did despite knowing full well as a Clerk, you have no authority to issue a tax clearance. You demanded and received K300,000 from this tax payer knowing full well that Zambia Revenue Authority does not charge for such services or indeed any services at all”.

Each Plaintiff was required to submit a written exculpatory statement within five working days, which they did. Each of the Plaintiffs was by letter dated 20th June, 2011 invited to and attended the Disciplinary Committee meeting which took place on 28th June, 2011. By letters dated 2nd August, 2011 the Plaintiffs were informed that they had been found guilty of both charges that had been leveled against them, and that management had decided to summarily dismiss them from employment with immediate effect. They were informed of their right of appeal within five working days.

The Plaintiffs appealed to the Commissioner General against their dismissals. The Appeals Committee which was chaired by the Commissioner General heard their appeals on 29th August, 2011. Both Plaintiffs attended before that Committee. The 2nd Plaintiff was also represented at the appeal hearing by the Acting General Secretary of the Zambia Revenue Authority Workers Union to which Union the 2nd Plaintiff belonged. Following the appeals hearing, the Plaintiffs were informed, by letters dated 7th September, 2011 signed by the Commissioner General, that the Appeals Committee had endorsed the decision of the Disciplinary Committee to summarily dismiss them.

The Plaintiffs had produced a copy of the Grievance and Disciplinary Procedures Code which outlines the process of charging and dealing with an erring employee. Clause 4 describes the purpose and principles of the Code as being meant to;

- (a). ensure fair and equal treatment of all employees;
- (b). encourage timely corrective action where the behavior or performance of an employee is unsatisfactory or unacceptable; and
- (c). ensure that the principles of natural justice are applied before an employee is disciplined.

The Code also provides for the process of charging and hearing of the erring employee up to the appeal stage before the Commissioner General's Committee.

With regard to disciplinary offences and penalties, these are provided for in the schedule to the Code. Specific to the instant case, clause 22 creates the offence of **“failure to follow established channels or procedures”**. This carries a written warning for first breach, final warning for second breach, and dismissal for third breach. The offence of **“Dishonest conduct”** is created under clause 40 and carries summary dismissal for first breach. Dishonest conduct is defined as including the following:

“iv – Accepting or offering bribes(s) in respect of any authority business;

V – Corruption – an act or conduct done in exchange for personal monetary or material gain;

ix - Abuse of office – use of one’s position, authority and office resources for personal monetary or material gain”.

The terminal benefits prescribed for an employee who is summarily dismissed are specified at pages 28/29 of the Code as follows;

“Remuneration will be paid up to date of termination with monetary value for accrued leave. Benefits accrued from contributory Pension Schemes and other schemes shall be payable up to amounts so contributed or as prescribed under the company’s pension scheme rules. Staff under non-contributory schemes shall lose all such terminal benefits”.

It is with the foregoing facts in mind that I have to determine whether indeed the termination of the Plaintiffs’ employment was wrongful or unlawful, and whether any damages are due and payable to the Plaintiffs.

According to the 1st Plaintiff himself, his duties as Security Guard were, inter alia, to safe guard the employers property. He used to work from the reception area at the time. On the material day the tax payer approached him and asked him to buy some presumptive

tax receipts for her taxi. She gave him K300,000 cash for that purpose and left for other business around the Authority's Offices. He said before he could leave to go and buy the said receipts, he was summoned to the Assistant Commissioner's Office where he was asked if he knew Ms. Mayimbo, the tax payer in this case. He said he knew her. He was asked what had transpired between him and the tax payer, and he told the Assistant Commissioner about the K300,000 she had given him to buy the presumptive tax receipts for her, but his story was not believed. He was asked to surrender the money, which he did, and he was thereafter charged with the subject disciplinary offences. The 1st Plaintiff wrote an exculpatory statement against the said charges and went through the case hearing and appeal processes which I have already outlined. The 1st Plaintiff claimed that his dismissal was not in good faith considering that he had worked for the Authority for a long time, in fact since February, 1996, and had reached the early retirement age of 50 years though he had not yet applied to be early retired. He said although the Disciplinary Committee had found him guilty of the subject offences, he was innocent.

Under cross examination the 1st Plaintiff said he had been familiar with the work of the various departments in the Authority. He said it was not his duty at the time to issue tax clearance certificates or to sell presumptive tax receipts. He admitted that he was the one who had handed over the tax clearance certificate to Ms. Mayimbo. At the time he did so he did not give her back the K300,000 or the tax receipts. The tax payer went to complain to an Inspector who took her to the Assistant Commissioner.

The 1st Plaintiff said that following his dismissal, he completed a clearance form for him to be paid the terminal benefits. However, he was informed that he still owed the Authority some K4,000,000.

The 2nd Plaintiff said that he started working for the Authority in 1997. His position at the time of his dismissal was that of Clerical Officer and he was reporting to the Senior Inspector of Taxes, a Mr. DANIEL CHIRWA, at the time. At first the 2nd Plaintiff said that he had the authority to sign tax clearance certificates. However, when his attention was

drawn to the offences outlined in the charge sheet, he relented and admitted that he had no such powers. He admitted that he had signed the tax clearance certificate for Ms. Mayimbo when it was supposed to be signed by his supervisor, Mr. CHIRWA. He denied that he had demanded or received the K300,000.

The 2nd Plaintiff was charged with the disciplinary offences already cited, exculpated himself in writing, and went through the case hearing and appeal processes I have already referred to earlier in this judgment.

When he was cross examined, the 2nd Plaintiff said at the time of the alleged offences, he was working under the Large Tax Payer Office. He said Ms. Mayimbo's business fell under the Small Tax Payer Office which was supposed to process her tax clearance certificate. However, he proceeded to process and sign the tax clearance certificate even though he was not mandated to do so. He said following his dismissal he made a request for the clearance form in order to access his terminal benefits but he was told to access the form on the Authority's website. Thereafter he did not pursue the matter, he said, because the case was by then before Court.

Ms. Ngwira, Counsel for the Defendant called one witness, Mr. WILBROAD KATEMA, the Human Resources Manager, to testify on behalf of the Authority. His evidence was more or less a resume of the disciplinary processes that the Authority had gone through in dealing with the Plaintiffs' cases. This was from the records kept of the cases in his office. That evidence was supported by the documentary evidence before Court and already outlined earlier in this judgment. As for the payment of terminal benefits to the 2nd Plaintiff, Mr. Katema said that the computation of benefits had been done and would be paid to the 2nd Plaintiff once he completed the clearance process with the Authority.

At the close of the trial, I invited Counsel to file written submissions, which Defendant's Counsel did and which have taken into account when arriving at my decision. Up to the time of delivering this judgment I had not received any submissions on behalf of the Plaintiffs.

As already stated, the Plaintiffs pleaded wrongful and unlawful termination of their contracts of employment. The burden was upon them to demonstrate in which way the terminations were wrong or unlawful. In my view, upon evaluation of the evidence on record, they have failed to do so.

In my view, it cannot be suggested that there were no grounds upon which the employer could take disciplinary action. There is abundant evidence, even from the Plaintiffs themselves, that the Plaintiffs were guilty of wrong doing. There was a complaint from the tax payer that the Plaintiffs had solicited a bribe from her to expedite the processing of her papers. It was not the job of the 1st Plaintiff to sell presumptive tax receipts or to assist tax payers to purchase said receipts. Neither was it the job of the 2nd Plaintiff to process and sign tax clearance certificates.

These were clearly wrongful acts on their part and fit in the definitions of the offences they were charged with. There was therefore overwhelming evidence upon which the Defendant, through its officers, could act against the Plaintiffs.

Ms. Ngwira cited two cases in support of her client's position, which I accept as relevant in this case.

In the case of ZAMBIA ELECTRICITY SUPPLY CORPORATION LIMITED v. MUYAMBANGO (2006) Z.R. 22, the Supreme Court set out the law thus;

"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".

Further in the case of THE ATTORNEY GENERAL v. RICHARD JACKSON PHIRI (1988) (1989) Z.R 121, the Supreme Court held;

“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 any exercise of powers will be regarded as bad if there is no substratum of fact to support the same”.

On the evidence before me there can be no doubt that the Defendant had the requisite power to take disciplinary action and that there was reasonable basis for taking the action it did. The Plaintiff's claim to innocence does not hold any water in the circumstances of this case.

I have also considered if the procedures laid down in the Grievance and Disciplinary Procedures Code were adhered to. I find that the Code was followed to the letter. The Plaintiffs were, in my view, properly charged, given the opportunity to exculpate themselves, they were heard and found guilty. They were even heard further on appeal when one of them was even represented by an official from the Union. It is not my duty to review the case de novo as if I was sitting as an appellate Court from the Defendant's established internal tribunals. The Plaintiffs' case was fairly dealt with and I find no ground upon which to interfere with the Defendant's action. In short, I find that there was nothing wrongful or unlawful about the Defendant's action of terminating the Plaintiffs' contracts of employment.

There was a half hearted attempt at claiming the terminal benefits. The Plaintiffs knew or ought to have known how those benefits were to be claimed, if indeed either of them was entitled to any. It was by first completing the clearance formalities. The benefits were computed and the computations served on the Plaintiffs' Advocates through the Defendant's Supplementary Bundle of Documents filed into court way ahead of trial. Those computations were not challenged. The 1st Defendant was shown to be owing the Defendant while the 2nd Defendant has a credit balance. Had the Plaintiffs acted properly their benefits would not have arisen as an issue in this case.

The result is that the Plaintiffs' entire action is dismissed for lacking merit. The Defendant shall have its costs, said costs to be taxed if not agreed.

Leave to appeal granted

Delivered at Kitwe in Open Court this 31st day of May, 2013

I.C.T. Chali
JUDGE

