

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**

2012/HP/1541

BETWEEN:

**GIBSON MUNSHA
AND
DUNAVANT ZAMBIA LIMITED**



PLAINTIFF

DEFENDANT

Before Hon. Mrs. Justice M.S. Mulenga on the 29th day of February 2016

FOR THE PLAINTIFF : MS. M. KALELA, LEGAL AID COUNSEL – LEGAL AID BOARD
FOR THE DEFENDANT : MS. P. TEMBO OF MESSRS MWENYE AND MWITWA ADVOCATES

J U D G M E N T

Cases cited:

- 1. Zambia Electricity Corporation Limited vs David Lubasi Muyambango SCZ No 7 of 2006**
- 2. Caroline Tomaida Daka v Zambia National Commercial Bank Limited Plc (2008/HP/0846) (unreported)**
- 3. Chola Chama v Zambia Electricity Supply Corporation Limited (2008) ZR 222**
- 4. Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172**
- 5. Attorney General v Phiri SCZ Judgment No. 2 of 1989**
- 6. National Breweries Limited v Mwenya SCZ Judgment No. 28 of 2002**

The Plaintiff took out Writ of Summons dated 14th December, 2012 claiming the following reliefs:

- Damages for wrongful or unlawful dismissal*
- Loss of salaries and allowances from the date of dismissal to date of Judgment*
- Interest on the said sum claimed*
- Costs*
- Any relief the Court may deem fit*

The Plaintiff states in his Statement of Claim that he was at all material times an employee of the Defendant Company and that the Defendant was a company incorporated under the Companies Act Cap 388 of the Laws of Zambia having its registered office at Lusaka.

That on the 6th November, 2009, the Plaintiff was employed by the Defendant as an Assistant Accountant with effect from 1st January, 2010 on a fixed term contract of two (2) years. On 8th November, 2011 he was charged with the following offences:

- a. *Misappropriation of the Defendant's Company funds amounting to Kwacha Forty Million (K40,000,000.00)*
- b. *Giving false evidence or false information of Dunavant records; and*
- c. *Removing , altering or destroying official records.*

On 21st May, 2010 the Plaintiff caused to be issued the amount of K40,000,000 (K40,000.00 rebased) for crop purchases at Jumbe to Mr. Matthews Phiri, an employee of the Defendant, receipt of which was acknowledged by the said Mr. Phiri by raising a Goods Received Voucher (GRV) number 320251. The Plaintiff reconciled the disbursement of the amount to Jumbe based on the GRV by raising the Stock Movement Voucher (SMV) number 31960. As to the charge in paragraph (b), it was alleged that the Plaintiff, on 26th and 27th May, 2010 purported to have sent the amount of K100,000.00 to Petauke branch of the Defendants, which money was not received at Petauke. However, after cash reconciliations were

- prepared by the Plaintiff there was no indication of the purported transfer of K100,000.00 to Petauke.

With regard to the missing documents that were kept in the Plaintiff's office, the Plaintiff will show at trial that the Defendant's other employees had access to the Plaintiff's office making it difficult to ascertain the circumstances under which the said documents went missing. The office being unrestricted, the loss of the documents could not be attributed to him solely.

On 7th November, 2010, the Defendant convened a disciplinary hearing at which the Plaintiff explained the whereabouts of the K40,000.00 and requested for an adjournment of the proceedings to enable him retrieve the goods received voucher (GRV) from Jumbe which he had issued to Mr. Phiri. The Plaintiff's request was denied. Thus based on the charges leveled against him, he was summarily dismissed from employment with effect from 1st January, 2011 and therefore the Plaintiff has suffered loss and damages and claims the above stated reliefs.

In its Defence dated 20th February, 2013, the Defendant states that the Plaintiff ceased to be its employee on 1st January 2011. The Defendant admits that the Plaintiff was charged and a disciplinary hearing conducted and adds that the Plaintiff duplicated the transaction relating to the sum of K40,000.00 and recorded the same to have occurred twice on 21st May, and 28th May 2010 when

- in actual fact the transaction only happened once. Further, that the Plaintiff agreed that the sum of K40,000.00 was a duplication as movement of the money only took place once on 21st May, 2010 and that 28th May, 2010 was the date when the reconciliation was done. That it was agreed that one transaction had to be cancelled, in particular the sum of K40,000.00 recorded on 21st May, 2012 and the Plaintiff in the presence of the Defendant's seasonal auditors and stores clerk from Jumbe/Mfuwe Mathews Phiri proceeded to cancel the transaction relating to K40,000.00. The Plaintiff later reinstated the duplicated entry of the sum of K40,000.00 which resulted in the Defendant's loss of the sum of K40,000.00 which sum the Plaintiff misappropriated.

As regards the charge of giving false information, Defendant states that the Plaintiff did in fact initially report through his crop funds reconciliation module that he had sent the sum of K100,000.00 to Petauke when in fact not and that he only changed his report when he was queried and informed that Petauke had refused receipt of the sum of K100,000.00 from the Plaintiff. Further that the Plaintiff never shared the keys to his office and safe with anyone. That the Plaintiff is not entitled to the reliefs sought.

The Defendant states in its Counterclaim that the Plaintiff was employed on a two (2) year fixed contract as an Assistant Accountant.

- The Defendant repeats what is stated in the defence regarding the K40,000.00 which the Plaintiff duplicated and unjustifiably reinstated after the same was canceled with his agreement. The Plaintiff misappropriated the Defendant's money aforementioned and in order to cover up his misconduct recorded that he had sent the sum of K40,000.00 twice when he had only sent it to Jumbe/Mfuwe once. That the Defendant has on a number of occasions reminded the Plaintiff to pay back the Defendant's funds amounting to the sum of K40,000.00 but the Plaintiff has to date failed or neglected to do so and the Defendant has thus suffered loss as follows:

- a. *Loss of use of the sum of K40,000.00*
- b. *Loss of opportunity to invest the said sum of K40,000.00*
- c. *Loss of funds by way of costs and expenses incurred in attempts to recover the said sum.*

And the Defendant counterclaims the following reliefs:

- i. *Payment of the sum of K40,000.00 from the Plaintiff being the sum the Plaintiff owes the Defendant*
- ii. *Interest at the current commercial bank lending rate on the amount in (i) from 7th January, 2011 until full payment*
- iii. *Any other relief the court may deem fit or necessary and*
- iv. *Costs of and incidental to this action.*

The Plaintiff in his Defence to counterclaim dated 27th May, 2014 states that the Defendant employed him initially as Internal Audit Officer on a one year fixed contract at the Defendant's headquarters and was later transferred to Chipata office in the capacity of Assistant Accountant running the Chipata accounts office. The

Plaintiff disputes the counterclaim to the extent that the transaction of 21st May, 2010 involving K40,000.00 was different and independent from the one of 28th May, 2010 in that the former transaction was conducted through an intermediary in the name of Mr. Msanivute Sakala who confirmed this in writing. The later transaction was conducted between the Plaintiff and Mr. Mathews Phiri.

At the trial the Plaintiff testified that he worked for the Defendant as Assistant Accountant. His job entailed preparing books of accounts, paying wages and releasing operations funds and reconciliation of books of accounts and carrying out stock taking and disbursing crop funds to pay masters and withdrawing funds from the Bank.

In July 2010, when he was doing reconciliations, he discovered that the crop fund of K40,000.00 was outstanding under Mr. Matthwes Phiri paymaster for Jumbe/Mfuwe shades. He asked why Mr. Phiri was holding on to the money, but Mr. Phiri denied receiving the moneys. He called his supervisor Mr. A. Banda and explained and he called the internal auditors. The auditors discovered that the one who took the K40,000.00 on to Jumbe was Msandivute Sakala. The Plaintiff produced goods received vouchers (GRV) number 320251 prepared by Mr. Mathews Phiri to acknowledge receipt of the funds as produced on page 2 of the Plaintiff's bundle of documents.

- That in October 2010 the internal auditors asked Mr. Sakala how he was involved in the handling of the K40,000.00 and on 8th November, 2010 he received the charge forms signed by K Bakasa, the Agricultural Regional Manager produced on page 1 of his bundle of documents. He wrote an exculpatory statement and on 12th November, 2010 he received a letter inviting him for disciplinary case hearing. Further, on 7th December, 2010, he received a suspension letter as shown on page 9 of the Plaintiff's bundle of documents.

At the hearing on 28th December, 2010, he asked for a report which stated that he sent K100,000.00 to Petauke and since the report was not available during the hearing, the chairman adjourned the meeting for 15 minutes for them to go and get the document as they said it was on file. It took one hour for them to bring the cash utilization reconciliation and this was dated 28th July, 2010 but was set printed on 20th the December, 2010 by Mr. Mwanza. He told them that the same was just prepared by Mwanza and that they were trying to victimize him. They then called Mathews Phiri to explain the K40,000.00 who insisted that he never received the K40,000.00 for 21st May, 2010 but only received the K40,000.00 dated 28th May, 2010.

The hearing did not conclude on that day as they finished at midnight. The following day, he received a letter demanding that he pays the K40,000.00 within three (3) weeks failure to which he

- would face legal action. The letter appears at page 10 of the Plaintiff's bundle of documents. Further on 14th January, 2010, he received the summary dismissal letter as it appears at page 1. He then appealed against the dismissal out of time on 27th May, 2011 and this was denied as per response at page 12. Hence the court proceedings seeking an order of compensation for wrongful dismissal and other expenses such as repatriation as he was recruited in Lusaka.

Under cross examination the Plaintiff stated that his first contract was in May 2008 and he signed another contract in 2009. It was not a fixed contract for two years. There were moneys on account of Mr. Mathews Phiri that were not accounted for. He admitted having seen the cancellations of a total of K40,000.00 on 21st May, 2010 as appearing on page 5 but denied having made the cancellation. He denied having had sight of the document at page 29 of the Defendant's bundle of documents wherein Mathews Phiri disputed having received money and his explanation was that he signed on 28th May for the money he received on 21st May.

He admitted having written the report on page 28 of the Defendant's bundle of documents on 16th October 2010. His letter did not talk of 28th but 21st as that was the bone of contention. On 21st May the Plaintiff gave the money to Mr. M. Sakala and he signed at the back of the paymaster's register. The Plaintiff did not exhibit the register. That it would be false to say there was no record of transaction on

- 21st May as he signed the goods received register. That the one who collected the money signed at the back but he was refused to get a copy of the same.

The Plaintiff stated that there were three disciplinary charge forms appearing at pages 33 to 35 of the Defendant's bundle of documents. At page 34, the charge is removing, altering or destroying official records. This was under an SMV which went missing under unexplained circumstances. He still maintained that the SMV was not important as it had nothing to do with reconciliations. He later acknowledge that the SMV was used by third parties to reconcile with the GMV. He also maintained that the transactions of 21st and 28th May were separate and not that the transaction of 28th May was to correct or record the amount of 21st May as per Phiri's explanation on page 29 of the Defendant's bundle of documents. His explanation on this charge in the exculpatory letter is that he did not remember seeing the SMV book in his office and someone could have taken it. He went on to state that he used to keep SMV books but he did not have the SMV book as it was not important. He did not have sight of the report generated over his hearing and was surprised to see it in court as the hearing was not yet over.

When referred to the disciplinary hearing minutes on pages 36 to 40 of the Defendant's bundle of documents, he stated that he refused cancelling the transaction and he did not reinstate it as a

- document missing cannot resurface. The GRV did not resurface as it never went missing. As regards paragraph 6 of the Statement of Claim, the Plaintiff maintained that the SMV was not important. He reconciled using paymaster. He read the charges and exculpated himself the same September and the disciplinary hearing was in December 2010. He did not go with the document for the K100,000.00 because they did not ask for it. The two exculpatory letters on the two charges of misappropriation and giving false information were not before court but he presented them to his advocates. He did not know the penalty or sanctions for the offences he was charged with. The hearing did not conclude. He appealed against the summary dismissal and not the case hearing.

In re examination the Plaintiff stated that the two cancellations on paymaster register were not done by him but the internal auditors who took the register. The paymaster register is a big book and he was told not to copy anything after handing over that is why the documents where Sakala signed was not before court.

DW was Airubi Mwanza, the Credit Control Officer who testified on behalf of the Defendant that at the time of the event he was employed as Internal Auditor and he is the person who went to Chipata to audit the Plaintiff as the accountant as part of his routine duties to check on the crop fund utilization. Annual audits are normally conduct countrywide audit at all the offices. The idea

- behind reconciliations is to tie in the amount of funds disbursed to the offices against what is paid to the farmers.

In the case of Chipata, he was availed the necessary documents being the bank statements, paymaster reconciliation forms, accountant and paymaster register, the SMV and GRV. He compared the details of moneys sent with the bank statements and also compared the moneys which the Plaintiff withdrew from the bank and what was paid out to the farmers. From the bank side everything was correct. However, there was a shortage between what the accountant (Plaintiff) withdrew for payment to farmers and what was paid to the farmers. The overall difference or shortage was K97,083.60.

During the course of his investigation there were two transactions that had a problem, these were dated 21st May, 2010 for K40,000.00 and 28th May, 2010 for K40,000.00. That what happened was that on 21st May, 2010 the Plaintiff sent K40,000.00 to Jumbe and Mfuwe sheds meant for farmer payments. As per company requirements and procedure instructed to accountants that money was supposed to be paid on a document called stock movement voucher (SMV) and to be recorded in the master register where both the Plaintiff and person receiving the money sign to acknowledge transfer of funds. In addition, whenever that money is recorded properly in the account register and SMV, the person receiving the money is supposed to issue the GRV form to

acknowledge receipt of funds. However on 21st May, 2010 the money was only recorded on the SMV and not in the payments register. The money was properly received and a GRV was raised.

When the paymaster, Mathews Phiri, who was supposed to reconcile the K40,000.00 came to reconcile with the Plaintiff on 28th May, he discovered that the money was not recorded in the paymaster register. At that point he requested the Plaintiff to show him the record where the money was initially recorded. The Plaintiff went to paymaster register and showed Mathews Phiri where that information was transferred but it was not signed by Sakala who gave the paymaster the money as shown on page 1 of the Defendant's bundle of documents. The reconciliation became a problem and they decided to sign a fresh transaction on 28th May, 2010. He explained that if the transaction was left just like that it was going to be a duplicate if not signed. That the Plaintiff, paymaster Mathews Phiri and Joel Manda who was the seasonal internal auditor then agreed to cancel the 21st May transaction and the reconciliation was done on 28th May.

However in October 2010 when DW went back to the regional office to have a final reconciliation report, he discovered that the cancelled transaction which was indicated as duplication of 21st May was reinstated back as shown on page 25 of the Defendant's bundle of documents. That as a result of the reinstatement it caused a variance of K40,000.00 from the Plaintiff's point of view.

He asked the Plaintiff the reason he decided to reinstate a duplicated transaction which was cancelled and the Plaintiff said he had new evidence to show that the transaction was not a duplicate but a valid one. He requested the Plaintiff to give him the new evidence. Therefore, he requested for the SMV from the Plaintiff since it was kept by him and the GRV so that they could compare the records including the payments register. The Plaintiff said he did not have the SMV where the transaction was recorded. The SMV book was supposed to be kept in the company safe just like any other documents kept by the Plaintiff as accountant, locked under safe and key and the Plaintiff was the custodian of the safe keys in Chipata.

That since the Plaintiff said that the document was missing DW asked if he shared the keys with anybody and he responded that he did not but that he kept the key himself. He further asked the Plaintiff how the document went missing and he responded that he did not know which devil took the document from the safe which was locked. They inspected the safe to check if it had damages indicating forced entry or opening but it was intact. They also checked the paymaster register to see how it was recorded. They found that it was not initially recorded as required. He asked the Plaintiff why he did not record the transaction on the initial page as required but the Plaintiff remained quiet. At that point DW called the two witnesses who were present when the transaction was cancelled that is Mathews Phiri, the paymaster, and Joel Banda,

the internal auditor. He asked them and they said the transaction was a duplicated transaction that the Plaintiff did not have the required document and so they could not continue with the transaction.

DW then gave a report to management on his findings highlighting the K40,000.00 which was not accounted for. After that management called the Plaintiff and explained on the audit findings. He was given a charge letter to exculpate himself which he did. The Plaintiff was charged with three charges, namely, misappropriation of company funds, giving false accounting records and uttering information on company records. Under the disciplinary code they were classified as class 3 actions which warrant summary dismissal when one is found guilty. A hearing date was then set.

During the hearing, DW was in attendance as the witness and the one who investigated the matter. It constituted the chairman, the charging officer, secretary, the Plaintiff and two panel members and the representative the accused chose who was part of the company. The attendance is reflected in the minutes at page 36 of the Defendant's bundle of documents. DW summarized the proceedings by stating that the Plaintiff was asked to express himself freely on why he was not guilty. After the facts and findings were produced, the committee found him guilty over the three counts or charges based on the evidence and facts before the committee. The Plaintiff

was given a summary dismissal and an opportunity to appeal within 24 hours. He never appealed within the provisions of the code despite receiving the dismissal letter as reflected at page 43 of the Defendant's bundle of documents. The Plaintiff was then required to pay back the money failure to which action would be taken. DW maintained that the Plaintiff should give back the money he misappropriated that is the K40,000.00.

Under cross examination DW testified that there was an overall shortage of K97,083.00 and the K40,000.00 was part of this difference. An SMV was prepared for the 21st May transaction which shows that it was properly done. The paymaster register where it was cancelled was there as reflected on page 25 of the Defendant's bundle of documents but DW did not see the GRV and SMV. The Plaintiff was the only person who had access to the safe where all the documents were kept.

DW stated that he prepared the audit report in June 2010 but he did not avail the report to the Plaintiff. The report was however given to the panel. DW was aware of the cash utilization reconciliation prepared by the Plaintiff under which K100,000.00 was sent to Petauke. Page 25 of the Defendant's bundle of documents was evidence that the K40,000.00 was missing. The person who takes the money does not issue any document. It is the Plaintiff who was supposed to issue SMV and Mathews signed the

GRV indicating he received the money but it was not indicated in the accountant's register.

That the transaction of 21st May was the same as the one of 28th May hence the duplication that was there. On 21st May, the money was received by Mr. Phiri. The transaction was reconciled on 28th May. This was not put in writing. In the exculpatory letter, the same was mentioned. There was indication that the transaction was cancelled at page 1 which shows the amount as K40,000.00 in K20,000.00 by 2. The transaction of 21st May was signed for by the Plaintiff as indicated on page 3. Page 25 is electronic but is supposed to reflect on the physical copy.

The Plaintiff was told to bring additional documents if he had any. Other employees had access to the Plaintiff's office whenever they went to collect money. He denied that the Plaintiff's request to adjourn the meeting was denied. Mathews Phiri and Msanivute Sakala were no longer working for the Defendant

The Defendant's advocates file submissions dated 22nd December, wherein it is submitted that the issues for determination before this court are as follows:

- i. *Whether the Plaintiff was wrongfully and unlawfully dismissed by the Defendant and whether he is entitled to damages in respect of the same;*
- ii. *Whether the Plaintiff is entitled to loss of salaries and allowances from the date of his dismissal to the date of Judgment and or any other relief*

- iii. *Whether the Defendant is entitled to any relief and costs from the Plaintiff.*

Under the first head it is submitted that section 36 of the Employment Act Chapter 268 of the Laws of Zambia highlights some of the ways in which a contract of employment may be terminated. Further, that in line with the case of **Agholor Cheeseborough Ponds (Zambia) Limited (1976) ZR 1** it was held that:

"It is trite law that a master can terminate a contract of employment at any time even with immediate effect and for any reason. If he terminated outside the provisions of the contract then he is in breach thereof and liable to damages for breach of contract. To dismiss an employee is altogether a different matter...where however a master dismisses a servant, he terminates the contract summarily without notice or on the grounds of misconduct, negligence or incompetence. If such grounds are justified, the servant forfeits the right to any notice whatsoever and to a number of other benefits."

That it is trite law that at common law an employer may terminate a contract of employment for any reason even an unfair one. However, where an employer dismisses an employee, he must justify the dismissal and if there are disciplinary procedures that have to be followed before an employee may be dismissed, the employer must adhere to them as failure to do so may entitle an employee to damages for wrongful dismissal.

The Supreme Court in the **Zambia Electricity Corporation Limited vs David Lubasi Muyambango SCZ No 7 of 2006 at page 22**, guided on what should be considered when dealing with a claim for wrongful dismissal 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."

Counsel surmises that from the foregoing, the court when deciding a claim for wrongful dismissal is only invited to consider two issues: firstly, whether there was the necessary disciplinary power and secondly if the same has been exercised properly. It is argued that on the facts of this case, the committee that presided over the Plaintiff's case was properly constituted and it had the requisite disciplinary power. Clause 5 at page 22 of the Defendant's Disciplinary Procedure Code with the aid of clause 2.1 exhibited in the Defendant's Supplementary Bundle of documents, on the constitution of the disciplinary committee stipulates as follows:

"The disciplinary hearing committee shall consist of a nominated chairman and two management staff who will be panelists. In attendance will be the charging officer, the Human Resource Representative and the accused person with his local representative..."

DW1 testified that the panel that presided over the Plaintiff's case was as listed in the minutes and a perusal of the same will confirm that the committee was properly constituted in accordance with the preceding clause and as such, had the necessary disciplinary power. Further clause 5.2(ii) of the Disciplinary Code authorizes the disciplinary committee to impose any penalty provided for in the disciplinary code where guilt is proven.

That on the issue of whether the power was exercised properly, the Plaintiff on his own admission told this court that he was charged

and given an opportunity to exculpate himself which he said he exercised. He was served with the notice of disciplinary proceedings and he attended his hearing. He however contends that the proceedings were not concluded and that as such he did not get a chance to call his witness Mr. Sakala. He also alleged that he was not given an opportunity to retrieve the GRV which had previously been missing during the reconciliation and which would prove the transaction on 21st May, 2010 was valid. On the other hand the Defendant's witness told the court that the hearing was conducted in accordance with the disciplinary code. He testified that the charge was read out to the Plaintiff as well as the facts. He was given an opportunity to tell his side and the company was equally given the opportunity to present its case. After the decision to dismiss him was made, he was given the right to appeal. He was also allowed to retrieve the GRV at his request. Further it is submitted that the Plaintiff was afforded a hearing in accordance with the disciplinary code and his assertion that he was not is baseless. The Plaintiff did not at any time challenge the proceedings of the disciplinary committee and this is evident from the fact that the Plaintiff has not even exhibited his letter of appeal which appeal was denied as it was submitted late.

Furthermore, it is submitted that the Plaintiff was not being truthful when he stated that he was not allowed to present the GRV. Firstly, he knew the case that was made against him and it was thus odd that he would leave the very piece of evidence that

would apparently prove his innocence. Further page 34 of the Defendant's bundle of documents, the charge form, the Plaintiff was being charged for removing, altering and destroying the SMV which went missing in his custody. What was in issue was the SMV and not GRV. Thus the GRV was not in issue and it being produced or otherwise was immaterial at the hearing. This document was never produced at the disciplinary hearing and was also not produced in court.

That having established that the Defendant followed its procedure, counsel turned to establish whether the facts could justify the decision made. The case of **Caroline Tomaida Daka v Zambia National Commercial Bank Limited Plc (2008/HP/0846) (unreported)** was referred for the following proposition:

"Once the correct procedures have been followed by the disciplinary bodies or organs of an employer, the only question which can arise for the consideration of the Court based on the facts of each case, is whether there was a substratum of facts established to support the disciplinary measures."
(emphasis theirs)

It is submitted that the Defendant dismissed the Plaintiff after it found him guilty of all the three offences he was charge with. DW in relation to the charge of removing, altering or destroying official records, testified that the Plaintiff was the custodian of the keys to the safe where this document as well as other important source documents should have been stored. The Plaintiff's claim that he shared the keys to his office and thus cannot be blamed for the missing SMV cannot stand.

Secondly, on the charge of misappropriation of company funds amounting to K40,000.00, it is evident that the Defendant during its hearing was entitled to rely on the evidence of Mr. Mathews Phiri and DW who had been present when the Plaintiff and Mr. Phiri among others had agreed to cancel the transaction of 21st May, 2010 on account of duplication. On the evidence presented during the hearing and during trial, the documents that were vital for reconciliation purposes, in particular the SMV and GRV were missing and though the GRV resurfaced, the SMV has still not been located and as such the transaction of 21st May, 2010 could not be validated. The Plaintiff alleged that the SMV was not necessary but a perusal of paragraph 6 of his statement of claim and DW's evidence show the converse. The Defendant's bank statement showed that K40,000.00 had been withdrawn from its account but the crop utilization fund revealed that the money had not been received by the farmers who were the intended recipients.

Lastly on the charge of giving false information or evidence, DW testified that the Plaintiff was the author of the report that was generated indicating that K100,000.00 had been sent to Petauke. In view of the foregoing and a perusal of clauses 45, 49 and 55 of the Disciplinary code shows that the offences the Plaintiff was found guilty of were all class three offences and the penalty of being found guilty of each of them was dismissal.

That having shown that the Defendant was justified in dismissing the Plaintiff, any procedural irregularities that may have been alleged by the Plaintiff would still not fault the decision that was made based on the decision of the Supreme Court in the case of **Zambia Electricity Corporation Limited v David Lubasi Muyambango SCZ No. 7 of 2006** at page 22:

"Where it is not in dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is dismissed, no injustice arises from the failure to comply with the laid down procedure in the contract and the employee has no claim on the ground for wrongful dismissal or a declaration that the dismissal was a nullity."

That having shown that the Plaintiff was dismissed in accordance with the contract of employment, the disciplinary procedure code and the law, he is not entitled to damages for loss of salary and allowances from the date of dismissal to date of Judgment as stated in the case of **Chola Chama v Zambia Electricity Supply Corporation Limited (2008) ZR 222** wherein it was held that:

"During the period that an employee is on termination there is no consideration there to justify paying the former employee as it would be unjust enrichment."

Further that in any event, an employee whose contract of employment has been terminated be it wrongly, which the Defendant denies, has an obligation to mitigate his loss by finding another job.

That having shown that the Plaintiff's contract of employment was properly and lawfully terminated, he is not entitled to any of the reliefs sought and costs. On the other hand, the Defendant has

shown through the evidence of DW and the documentary evidence that the Plaintiff withdrew K40,000.00 from its account between 21st and 28th May, 2010 but failed to account for it. Following the termination of his contract, the Defendant made a demand for him to refund it the money he had misappropriated but the Plaintiff has to date failed or neglected to pay it back. The Defendant prays that the Plaintiff be ordered to pay back the money he misappropriated as prayed in the Counterclaim.

I have duly considered the evidence on record and the written submissions filed by the Defendant.

Findings of facts

I find as facts that the Plaintiff was serving under a contract of employment produced at pages 1-5 of the Defendant's supplementary bundle of documents dated 6th November, 2009 for a fixed period of two (2) years with effect from 1st January, 2010. The Plaintiff was based in Chipata at the time of the dismissal in issue. The Disciplinary Code and Appeals Procedure at pages 6 to 29 of the Defendant's supplementary bundle of documents was the one applicable to the Plaintiff.

On 8th November, 2010 the Plaintiff was served with three (3) charge forms for the offences of misappropriation of funds, removing, altering or destroying official records and giving false information regarding the K100,000.00 allegedly sent but not received by

Petauke branch. All these charges fall under category 4 of offences in the disciplinary code which is headed as dishonest conduct. The penalty for the first breach of each of these offenses is summary dismissal.

After being served with the charge sheets, the Plaintiff exculpated himself in writing but has only produced the exculpation in letter for the third offence of giving false information. A disciplinary hearing was held on 20th December, 2010 whose procedure and composition complied with the Disciplinary Code and Appeals Procedure document as also ably submitted by the Defendant's counsel. The Plaintiff was heard on those charges and he had a representative present. DW and Mathews Phiri, among others, gave evidence and the Plaintiff was given opportunity to respond. After hearing the parties, the disciplinary committee found the Plaintiff guilty on all the three charges and recommended that he be summarily dismissed and made to pay back the K40,000.00 shortage he had incurred or face legal action. The Plaintiff was asked to pay back the K40,000.00 as per letter at page 10 of the Plaintiff's bundle of documents. The Plaintiff did not do so and was subsequently summarily dismissed on 14th January, 2011 as per letter on pages 11 and 43 of the Plaintiff's and Defendant's bundle of documents, respectively.

The disciplinary committee's findings among others were that the Plaintiff:

“Cancelled the 21st May, 2010 transaction making it invalid because he considered the 28th May, 2010 one to stand for the one of 21st May. He did not record the 21st May, 2010 transaction both in the case register and at the back of the cash register as his custom was. He deliberately decided to hide the SMV to destroy all pieces of evidence on all money transactions. He failed to comment on who could be given responsibility for losing the SMV as he was the custodian of the book. He failed to produce the original document he sent to SIA to prove his innocence that he did not falsely declare having sent K100,000.00 to Petauke.”

The Plaintiff in his statement of claim and evidence has sought to argue that the charges against him were not proved because Mr. Mathews Phiri acknowledged receipt of K40,000.00 by raising the GRV number 320251 which he reconciled with the SMV number 31960. He however acknowledged that the K40,000.00 was unaccounted for on the account of Mr. Mathews Phiri. Secondly, that the loss of documents could not be solely attributed to him because his office was unrestricted as other employees had access to it. Thirdly, that after cash reconciliations prepared by himself, there was no indication of the purported transfer of K100,000.00 to Petauke.

These arguments by the Plaintiff were effectively negated by the evidence of DW who stated that there were two transactions each involving K40,000.00 in the case register dated 21st May, 2010 and 28th May, 2010. That when confronted by Mr. Mathews Phiri, the Plaintiff in the presence of the said Mathews Phiri and Joel Monda agreed and cancelled the 21st May transaction which was not signed for and the parties then signed a fresh transaction for reconciliation purposes on 28th May, 2010. That however, in October, 2010 DW

found that the Plaintiff had reinstated the cancelled transaction which was agreed to have been a duplication. The reinstatement appeared on the computer statement at page 25 of the Defendant's bundle of documents. The Plaintiff failed to provide the new evidence to warrant the reinstatement of the cancelled transaction by way of the SMV and corresponding GRV.

Considering the above, the fact that it is not in dispute is that only one transaction involving the payment of K40,000.00 was proved by way of the SMV number 319601 with the corresponding GRV number 320251. This transaction was supposed to be for 21st May, 2010 but the entry could not be completed as the person Msandivute Sakala, who had received and transmitted the money to Mr. Mathews Phiri had not signed or was not made to sign by the Plaintiff contrary to normal procedure. The incomplete entry over the 21st May transaction was then agreed to be cancelled by the Plaintiff in the presence of Mr. Phiri who had issued the GRV and the fresh entry of 28th May 2010 was entered and signed as a reconciliation. The Plaintiff, both at the disciplinary hearing and in Court, did not provide any evidence being the requisite SMV and GRV to support his later reinstatement of the cancelled duplicate transaction involving a second K40,000.00 which is indicated as still outstanding on Mr. Phiri's account statement at page 25 of the Defendant's bundle of documents. The charge for misappropriation of funds was therefore justified and proved against the Plaintiff.

- The second charge of removing, altering or destroying official records relating to the SMV that went missing in unexplained circumstances was also justified and proved. The Plaintiff and DW both stated that the Plaintiff was the custodian of the SMV and other documents and that the SMV was a document that was also used for reconciliation purposes as it was a document supporting payment. DW stated that the SMV was supposed to be kept in the company safe under lock and key like the other documents. That the Plaintiff admitted that he was the sole custodian of the keys to the safe and there was no evidence of the safe having been tampered with. This shows that the responsibility to keep the documents safe was entirely on the Plaintiff and he could not even shift that to people who accessed his office to use the phone. Those people have not been shown to have had keys to the safe where the missing documents were supposed to be kept. The Plaintiff's argument that anyone could have taken the documents lacks merit in the absence of reasonable and convincing evidence.

Regarding the third charge of giving false information, the parties have not provided the said correspondence under which the Plaintiff stated that he had sent K100,000.00 to Petauke but which was not received. The minutes of the disciplinary meeting however talks of documents that were produced after the meeting was adjourned for them to be availed. Based on the case of **Zambia Electricity Corporation Limited v David Lubasi Muyambango** cited above by the Defendant's counsel this court is not supposed to review as an

- appellate tribunal what the disciplinary committee had done. However, this does not preclude me from finding that nothing much has been provided before me on this aspect to arrive at a meaningful position on whether this was justified and proved or not. Nevertheless, even if it is taken that this third charge was not sufficiently proved, it does not change anything in terms of the Plaintiff's case as the other two charges have been found to have been justified and proved and each one warrants a summary dismissal.

Plaintiff's claim

The Plaintiff's reliefs all hinge on the main claim for damages for wrongful or unlawful dismissal. The burden of proof in civil matters is on the Plaintiff to prove his allegations. In **Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172** where the proposition was applied to an action for unlawful dismissal like this current one, it was stated that:

"I think that it is acceptable that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove the allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of his opponent's case."

Wrongful dismissal is where an employee is dismissed contrary to or in breach of the relevant provisions of the contract of employment. The authors of Modern Law of Employment, G.H.L. Freidman, Stevens and Sons, 1963 state at page 483 that:

"where the employee has been guilty of 'moral misconduct, either pecuniary or otherwise, willful disobedience or habitual neglect, the employer may dismiss him summarily, without giving the employee either the appropriate notice or any wages in the place of notice."

The case of **Attorney General v Phiri SCZ Judgment No. 2 of 1989** was cited by the Defendant wherein it was held 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 exercises of powers will be regarded as bad if there is no substratum of fact 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."

"The trial court does not sit as a court of appeal from the decision of the disciplinary body or to review its proceedings or to inquire whether its decision was fair or just or reasonable...as the court ought to have regard only to the question whether there was power to discipline and whether such power had been validly exercised."

In **National Breweries Limited v Mwenya SCZ Judgment No. 28 of 2002**

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 is a nullity; having properly been dismissed, the Respondent cannot be deemed to have been retired and he is not entitled to any retirement benefits."

Considering the facts of this case as found above, the Plaintiff was properly charged and given opportunity to exculpate himself. The Plaintiff was later heard by the disciplinary committee which was duly constituted in accordance with the Disciplinary Code and Appeal Procedure and which appropriately exercised the power to meet out the disciplinary measures provided for.

As stated above, the penalty for each of the three offences the Plaintiff was charged with was summary dismissal.

The Plaintiff has thus failed to prove that his dismissal was wrongful or unlawful and his entire claims or reliefs sought fail and are hereby dismissed as lacking merit.

Defendant's counterclaim

On the facts of this case as discussed above, the Defendant has proved that the Plaintiff failed to account for K40,000.00 or to reconcile the said shortage. Clause 2.4.5. of the Disciplinary Code and Appeal Procedure on summary dismissal provides under paragraph 3 that:

“Employees who are summarily dismissed will forfeit all accrued benefits and may be subject to further recovery of loss incurred by the company as a result of their actions which they were found with a case to answer.”

Based on the above clause, the disciplinary committee was in order or justified to recommend that the Plaintiff must pay back the K40,000.00 as the money owed by the Plaintiff.

The Defendant has proved its counterclaim and I order that the Plaintiff pay the Defendant K40,000.00 with simple interest at 10% per annum from 20th February, 2013 which is the date of the Defence and counterclaim to date of Judgment and thereafter at the average Bank of Zambia lending rate until payment.

Costs are for the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 29th day of January, 2016



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M.S. MULENGA
HIGH COURT JUDGE