

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP/393/2016

BETWEEN:

MASHEBE MBINGA

AND

AFROX ZAMBIA LIMITED



COMPLAINANT

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 10th day of August, 2017

Appearances:

For the Complainant: Mr. M. L. Mukande S.C. of Messrs. M. L. Mukande & Co.

For the Respondent: Mrs. P. M. Kapaipi of Messrs. Abha Patel & Associates

JUDGMENT

Legislation referred to:

1. *The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia*

Cases referred to:

1. *Zambia Consolidated Copper Mines Limited vs. James Matale (1995 – 1997) Z.R. 144*

2. *Amiran Limited vs. Robert Bones (Appeal No. 42 of 2010)*

3. *Attorney General vs. Richard Jackson Phiri (1988 -89) Z.R. 121*

4. *Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango (2006) Z.R. 22*

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1.0 **ORDER**

1.1 For the reasons I shall give in my judgment, I order the following:

- (a) The claim for damages for wrongful termination fails and is dismissed;
- (b) The claim for reinstatement with full benefits fails and is dismissed;
- (c) Each party to bear their own costs.

4.0 **COMPLAINANT'S CASE**

- 4.1 On 23rd August, 2016, the Complainant filed a Notice of Complaint accompanied by an affidavit in support against the Respondent.
- 4.2 The grounds on which the Complaint was presented were that the decision by the Respondent to terminate the Complainant's Contract of Employment was done in bad faith, thus the termination was wrongful.
- 4.3 At trial only the Complainant gave evidence on oath to support her case.
- 4.4 The summary of her evidence was that, she was employed by the Respondent on 22nd May, 1995 as a Sales Clerk. She was later promoted to Sales Centre Supervisor and based at Lusaka.

- 4.5 As a Sales Centre Supervisor, she was reporting to the Branch Manager. Her duties included sales, attending to customers and stores.
- 4.6 In November, 2014 she was on sick leave and a stock count was conducted. Upon her return from sick leave, she was briefed by the Branch Manager about the stock count.
- 4.7 She was told about the variances that had come out in the stock count.
- 4.8 On 1st December, 2014, her Supervisor wrote a letter to the Complainant telling her about the revelations of the stock count that was conducted on 15th November, 2014, and the stock variances that were detected. She was given 48hrs to show cause why disciplinary action could not be taken against her.
- 4.9 On 3rd December, 2014, she exculpated herself.
- 4.10 On 13th December, 2014, she was charged by her Supervisor with the offence of "*Gross Negligence, which affects the profitability and or standing of the Company and or the trust relationship the Company and individual.*"
- 4.11 On 18th December, 2014 a Disciplinary inquiry was held where the Complainant attended and gave her oral evidence.
- 4.12 The Complainant was thereafter summarily dismissed.

- 4.13 It was her evidence at trial that the only role she would play during the stock count was to prepare stock sheets which she would distribute to all employees to enable them conduct stock count. After that, the stock sheets would be given back to her so that she could update stocks in the system against those physically counted.
- 4.14 If variances were found, then another stock count would be conducted until a final report is done which is then given to the Stores Clerk who was the custodian of the Stores and he would put a reason as to why there were variances. After the Store's Clerk puts the reasons, the report is then given to the Branch Manager.
- 4.15 The Complainant denied that she ever was involved in writing back in the system, and claimed the termination of her employment was wrongful.
- 4.16 She, therefore, sought the following reliefs:
- (a) Reinstatement in the same position with full benefits, in the alternative;
 - (b) Damages for wrongful termination of employment as the same was done in bad faith;
 - (c) Any other relief the Court may deem fit; and
 - (d) Costs.

3.0 RESPONDENT'S CASE

- 3.1 On 22nd December, 2016, the Respondent filed its Answer to the Notice of Complaint and stated that the Complainant's dismissal was done in good faith and in accordance with the Respondent's Disciplinary Procedure.
- 3.2 The Respondent stated that as a result, the Complainant was not entitled to the reliefs so claimed.
- 3.3 The Answer was supported by an affidavit sworn by Mr. Christopher Chanda, The Human Resource Manager at the Respondent.
- 3.4 Mr. Christopher Chanda and Mr. Victor Kapanda gave evidence on oath on behalf of the Respondent.
- 3.5 Summary of their testimonies was that in November, 2014, a stock count was taken at the Lusaka Branch of the Respondent where the Complainant was in charge of Stores.
- 3.6 They told Court that, after the stock count, various variances on different goods were detected and the Complainant was asked to explain why there were variances.
- 3.7 The Complainant's explanation was not satisfactory and she was asked to exculpate herself which she did. Still not being satisfied by her exculpatory letter, the Line Manager charged the Complainant with the offence of gross negligence.

- 3.8 A Disciplinary Committee was constituted and heard the Complainant's case after which she was dismissed.
- 3.9 After her dismissal, she appealed and the Appeals Committee upheld the decision to dismiss her.
- 3.10 Upon her dismissal, the Complainant was paid her salary up to the time of dismissal and accessed her private pension from Saturnia Pension fund.
- 3.11 Mr. Chanda in particular testified that the Complainant was dismissed after the Disciplinary Procedure was followed.

4.0 SUBMISSIONS

- 4.1 I have looked at the submissions by both parties. I will not recite them here but will take them into consideration in my opinion.

5.0 ISSUES FOR DETERMINATION

- 5.1 The core of this case rests on:
- (a) Whether or not the Complainant's employment was wrongfully terminated;
 - (b) Whether or not the claim for reinstatement has merit.

6.0 OPINION

- 6.1 The Complainant has claimed that her Employment Contract was wrongfully terminated. It must be mentioned that the Complainant was dismissed after going through the disciplinary process as per Respondent's Disciplinary Code.

- 6.2 The Claim is therefore, Wrongful dismissal as I understand it from the evidence on record.
- 6.3 I will touch on the phrase "*Wrongful termination*" before I discuss the issue of wrongful dismissal.
- 6.4 Wrongful termination is a claim that is premised on a fact that an employee's Contract of Employment is terminated using a termination clause. The employer in this case terminates the Employment contract using the termination clause to hide behind the real reason for the termination.
- 6.5 In the cases of ***Zambia Consolidated Copper Mines Limited vs. James Matale*** and ***Amiran Limited vs. Robert Bonas***, the Supreme Court rightly guided that in the process of doing substantial justice, this court is empowered to delve behind or into reasons given for termination in order to redress the injustices discovered.
- 6.6 The rationale in these cases was that where an employment Contract is terminated by using a Notice clause, and an employee alleges that a notice clause was used to hide behind the real reasons for termination, then this Court is empowered to go behind the notice clause to find out the real reason for termination.
- 6.7 Once the Court delves behind the reason for termination, it can either uphold the termination or find the termination to be wrongful. This is where Wrongful Termination has its roots.

The claim for Wrongful Termination is not supported by evidence in this case. It is therefore, dismissed.

- 6.8 This differs with Wrongful Dismissal which occurs when an employee's Contract of Employment is terminated by the employer and that termination breaches one or more of the terms of the Employment Contract.
- 6.9 For a claim of wrongful dismissal to succeed, the Complainant must adduce evidence and prove that the provisions of the Contract of Employment and/or Disciplinary Code of Conduct to which he/she was a party was breached by the Respondent when he/she was dismissed.
- 6.10 Wrongful dismissal is a common law term which in essence is a breach of Contract of Employment by the Employer.
- 6.11 When a claim for wrongful Dismissal is presented before Court, the duty of the Court is to examine if there was breach Contract of Employment by the Employer in the manner the dismissal was done.
- 6.12 The breach of Contract of Employment may take the form of a flawed disciplinary process. The cases of **Attorney General vs. Richard Jackson Phiri** and **Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango** are leading authorities on this aspect.

6.13 In casu, there is evidence that the Complainant was asked to exculpate herself, she was charged, underwent disciplinary process, was dismissed, appealed and her dismissal upheld.

6.14 I find as a fact that there was no claim of flaws in the disciplinary process of the Complainant or any breach of her Condition of Employment when she was dismissed. That being the case, I find that the case for wrongful dismissal has not been established by the Complainant in this case. The claim for Wrongful Dismissal therefore fails.

7.0 CLAIM FOR REINSTATEMENT

7.1 Since the Complainant has not succeeded in her claim for Wrongful Termination/Wrongful Dismissal, the claim for reinstatement falls off.

8.0 CONCLUSION

8.1 The Complainant has failed in all her claims.

8.2 Each party to bear their own costs.

8.3 Informed of the Right of Appeal.

Delivered this day of 2017



M. MUSALUKE
HIGH COURT JUDGE