

CAZ 08/56/2018

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRD/ND/67/2017

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT NDOLA

(LABOUR JURISDICTION)



BETWEEN:

VICTOR BWEUPE

COMPLAINANT

AND

ZAMBIA NATIONAL COMMERCIAL BANK

RESPONDENT

Before: The Honourable Mr. Justice D. Mulenga this 8th day of February, 2018.

For the Applicant : Mr. T.T. Shamakamba of Messrs Shamakamba & Associates

For the Respondent : Mr. B. Mutale of Messrs BCM Legal Practitioners

JUDGMENT

Case referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) Z R 172
2. The Attorney-General v Richard Jackson Phiri (1988-1989) Z. R 121

The Complainant filed a Notice of Complaint with an affidavit in support on 1st July, 2016. The grounds of the Complainant's Complaint are that the termination of his employment by the Respondent is unjustified therefore, wrongful.

The Complainant seeks the following relief:-

- (a) An order that the termination of his employment was unjustified and wrongful
- (b) An order for payment of damages for wrongful and unjustified termination of employment
- (c) An order for payment of terminal benefits
- (d) Other costs relating to the matter
- (e) Interest and
- (f) Costs.

The Complainant through his affidavit in support of the Notice of Complaint, deposed that he joined the Respondent Bank on 17th October, 2013 and worked as a Teller.

The Complainant deposed that, on 10th February, 2016 he was charged by the Respondent, with misappropriation of funds belonging to a person having business dealings with the Bank, under Clause 7.2 of the Respondent's Disciplinary Code. The Complainant exculpated himself via a letter dated 13th February, 2016, the same is exhibit marked "VB3", and on 15th March, 2016 he was served with a letter of dismissal.

The Complainant, on 23rd March, 2016 appealed against the decision to dismiss him from employment, however, the decision to dismiss the Complainant from employment was upheld by the Appeals Committee on 15th April, 2016.

According to the Complainant the particulars of the offence against him were that he had withdrawn and deposited on account number 5187464100241, belonging to a customer, one Mr. Lazaro Malite, without his consent or knowledge. It was alleged that the customer disputed the withdrawals and deposit in question when he was interviewed by the Respondent. Further, that the signatures appearing on the withdrawal and deposit slips were at variance with the specimen signatures held at the branch.

The Complainant contended that at no time did he sign any deposit or withdrawal slip relating to account number. 5187464100241 belonging to Mr. Lazaro Malite. Also that the Respondent's allegation that the signatures on the deposit slip was not for the customer cannot be a basis to dismiss him from employment as it is a well-known bank practice that third parties sign deposit slips on behalf of bank customers or account holders and that there was no conclusive evidence that he was the one who signed the deposit slip.

The Complainant deposed also that at the case hearing the customer was never called so that the Complainant may challenge him in respect of the issue of signing of the deposit/or withdrawal slips and whether or not money had been stolen, neither was there a written statement of the said customer.

The Complainant averred that the amount of K1, 700.00 allegedly said to have been misappropriated was merely misposted and the money was still in the bank.

The Complainant deposed that clause 7.2 under which he was charged did not exist in the Respondent's current Disciplinary Code, except in the proposed and unsigned Disciplinary Code, therefore it was wrong and illegal to charge him under a non-existent clause.

The Complainant averred that the only reason he was dismissed from employment emanated from the events where he had discovered excess cash of K20, 000.00 which he reported to his supervisor, a Mrs. Kazembe who verified the same and reported the matter to her supervisor Mrs. Siame. The said excess cash was signed for by the Complainant, Mrs. Kazembe and Mrs. Siame, the same cash was then kept in the Vault, however, on 3rd March, 2015, the Complainant learnt from Mrs. Kazembe and Mrs. Siame that the said cash (K20, 000.00) had vanished from the Vault. The Complainant, therefore reported the matter to Head Office in line with the policy of the Respondent Bank, whereupon, a Mr. Xavier Musonda was sent to investigate the matter, however, no action was ever taken against Mrs. Kazembe and Mrs. Siame who were the custodians of the keys for the Vault where the K20,000.00 was kept and vanished.

The Respondent opposed the Complaint by its Answer and affidavit verifying the Answer, filed in Court on 29th July, 2016.

The Respondent denied that it terminated the Complainant's employment wrongly and or unlawfully but that, it charged the Complainant with an offence of misappropriation of funds belonging to persons having business dealings with the Respondent Bank. Further, that the Respondent's investigations in the matter revealed that the Complainant actually made the transactions and not the customer who is the holder of the account.

The gist of the Complainant's oral testimony is that prior to his being charged with a disciplinary offence of misappropriation of funds belonging to persons having business dealings with the Respondent Bank, he had incurred an excess amount of K20, 000.00 which he received over the counter but could not specifically locate from which customer or account.

According to the Complainant, he reported the said transaction to his bosses who were the custodians of funds, Mrs. Siame and Mrs. Kazembe. The said money was not kept in the suspense account but in the Vault. However, the following day the 3rd March, 2015, the Complainant was informed by Mrs. Kazembe that the K20, 000.00 which was kept in the vault had disappeared. The Complainant testified that, he in accordance with the policy of the Respondent Bank reported the issue of the excess amount of K20, 000.00 and its disappearance to Head office through a Mr. Muyunda.

Whereas, therefore, the Complainant does not deny that he had committed an error of crediting a customer account with K1, 700.00 which was declared as a short on 20th January, 2016. The Complainant contends that he was charged with the disciplinary offence in issue because he was a

whistle blower in respect of the disappearance of the excess amount of K20, 000.00.

According to Complainant, credit errors are common in the bank and so was the amount of K1, 7000.00 which was deposited in the account of a customer.

The Complainant also took issue with clause 7.2 under which he was charged as the same did not exist in the General Conditions of Service, Rules and Orders/Grievances and Disciplinary Code for Represented staff (exhibit *VB 7 (a)* to *VB 8* in his affidavit in support of Complaint).

The Complainant averred that the staff Grievance and Disciplinary Procedure Code, produced by the Respondent at pages 9 to 57, in its Bundle of documents, is merely a draft.

In cross-examination, by Learned Counsel for the Respondent, the Complainant told the Court that he did not know the outcome of the Respondent's investigations in respect of the amount of K20, 000.00, a matter which took place on 2nd March, 2015.

Further, the Complainant admitted that there was no evidence to prove that his dismissal from employment, was on account of his whistle blowing as regards the disappearance of K20, 000.00.

The Complainant further admitted that there was no customer who deposited the amount the amount of K1, 700.00 in the account of a bank customer one Lazarous Malite.

The Respondent, called one witness one Mobbroy Mwewa, a Manager, Human Resources in the Respondent Bank (he is hereinafter referred to as RW1).

The testimony of RW1, is briefly that on close of business on 19th January, 2016 when cash custodians of the Respondent Bank were balancing cash, they discovered that cash could not balance and through a verification exercise, it was established that an amount of K1, 700.00 was credited to a customer account, one Lazarous Malite. The said transaction was not backed up with cash, which meant that the customer did not come to the bank to deposit the said amount in his account.

The Complainant was queried and he claimed that the transaction was made in error. However, he failed to explain the correct bank account to which the said amount was to be deposited.

A further verification, on Lazarous Malie's account revealed that there were other three transactions which were in dispute, two withdrawals of K1, 000.00 and K300.00 and one deposit of K1, 000.00. The customer denied ever conducting the said transactions (Ref pages, 4, 5, 6, 7 and 8 in the Respondent's Bundle of documents).

RW1, further contended that the signatures on the withdrawal and deposit slips at pages 4 to 8 are not for the Respondent's customer one Lazarous Malite, now deceased.

RW1, explained that at the disciplinary hearing of the Complainant's case a customer, Lazarous Malite, was not called as a witness, because he had passed away.

As regards the Complainant's allegation that there was an excess amount of K20,000.00 which the Complainant had reported to have disappeared from the Bank, RW1 averred that the Respondent had instituted investigations in the matter and found that no such amount had gone missing from the Bank.

It was the Respondent's position through RW1 that the Complainant was properly charged in March, 2016, in accordance with the current Disciplinary Code which was executed on 5th October, 2015.

RW1 contended that the Complainant was not dismissed from employment on grounds that he was a whistle blower.

In cross-examination by Learned Counsel for the Complainant, RW1 testified that the Complainant was charged with misappropriation of funds belonging to a person having business dealings with the Respondent Bank.

RW1 was cross-examined at length by Learned Counsel for the Complainant as regards the transaction of K1, 700.00, which the Complainant said he credited the customer's account in error.

RW1 testified that he was not aware of any forms which could have been filled by the Complainant in his quest to correct the wrong entry made on the material date.

At the time of writing the judgment herein, only the Respondent's advocates had filed written submissions, on 26th October, 2017.

It is clear from the pleadings and the facts of the case herein that the issues for determination by this Court is whether the Complainant was wrongfully dismissed from employment by the Respondent.

It must be pointed out at the outset, as it has been stated in the plethora of cases by the Supreme Court not least of which is **Wilson Masautso Zulu v Avondale Housing Project**¹, that a Plaintiff who does not prove his case cannot be entitled to judgment whatever may be said of the opponent's case. The import of the said holding is that the burden of proof is on the Complainant to prove on the balance of probabilities that his dismissal from employment was wrongful.

The Complainant's position is that there was no justification for the Respondent to dismiss him from employment. The Complainant's contention is that the credit error of K1, 700.00 to the account of Lazarous Malite is one which is common in banking, therefore, the charge of misappropriation of funds for persons having business dealings with the bank was merely as a result of his whistle blowing a malpractice in respect of the disappearance of K20, 000.00 in which his superior officers, namely, Mrs. Kazembe and Mrs. Siame were involved.

Learned Counsel for the Respondent submitted on reliance on the case of **The Attorney-General v Richard Jackson Phiri²**, where the Supreme Court, held among other things that;-

Where a disciplinary action is taken by an employer the duty of the Court is to examine if there was the necessary disciplinary power and if it was exercised in due form, once the correct procedures have been followed the only question for consideration of the Court would be whether there were facts established to support the disciplinary measure since it is obvious that any exercise of power will be regarded as bad if there is no substratum of facts to support the same.

Learned Counsel for the Respondent therefore, submitted that the Respondent in coming to a decision to summarily dismiss the Complainant from employment acted reasonably and on the basis of available evidence as there was uncontroverted evidence that the Complainant had made a cash deposit of K1, 700.00 in the account of one Lazarous Malite, a fact which the Complainant admitted and only pleaded that it was done in error.

In consideration of the allegation made by the Complainant of the whistle blowing, being the basis of his dismissal from employment by the Respondent, I critically applied my mind to the charge sheet which was raised against the Complainant. The same clearly shows that it was drawn by one Mossy Syamalala, Manager in the Respondent Bank. The Complainant did not call any evidence to show any involvement of the said Manager Mossy Syamalala in the said allegations so as to demonstrate any bias on his part against the Complainant.

The Complainant has also not called any evidence to show or demonstrate that Mrs. Kazembe and or Mrs Siame who the allegations of wrong doing in respect of the K20, 000.00 were targeted against, to have taken a pivotal role in his being charged of the offence of misappropriation of funds belonging to persons having business dealings with the bank and any involvement in his disciplinary case hearing, in order to establish that the said persons had an axe to grind against him.

It is also not in contention that the Complainant was given an opportunity to be heard on the disciplinary offence charged. The only issue as regards procedure raised by the Complainant, was that Clause 7.2 under which he was charged was not in the current Disciplinary Code but in the proposed and unsigned Disciplinary Code. However, perusal of the Disciplinary Code, produced by the Respondent at pages 9 to 56 of its Bundle of documents, the same shows that the said Disciplinary Code was executed on 5th day of October, 2015 between the Respondent's Management and the Union. Therefore, the same came into effect before the charge was raised against the Complainant.

Having considered all the facts and evidence adduced by the parties herein and taking into consideration the authorities alluded to herein above, I have come to the inescapable conclusion that the Complainant has failed to prove his complaint on the balance of probabilities, therefore, this complaint has failed and it is accordingly dismissed for lack of merit.

Each party to bear their own costs.

Delivered at Ndola this **8th** day of **February, 2018.**

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Hon. Justice D. Mulenga
JUDGE

