IN THE HIGH COURT FOR ZAMBIA **COMP No. IRC/ND/15/2018**

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT NDOLA

(*LABOUR JURISDICTION*)

BETWEEN:

SHEPHERD MUZHIKE **COMPLAINANT**

AND

CHAMBISHI COPPER MINES LIMITED **RESPONDENT**

Before: **The Honourable Mr. Justice D. Mulenga this 27th day of February, 2019.**

For the Complainant: Mr. B. Katebe of Messrs Kitwe Chambers ✓

For the Respondent : Mr. A. Imonda of Messrs A. Imonda and Company

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JUDGMENT

Cases referred to:

1. **Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172**
2. **Zesco Limited v David Lubasi Muyambango (2006) Z.R. 22**

3. The Attorney General v Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)

The Complainant filed his Notice of Complaint and Affidavit in Support on 8th February, 2018, on the grounds that he was wrongfully and unfairly dismissed from employment by the Respondent, after being charged with an offence of negligence on duty. The Complainant therefore seeks the following relief:-

(a) Compensation for loss of employment
(b) Payment of salary and accrued leave days
(c) Any other relief the Court may deem fit
(d) Interest and costs

The Complainant in his affidavit in support deposed that he was employed by the Respondent as a workman on 9th November, 2013. On 21st July, 2017, he received a letter from the Respondent alleging that he had participated in an illegal strike, however, the Respondent was going to be lenient with him. The Complainant further deposed that he was placed on final warning despite denying the allegations of inciting his fellow workers to go on strike.

According to the Complainant, the said strike took place on 24th and 25th March, 2017 when he was in afternoon shift. When he reported for work, the strike had already started. The Complainant deposed

that between September and October, 2017, there was acid spillage in the Respondent's plant consequent to which he was charged with negligence of duty. He was then dismissed from employment, as he was serving a written final warning.

The Complainant was the only witness for his case and the gist of his testimony was that on 24th March, 2017 when he reported for work around 13:51 hours, he found workers on strike at the Respondent company. However, he managed to enter the premises and worked as the said strike was not intense. On 25th March, 2017, the strike was serious and he only managed to enter the plant at 17:00 hours after the striking workers were addressed by a government minister. As a result of not commencing his shift at 14:00 hours on the stated date, he was considered absent and K53.00 was deducted from his April, 2017 salary by the Respondent.

The Complainant testified that on 21st July, 2017 the Respondent's industrial relations officer Mr. Mwanabene handed him a letter which is exhibit "***SM3***" stating that the Respondent had observed his actions during the strike, but was going to exercise leniency. To his surprise, on 16th August, 2017 he was asked to sign a final warning letter alleging that he was absent from work on 25th March, 2017, but he declined to sign the same.

On 18th October, 2017, he was instructed by control room operators Sydney Chikomba and Simon Izumbo to discharge acid from main tank number nine (9) to underground tank number one (1). When he filled up the underground tank, he was asked by Mr. Izumbo to open the inlet valve on the pump so that as he was pumping out acid, more acid would be flowing into the tank. The Complainant averred that while he was doing that, the said Izumbo called him and asked him to go and check the position of the inlet valves on the bigger tanks.

The Complainant averred that consequently, he forgot to close the inlet valve on the underground tank, when he returned, he found acid overflowing. On 19th October, 2017, he was asked to give a statement concerning the incident. His explanation was that he was not provided with a torch to clearly observe the acid levels, there was no operator nearby and the sensors which detect acid levels were not functioning.

The Complainant testified that on 8th November, 2017 a case hearing was conducted and he was dismissed from employment. On 9th November, 2017 and 28th December, 2017 he lodged in his first and second appeals respectively, which were both unsuccessful. The Complainant averred that his dismissal was unfair and wrongful because there was unreasonable delay from the time the strike took place in March, 2017 to the time he was placed on final warning on 16th August, 2017. He further testified that the person who charged him for absenteeism was not his immediate supervisor.

In cross-examination by Learned Counsel for the Respondent, the Complainant admitted that his charge for absenteeism was raised on 31st March, 2017, he exculpated himself and was placed on final warning. He admitted that while serving the final warning, he was charged with negligence of duty after the acid overflow incident and he admitted the charge. He attended a case hearing, was dismissed from employment and was paid his dues in November, 2017.

The Complaint is opposed and to that effect, the Respondent filed an answer and affidavit in support on 27th February, 2018. In its answer, the Respondent contends that on 18th October, 2017, the Complainant discharged acid from the main tank to an acid pot in a negligent manner, resulting in an overflow. The Complainant was charged with negligence of duty and he admitted the charge. The Respondent further contends that considering that the Complainant was serving a final warning, summary dismissal was appropriate and he was dismissed on 8th November, 2017.

The Respondent called three witnesses. The first witness was Simon Izumbo (hereinafter referred to only as "RW1"). RW1 testified that on 18th October, 2017 he assigned the Complainant to discharge acid from a storage tank. However, the Complainant negligently left the inlet valve, of the tank open, when he went to check on another tank, this caused an acid overflow.

The second Respondent witness (RW2) was Simon Chikomba, his evidence in relation to the incident of 18th October, 2017 did not differ in substance from that of RW1 and I will therefore, not restate the same.

The gist of RW2's testimony in cross-examination was that on 25th March, 2017 when there was a strike, he entered the plant late and he was considered absent. However, his salary was not deducted as a consequence of that absenteeism.

The last Respondent witness was Martin Kabende (hereinafter referred to only as "RW3"). RW3 testified that after the illegal strike of 24th and 25th March, 2017, the Complainant was charged with absenteeism. However, union representatives asked for leniency from the Respondent's management, on behalf of its union members. In exercise of that leniency, after the Complainant was heard, he was placed on final warning valid for 6 months.

RW3 told the Court that while the Complainant was serving the final warning, he was charged with negligence of duty arising from an acid spillage incident. The Complainant was heard, found guilty and dismissed from employment.

In cross-examination by learned Counsel for the Complainant, RW3 averred that the charge of absenteeism was raised against the Complainant on 31st march, 2017 however he was only placed on final

warning on 16th August, 2017 as there were representations from the union and Government officials asking the Respondent to be lenient.

I am highly indebted to both Learned Counsel for filing written submissions which I may refer to as and when necessary.

The Complainant having abandoned the claim for payment of a salary and accrued leave dues, clearly, from the evidence and facts adduced by both parties herein, this Court is called upon to ascertain and determine whether the dismissal of the Complainant from employment by the Respondent was wrongful and unfair.

I am alive to the Supreme Court's guidance in its holding in the case of **Wilson Masautso Zulu v Avondale Housing Project Limited**[1], that:-

Where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to a judgment whatever may be said of the opponent's case.

The import of the above precedent is that the Complainant has a duty to prove on the balance of probabilities his complaint against the Respondent.

It is uncontroverted that the Complainant was employed by the Respondent as workman on 10th November, 2013. It is also common cause that following a strike at the Respondent Company on 24th and 25th March, 2017, the Complainant was charged with absenteeism, subsequent to which he was placed on written final warning on 21st August, 2017. The Complainant did not appeal against the final warning. It is undisputed that on 18th October, 2017, the Complainant caused an acid overflow. He was charged with negligence of duty and dismissed from employment.

In considering the issue for determination herein, I am guided by the case of **Zesco Limited v David Lubasi Muyambango**[2] in which the Supreme Court guided that:-

> ***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 in due form.***

I am also guided by the case of **The Attorney General v Richard Jackson Phiri**[3], where it was held 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 any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.

The import of the aforecited precedents is that it is not the duty of this Court to be in the position of an appellate tribunal, once it is shown that the correct procedure has been followed, the only question to be asked is whether there was a substratum of facts to warrant the dismissal.

In reliance on the aforecited cases, Learned Counsel for the Complainant has submitted that there were no substratum of facts upon which to dismiss the Complainant from employment. It has also been submitted that the Complainant worked on 25th March, 2017, and was not absent hence disciplinary power was not exercised in due form when he was given a final warning. Learned Counsel for the Complainant has further submitted that the Complainant should have been charged with reporting late for work and the said offence would have attracted a verbal warning.

In response, Learned Counsel for the Respondent has submitted that the Complainant never lodged any appeal against the finding of guilt on the charge of absenteeism and the penalty of final warning.

I have carefully perused the Respondent's disciplinary code and observed that according to **Clause 4.9** of said code, which provides that:-

> **If an employee absents himself for any reason without authority after working part of the shift, he will not be paid for any part of that shift, he will be marked "Absent" for the shift and disciplined for the offence accordingly.**

In casu, the Complainant does not deny having entered the Respondent's plant at 17:00 hours when his afternoon shift commenced at 14:00 hours on 25th March, 2017. There is also no evidence on record to show that the Complainant made an effort to obtain permission from his Supervisor to enter the plant late due to the strike. It is this Court's considered position therefore that there was a substratum of facts upon which to charge the Complainant with absenteeism and impose a final warning on him.

Further, Clause 4.7 (b) of the Respondent's disciplinary code provides that summary dismissal is a penalty that is meted out to an employee who is serving a final warning. It is this Court's considered position that the Complainant did not see anything wrong with the final warning that was slapped on him after being charged with absenteeism as he did not exercise his right of appeal. The Complainant cannot now start raising issues of unreasonable delay from the time the strike took place to when he was placed on final warning. The Respondent therefore, had the necessary disciplinary

power when it dismissed the Complainant on a charge of negligence of duty, arising from the acid spillage incident, while he was still serving the final warning. The evidence before Court clearly shows that the Complainant was guilty of the offence of negligence of duty. There was a substratum of facts as negligence of that magnitude resulting into acid overflow is a very serious breach of safety regulations in a mine area, which could result in fatalities.

I therefore find and hold that the Complainant has not proved on a balance of probabilities his claim for wrongful and unfair dismissal from employment. The said claim is accordingly dismissed for lack of merit.

Each party shall bear their own costs.

I make no order as to costs

Informed of Right of appeal to the Court of Appeal within thirty (30) days from the date hereof.

Delivered at Ndola this 27th day of February, 2019.

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Hon. Justice D. Mulenga

JUDGE

27 FEB 2019