

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

2016/HP/1414

BETWEEN

MARCKLINS MUDENDA

AND

JTI LEAF ZAMBIA LIMITED



PLAINTIFF

DEFENDANT

Before the Honorable Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff: Mr. Wina Vukuvic – Messrs Kalokoni & Co

For the Defendant: Mr. M. Mukupa - Messrs Isaac & Partners

JUDGMENT

CASES REFERRED TO:

1. Attorney General v Jackson Phiri (SCZ Judgment No. 2 of 1989)
2. Jones Siasamba v ZESCO Limited Appeal No. 30/2003
3. Caroline Tomaida Daka v Zambia National Commercial Bank Limited PLC (2012) 3

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. Modern Employment Law, A Guide to Job Security & Safety 9th Edition at page 158

2. Ian Smith and Gareth Thomas, in Smith's and Woods Employment Law, Ninth Edition, (Oxford, Oxford University Press, 2008)

This is a matter where the Plaintiff took out a Writ of Summons and Statement of Claim wherein, he claimed for: -

- i. Damages for Unfair dismissal*
- ii. Pension*
- iii. Payment of all contractual entitlements*
- iv. Any other relief the Court may deem fit*
- v. Costs*

In the statement of claim filed on 18th July, 2016 the Plaintiff stated that on 15th January, 2012 he was employed by the Defendant as a Field Supervisor in its Zambian Leaf Operation based in Kaoma. The contract of employment was signed on 29th January, 2012. He further averred that the contract provided for payment of pension benefits from NAPSA and a private pension scheme called Buyantanshi Pension Trust, Target Bonus, one month's salary in lieu of notice and other accrued benefits to an employee, being inter alia, leave days, Group life insurance and Medical aid.

It was further stated that on 1st December, 2015 he was given a notice to attend a disciplinary hearing and was charged with the offences of Dishonest Conduct, Failure to adhere to company policies and Gross Negligence. It was further averred that he was summarily dismissed after being found guilty of all the charges at the disciplinary hearing held on 11th December, 2016. It was also stated that he appealed. That on appeal, the

charge of Gross negligence was dropped and he was found guilty of Dishonest conduct and Failure to adhere to company policies and the summary dismissal was upheld.

As regards the reason for the dishonest charge it was indicated that it arose from an allegation that the Plaintiff instructed the Leaf Production Technician under his supervision on 25th August, 2015 to submit a list of JTI contracted growers who had unpaid balances outstanding to the defendant. Further that he increased their quotas so as to facilitate the purchase of tobacco from independent growers in the names of the contracted growers of the Defendant, purporting that the said growers had in fact met their quotas when in fact not. He also averred that on the alleged date, he could not have given instructions to the Leaf Technician as he was not in Kaoma but was in Mumbwa on a trip that was approved by his supervisor and the head of department, Mr. Lars Gruner. Further, the Plaintiff stated that on 13th August, 2015 he was instructed by his immediate supervisor Mr. Felix Miyombo to organise growers from his leaf area that did not perform well so that the company could have independent growers from Chipata to sell their crops in the names of JTI growers so as to clear some unpaid loans but the supervisor later told him to leave the task to another employee named Shilton Banda and he had no further dealing with the issue.

He averred further that the 2014-2015 marketing season was not a good growing season for the Defendant due to the drought experience in the country. That as a result the loan recovery rate was very low. The company therefore, under such circumstances, had the practice of buying tobacco from independent growers from other companies who had excess tobacco to

help clear the loans of JTI farmers who had poor harvests or could not clear their loans.

He alleges that the dishonest conduct he was charged with was a practice of the company and was done with the full knowledge and approval of management and was therefore not a violation of the contract of employment between him and the Defendant. It was also averred that he did not authorise any quota increments' in the system for JTI farmers, with the intention of using the tobacco purchased from independent growers to fill up the revised quotas.

In Defence, the Defendant acknowledged that the Plaintiff was employed by the Defendant but, denied the assertion by the Plaintiff that he exhibited professional conduct of the highest standard during his four years of service with the Defendant. The Defendant also admitted to the contents in paragraph 6,7 and 8 in the Plaintiffs statement of claim that the plaintiff was given notice for the disciplinary hearing and further that he was charged with the offences of Dishonest Conduct, Failure to Adhere to Company Policies and Gross Negligence. Further that the charge of Gross Negligence was dropped on appeal and the summary dismissal for the Plaintiff was upheld on two charges. The Defendant denied the allegation by the Plaintiff that it charged the Plaintiff for Dishonest Conduct on an allegation that the Plaintiff instructed the Leaf Production Technician under his supervision on 25th August,2015 to submit a list of JTI contracted growers who had unpaid balances outstanding to the defendant and that he requested that Leaf Production Technician increases their quotas so as to facilitate the purchase of tobacco from independent growers in the names of the contracted

Western Province. He confirmed that he was charged for negligence and a hearing was held. Further that after the hearing he was dismissed for dishonest conduct, failure to adhere to company policies and for gross negligence.

In cross examination he stated that he was employed by JTI as a supervisor for over 4 years and his duties were to supervise technicians. He further stated that he would sponsor farmers with inputs which were recovered from the sales. He also said that the policy was that when a farmer defaults he is taken to court and further that the company policy did not allow buying tobacco from independent growers. He admitted that JTI disciplinary procedures were followed and that the charge of gross negligence was dropped on appeal.

PW2 was **Felix Kelvin Miyambo**, a farmer, who testified that at the material time he was, the Manager for JTI in Kaoma and the Plaintiff was his subordinate. He further testified that he was very surprised to learn that the Plaintiff was dismissed for dishonest conduct over the issue of collecting tobacco from independent growers as he was the one who sent him to do that. He further testified that he was instructed by his supervisor Mr Peter Codder to get tobacco from independent growers and sell it to the Defendant's farmers as a strategy put in place to recover the loans by the JTI farmers. He also testified that he was not called for the Plaintiff's disciplinary hearing even though he was his supervisor.

In cross examination he stated that he was dismissed for gross misconduct involving the case of the Plaintiff. He stated that he was not dismissed for

the issue of farmers from Eastern Province. He further indicated that he was authorised to buy from independent growers but he was not authorised to use accounts of contracted growers to buy from independent growers. He further stated that he was dismissed after the Plaintiff but in the same month.

DW1 was **Sampa Chipalo**, the only witness for the Defendant, who testified that the Plaintiff was charged for offences of Dishonest conduct, failure to adhere to company policies and Gross negligence. He testified that the details for the charge of dishonest conduct were that the Plaintiff gave an instruction to his subordinate to collect names of contracted farmers of JTI and he increased quotas for buying tobacco for the said farmers without the Defendant's knowledge. He further testified that this amounted to dishonest conduct because records were distorted in terms of farmer performance, as well as giving a wrong picture that tobacco has been supplied by contracted farmers instead of non – contracted farmers. He testified that regarding the charge of failure to adhere to company policies, the Plaintiff facilitated for non contracted farmers to sell tobacco to JTI on the pretext that they were contracted farmers, which was against the company policy. Further in his testimony, the witness stated that the Plaintiff was charged with 5 other employees who were also dismissed connected to the same case.

In cross examination he stated that he was not around and was not working in the stated position at the time the Plaintiff was charged. He indicated that what he testified is what is on the record. He indicated that the Plaintiff was not instructed by his supervisor as alleged and also that tobacco was not

supposed to be bought from independent farmers unless they reported as such. When he was showed the email correspondence, the witness acknowledged that the email was official communication and further that even if the Plaintiff was instructed by his supervisor, it amounted to unlawful instructions. He also said that the sell was done in the system using procedure of the company. He further said that the payments were made by cash and the money went directly to the farmer. Further that there was no monetary benefit to the Plaintiff.

It was submitted for the Plaintiff that the Plaintiff was dismissed for a widely accepted practice within the company. It was further submitted that there was no evidence on the part of the Plaintiff of any wrong doing and that there was no evidence to support the charges levelled against him. The court was referred to the case of Attorney General v Jackson Phiri (SCZ Judgment No. 2 of 1989)⁽¹⁾

“once the correct procedures have been followed, the only questions which can arise for the courts consideration based on the facts of the case would be whether there were infact, facts established to support the disciplinary measures, since it is obvious that any exercise 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 levelled in disciplinary proceedings, injustices would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures.”

The Plaintiff argued that his job was taken off by the Defendant without any good reason. To fortify the above point the Court was referred to the book **Modern Employment Law, A Guide to Job Security & Safety 9th Edition** at page 158 where Michael Whincup stated as follows:

“the law infact presumes the dismissal unfair, the effect of which is that a person’s job becomes his property. It cannot then be taken off the employee without some very good reason, and the burden of proving that reason is upon the employers.”

It was further submitted that since the Defendant claimed that the Plaintiff failed to adhere to a laid down company policy, the onus lay on the Defendant to prove that indeed such a policy existed within the company but there was no such document. The court was referred to the case of **Jones Siasamba v ZESCO Limited Appeal No. 30/2003**⁽²⁾ where it was held that:

“The general principle which is well established and entrenched in our civil justice is that whosoever claims must prove. This principle applies in all cases except where strict liability is invoked.”

It is common cause that;

- 1. The Plaintiff was employed by the Defendant as a Field Supervisor in its Zambian Leaf Operation based in Kaoma.*
- 2. The Plaintiff was given notice on 1st December 2015 to attend a disciplinary hearing and was charged for Dishonest conduct, Failure to adhere to company procedures and Gross negligent.*

3. *The Plaintiff was heard and summarily dismissed for all the three offences.*
4. *The Plaintiff appealed and after the appeal hearing, the charge of Gross misconduct was dropped but the dismissal was upheld for the charge of Dishonest conduct and Failure to adhere to company procedures.*
5. *The perusal of the record will show that disciplinary procedures were followed in respect of the plaintiff, there is no allegation of breach of rules of natural justice and there is no suggestion that the offence of Dishonest conduct and Failure to adhere to company policies cannot lead to termination by notice under the defendant's disciplinary code.*

The Supreme Court in Attorney General v Phiri (1988-1989) Z.R. 121⁽³⁾ stated that:

- “1. *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; and*
2. *The Court cannot be required to sit as a Court of Appeal from decisions of administrative tribunals to review its proceedings, or to inquire whether its decision was fair or reasonable and that the Court ought to have regard only to the question whether the tribunal had valid disciplinary powers and if so, whether such powers were validly exercised.*

In other words, under unfair dismissal, the courts will look at the reasons for the dismissal to determine whether the dismissal was just or not”

A perusal of the charge of Dishonest conduct in this matter will show that the reasons given are that the Plaintiff instructed his subordinate to collect a list of names of the JTI contracted growers who had unpaid balances outstanding to JTI at his request so that he increases the contracted growers quotas without informing the contracted growers of these changes. The Plaintiff admits that there was such a practice as a policy of the company to mitigate the effects of the poor rainfall for that season. However, The Plaintiff denies having given the said instructions.

The second charge of Failure to adhere to company policies is premised on the reasons that the Plaintiff on an unspecified date during the marketing season, facilitated the arrival of unapproved independent growers to the Rosewood facility. On 25th August, he proceeded to authorize quota increments in the system for JTI farmers with the intention of using the tobacco purchased from the independent growers to fill up the revised quotas instead of booking the purchases as purchases from independent growers. PW2 acknowledged that he was the one who gave the said instructions upon receiving approval from his supervisor.

The learned authors of the book **Modern Law of Employment 1963** stated this at page 480:

“summary dismissal is dismissal as the contract requires. If such dismissal is without any justification it will be wrongful and by such dismissal the

employer is deemed wrongfully to have repudiated his contracted obligation to the employee.”

Further, Ian Smith and Gareth Thomas, in Smith's and Woods Employment Law, Ninth Edition, (Oxford, Oxford University Press, 2008) at page 431 observe as follows:

“At common law an employer may dismiss any employee summarily (i.e. without notice) if he has sufficient cause to do so. In old cases from the nineteenth century and before, this was viewed as a natural and necessary aspect of the relationship between master and servant and servant's duty of obedience. The Judgment of Parke B in Callo v Brouncker (1), was treated for many years as laying down set rules on summary dismissal which he said could be for moral misconduct (pecuniary or otherwise), willful disobedience or habitual neglect. However, with the move in nineteenth century towards viewing employment in a contractual rights, the emphasis changed so that the right to dismiss summarily became explicable on the ground that the conduct of the employee was such that it showed repudiation by him of the contract of employment, which the employer accepted and treated as terminating the contract immediately.”(See Boston Deep Sea Fishing and Ice Company v Ansell (2); Laws v London Chronicle (indicator Newspaper) Ltd (6); and Pepper v Webb (8).

From the evidence adduced on the record it would appear that the Plaintiff was dismissed for carrying out the instruction of his superior officer. The evidence of PW2 was not seriously challenged in cross examination. I therefore find that the Plaintiff has proved the case on a balance of

probabilities that his dismissal was unfair. He is therefore entitled to his claims for pension and payment of his contractual entitlements.

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

Leave to appeal is granted.

Delivered at Lusaka this 3rd day of March, 2020.

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C. LOMBE PHIRI
JUDGE

