

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

2020/HPC/0426



BETWEEN:

FIRST NATIONAL BANK ZAMBIA LTD

PLAINTIFF

AND

CLEMENT CHAAMBWA

DEFENDANT

**CORAM: Hon. Mr. Justice Bonaventure C. Mbewe in Chambers
on the 16th day of July, 2020.**

Research Advocate : Ms. Mwiche Ntinda

Marshal : Ms. Esther Ng'uni

For the Plaintiff : Mr. M. Moonga, Legal Manager - FNB

For the Defendant : N/A

RULING EX TEMPORE

Cases and Authorities referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

2. *The Rules of the Supreme Court of England 1965 (White Book)*
1999 Edition Volume 1

INTRODUCTION

This is an action by the Plaintiff, First National Bank Limited brought against the Defendant, one Clement Chaambwa in which the claims against the Defendant are for;

- a) *Payment of the sum of ZMW618,630.90;*
- b) *An Order for the immediate delivery by the defendant to the Plaintiff of Agricultural Equipment/ Machinery being;*

- 1. *Tafe Tractor 5900 59HP 2WD W/S433 Eng W/ Canopy;*
- 2. *Plough Ripper CFU Ndume, 2TINE C/ CRUMBER;*
- 3. *Trailer 5TN Steel Deck with Drop Sides 2 Axels S/S-STR and;*
- 4. *Planter PLB Mounted Row Crop 02Rowsx 1900 mm Tool Bar.*

- c) *An interim Order for the detention, custody and preservation of Agricultural Equipment/ Machinery being;*

- 1. *Tafe Tractor 5900 59HP 2WD W/S433 Eng W/ Canopy;*
- 2. *Plough Ripper CFU Ndume, 2TINE C/ CRUMBER;*
- 3. *Trailer 5TN Steel Deck with Drop Sides 2 Axels S/S-STR and;*

4. *Planter PLB Mounted Row Crop 02Rowsx 1900 mm Tool Bar.*

- d) Interest on the amount in (a) above;*
- e) Costs; and*
- f) Any further relief that the Court may deem fit.*

In seeking to enforce the third relief claimed in its Writ of Summons, the Plaintiff filed this application *ex parte* by way of Summons for an Order of Interim Detention, Custody and Preservation of Property pursuant to **Order 27, Rule 3 of the High Court Rules** as read with **Order 29, Rule 2 of the Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**. I granted the *ex parte* Order on 9th June, 2020 with a return date for an *inter partes* hearing for 16th July, 2020.

The Plaintiff's application is supported by an affidavit sworn by one Lemba Martin who is Collections Analyst in the Plaintiff's Recoveries Department who deposes that the Plaintiff advanced the Defendant a term loan facility on or about 14th November 2014 to purchase the agricultural equipment listed in the said affidavit which are the same ones also listed in the Writ of Summons. The said facility was to have been repaid over a period of 48 months. The agreement was that absolute ownership would remain with the Plaintiff until full and final settlement of all agreed amounts under the loan facility and the Defendant has defaulted by failing to make the agreed monthly repayments on numerous occasions

and the said facility has since expired. That the Defendant has frustrated the Plaintiffs attempts to take possession of the machinery and the said financed assets are deteriorating and depreciating and are at risk of getting damaged if they continue to be in the possession of the Defendant which will have an adverse effect on their market value should they eventually be repossessed and sold to recover outstanding amounts. The affidavit asks this Court to grant the interim relief sought by the Plaintiff and undertakes to pay any damages the Plaintiff may suffer as a result of the granting of the Order sought.

The Plaintiff also filed skeleton arguments in support of its application which relies on the following law to advance its application, namely **Order 27, Rule 3 of the High Court Rules** which provides that;

“It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject-matter of such suit, and, for all or any of the purposes aforesaid, to authorize any person or persons to enter upon or into any land or building in the possession of any party to such suit; and for all or any of the purposes aforesaid, to authorize any samples to be taken, or any observations to be made or experiments to be tried, which

may seem necessary or expedient for the purpose of obtaining full information or evidence....”

and **Order 29, Rule 2 (1) and (2) of the Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**, which provides that;

“(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorise any person to enter upon any land or building in the possession of any party to the cause or matter.”

The Plaintiff submits that the assets it seeks to have custody of, detained and preserved are the subject matter of these proceedings and this is a proper case for this Court to grant the Order sought irrespective of where the assets may be, and notwithstanding that the assets may be in the possession of third parties.

The Plaintiff has filed an Affidavit of Service evidencing service of the Originating process as well as the Order of Interim Detention, Custody and Preservation of Property on the Defendant which service was effected on 11th July, 2020. The Defendant has not entered appearance to the main application and neither has he filed any affidavit in opposition to the application currently before me.

RULING

In view of the Defendant's failure to file any opposition to the Plaintiff's application for an Order of Interim Detention, Custody and Preservation of Property, in accordance with the Rules of this Court, the application is undefended and the Court hereby confirms its Order of Interim Detention, Custody and Preservation of Property granted **ex-parte** on 9th June, 2020 pending determination of the matter or until further order of the Court.

I award the Plaintiff costs of and incidental to this application.

Delivered at Lusaka this 16th day of July, 2020.



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Bonaventure C. Mbewe
HIGH COURT JUDGE

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL/LABOUR DIVISION
HOLDEN AT NDOLA
(LABOUR JURISDICTION)**

COMP NO. IRC/ND/49/2019

BETWEEN:

NSAMA VERNON KALUMBA



AND

**ZAMBIA TELECOMMUNICATIONS
COMPANY LIMITED**

RESPONDENT

**Before: The Honourable Mr. Justice D. Mulenga this 15th day of
May, 2020.**

For the Complainant : In person

For the Respondent : Mr. M. Mwaba (In-house Counsel)

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project Limited (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.)

4. **Chimanga Changa Limited v Stephen Chipango Ng'ombe (2010) Z.R 208, Vol 1**
5. **Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines Appeal No. 97 of 2000**

The Complainant filed his Notice of Complaint and Affidavit in Support on 2nd May, 2019, on the grounds that he was wrongfully and unfairly dismissed from employment by the Respondent after being charged with falsifying official documents, gross misconduct and failure to account for company materials. The Complainant therefore seeks the following relief:-

- (a) A declaration that his dismissal was wrongful and unfair.
- (b) Reinstatement
- (c) In the alternative, damages for wrongful and unfair dismissal
- (d) Interest
- (e) Costs
- (f) Any other relief the Court may deem fit.

In his affidavit in support of complaint, the Complainant deposed that he was employed by the Respondent as a stores officer on 1st April, 2011, on a two year contract. Before the expiry of the said contract, he was promoted to the position of warehouse coordinator. While serving in his capacity as warehouse coordinator in February, 2014, he was informed by his supervisor Mr. Katongo that the Chipata stores officer a Mr. Pensulo was indisposed and he needed to go to Chipata to sit in for the said officer.

The Complainant deposed that he worked at the Respondent's Chipata stores office for 20 days from 5th to 25th February, 2014 when Mr. Pensulo reported back for work. According to the Complainant, he then travelled back to Lusaka to continue with his duties. On 7th August, 2014, he received a disciplinary charge form where he was charged with falsifying official documents, gross misconduct and failure to account for company stock or materials or cash.

It was a deposition by the Complainant that the Respondent alleged that on 10th February, 2014 while he was working at the Chipata stores office, he had over issued scratch cards worth K15, 000.00 on stores requisition form 29462 and delivery note 07811 which stock was not supported by approved order form, tax invoice and payment receipt. According to the Complainant, he exculpated himself and explained that despite issuing the said stock without a tax invoice, the receiver signed on the stores requisition form and delivery note.

The Complainant further deposed that in accordance with the Respondent's inventory management manual, his obligation as stores officer was to issue stock only against an approved requisition form, not a tax invoice. The said requisition form was approved by the regional business manager Mr. Salatiel Lungu and the delivery note was signed by the receiver Mr. Chisanga who was the territory sales representative.

According to the Complainant, on 13th August, 2014, a case hearing was convened and his supervisor Mr. Katongo who was the charging official was part of the panel contrary to the Respondent's disciplinary code. On 21st August, 2014, he was dismissed from employment after being cleared

of the offences of falsifying official documents and gross misconduct but found guilty of the offence of failure to account for company stock. On 4th September, 2014 he appealed against his dismissal but did not get any response.

The Complainant was the only witness for his case and the gist of his oral testimony was that the offence of failure to account for stock arose out of a transaction he worked on in Chipata on 10th February, 2014. On the said date he received a stores requisition form from the Chipata retail shop team leader Mr. Chilekwa requesting for 7500 airtime scratch cards of K2 each and 3330 scratch cards of K5 each. He proceeded to issue the said stock. However, months after leaving Chipata, it was brought to his attention by auditors that the K5 scratch cards he had issued were more than what the dealer had paid for.

The Complainant averred that the stores requisition form indicated 3330 cards of K5 each, but the tax invoice indicated that the dealer only paid for 330 cards, thereby occasioning a loss of 3000 cards. He explained that as a stores officer, he was not mandated to look at the tax invoice before issuing stock as the only document he had to look at was the stores requisition form, signed by an authorized person. He added that a tax invoice is not generated by the stores department as the said department does not come into contact with customers or dealers.

In cross-examination, the Complainant maintained that his supervisor should not have sat in his disciplinary case hearing. He however admitted that according to the minutes of the case hearing, his supervisor's name did not appear as part of the hearing panel, but only shows that he was in

attendance. The Complainant also admitted that in his exculpatory letter, he did not state that he was not required to look at the tax invoice. He added that it was his duty to fill in all details on the delivery note but he did not fill in the invoice number which can only be obtained by looking at the tax invoice. He stated that stores department does not indicate the invoice number as that is done at the retail shop, before delivering to the dealer.

The complaint is opposed and to that effect, the Respondent filed in an answer and affidavit in support on 3rd June, 2019. In its answer, the Respondent contends that as stores officer, the Complainant did not follow the correct procedure when issuing stock, which resulted in him failing to account for stock worth K15,000.00. The Complainant was charged with falsifying official documents, gross misconduct and failure to account for stock or materials or cash. He exculpated himself and was subjected to a disciplinary hearing. The Complainant was found guilty and subsequently dismissed from employment.

To buttress its defence, the Respondent in an affidavit sworn by one Henry Lungu, its Human Resource Operations Manager deposed that at the time of his dismissal, the Complainant was serving the Respondent in his capacity as warehouse coordinator. In February, 2014, the Complainant was sent to Chipata to go and sit in for a stores officer who was sick. The Complainant worked in Chipata for 20 days from 5th to 25th February, 2014.

The Respondent deposed that after the Complainant returned to Lusaka, it was discovered that while on official duty at the Respondent's Chipata store, the Complainant issued scratch cards worth K15,000.00 which were

not supported by requisite documents. Further, the serial number range indicated by the Complainant did not match with the actual serial number range of the scratch cards issued. According to the Respondent, the Complainant issued 3330 by K5 scratch cards when the dealer only paid for 330 by K5 scratch cards

It was deposed by the Respondent that the Complainant relied on a stores requisition form despite it being standard practice at the Respondent company to attach requisite documents like an approved order form, tax invoice or payment receipt to enable a stores officer to issue only stock that has been paid for. The deponent added that the stores requisition form which the Complainant relied on was not approved by the finance department, which made the presentation of a tax invoice or payment receipt even more necessary in order to verify the amount of scratch cards paid for.

The Respondent deposed that the Complainant was charged in accordance with the disciplinary code, he was given four days within which to respond and he exculpated himself on 11th August, 2014. A disciplinary case hearing was convened on 13th August, 2014 and the Complainant's supervisor Mr. Katongo was not part of the committee but only attended the hearing. It was further deposed that on 21st August, 2014, the Complainant appealed against his dismissal and the outcome of the appeal was communicated to him.

The Respondent called two witnesses. The first witness was Chilekwa Witi (hereinafter referred to only as "RW1"). The gist of RW1's testimony was that a TSR who is the Respondent's employee helping dealers to buy stock

from the Respondent goes with an approved stores requisition form and tax invoice to the stores office to collect stock. RW1 averred that the stores officer looks at both documents for verification, and then issues a delivery note which indicates the name of the dealer, invoice number and stock bought. RW1 added that stock can only be issued against an approved stores requisition form and clause 3.4 of the Respondent's Inventory Manual did not state that a stores officer should only consider the stores requisition form.

The second respondent witness was Henry Lungu (hereinafter referred to only as "RW2"). RW2's testimony did not differ in material particular from his affidavit evidence, and I will not restate it herein.

At the close of the hearing both the Complainant and Learned Counsel for the Respondent filed written submissions which I may refer to only when necessary.

Certainly, the issue for the determination of this Court is whether the Complainant's dismissal from employment by the Respondent was wrongful and unfair.

From the outset, I must emphasise the guidance of the Supreme Court on the burden of proof in the case of **Wilson Masautso Zulu v Avondale Housing Project Limited**⁴, where it was held 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 common cause that the Complainant was employed by the Respondent as a stores officer on 1st April, 2011, after which he was promoted to the position of warehouse coordinator. In February, 2014, the Complainant was assigned by the Respondent to go and sit in for the stores officer in Chipata from 5th to 25th February, 2014. It is not in dispute that on 7th August, 2014, the Complainant was charged with falsifying official documents, gross misconduct and failure to account for company stock/materials/cash. The charge arose from a transaction on 10th February, 2014 at the Chipata office where the Complainant over issued 3000 by K5 scratch cards worth K15,000.00 which were not paid for, as the dealer had only paid for 330 by K5 scratch cards.

It is uncontroverted that the Complainant exculpated himself and attended a disciplinary case hearing. On 21st August, 2014, the Complainant was cleared of the offences of falsifying official documents and gross misconduct. However, he was found guilty of failure to account for company stock/materials/cash and consequently dismissed from employment. On 4th September, 2014 the Complainant appealed against his dismissal.

In considering the issue for determination herein, I have addressed my mind to the guidance in the case of **Zesco Limited v David Lubasi Muyambango**² in which the Supreme Court held 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 further 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.

I have also considered the case of **Chimanga Changa Limited v Stephen Chipango Ngombe**⁴ where it was held that:

An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.

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 and the employer acted reasonably in arriving at that decision.

In casu, the evidence on record is that on 10th February, 2014, the Complainant issued 3330 by K5 scratch cards when the dealer had only paid for 330 by K5 scratch card as evidenced by the tax invoice marked "NVK5". The total quantity of cards issued without being paid for were valued at K15, 000.00. There is further evidence on record as per appeal letter written by the Complainant marked "NVK12" which reads in part:-

1st September, 2014

The Chief Executive Officer

Zamtel House

Dear Sir,

RE: DISMISSAL APPEAL

I write with reference to the letter of dismissal from employment I received on the 26th August, 2014.

I worked in Chipata from 5th February, 2014 on relief duty at the time the stores keeper for Chipata, Millard Pensulo, was hospitalized. On 10th February, 2014 I received stores requisition form (SRF) number 29462. The quantity requested for K5 scratch cards was 3330 and I proceeded to issue the requested stock on the SRF. The receiver even signed on the SRF, I then raised a delivery note number 07811 as per procedure, where I as the issuer signed and the receiver signed too.

My mistake if any was not correctly recording the serial numbers of the stock I issued.

I had found a system in Chipata and I guess I should have been more prudent in my work...

Yours faithfully,

Vernon Nsama Kalumba.”

The Complainant's argument was that based on the aforecited clause, the only document he was supposed to consider is the stores requisition form as he was not mandated to address his mind to the tax invoice. It is this Court's considered view that the Complainant's argument is inconceivable because the said clause provides that the stores requisition form must be approved by the Head of Department and finance department. A careful perusal of exhibit "NVK3" which is the stores requisition form in issue reveals that the same was not even approved by the finance department. Therefore, the only way the Complainant could have verified the quantity of scratch cards purchased was by way of scrutinizing the tax invoice.

The Complainant raised an important issue concerning the composition of the disciplinary committee that heard and determined his matter. The Complainant vehemently argued that the charging officer who was his supervisor by the name of Mr. Kelvin Katongo should not have been part of the committee as that was in breach of clause 13.4 of the Respondent's disciplinary code.

The Complainant in his submissions referred this Court to the case of **Rosemary Ngorima and 10 others v Zambia Consolidated Copper Mines**⁵ where the Supreme Court stated that:-

"...in an employer-employee relationship the parties are bound by whatever terms and conditions they set out for themselves."

Placing reliance on the aforesaid case, the Complainant argued that the agreement between the Respondent and himself was that for all disciplinary matters, both parties would be bound by the disciplinary code. Therefore, the charging official should not have formed part of the disciplinary hearing panel.

In response, the Respondent submitted that no provision of the disciplinary code was breached as the Complainant's supervisor did not constitute part of the hearing panel but was merely in attendance.

I have carefully analysed the case hearing minutes which are exhibit "HL6" and suffice to mention here that the committee was only comprised of Mr. Pupuzyanji Sichembe, the Manager-network operations who was the chairperson, Mr. Lewis Mukupa the core network planning manager and Mr. Henry Lungu the human resources operations officer who was the secretary.

The name of Mr. Kelvin Katongo who was the Complainant's immediate supervisor only appears on the list of people who were in attendance during the case hearing. The said Mr. Katongo played on a role of a charging officer, he read the charge and did nothing more than that during the proceedings. It is this Court's considered position therefore that the Complainant's argument to the effect that the Respondent breached the disciplinary code cannot hold any water as clearly, his supervisor was not part of the disciplinary committee.

I therefore find and hold that the Complainant has failed to prove 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.

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

Delivered at **Ndola** this **15th** day of **May, 2020**.


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Hon. Justice D. Mulenga
HIGH COURT JUDGE