

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

**2012/HP/152
2012/HP/153**

BETWEEN:

**YUYI MUYENGA
ROBERT NYIRONGO**



**1ST PLAINTIFF
2ND PLAINTIFF**

AND

PUMA ENERGY ZAMBIA PLC

DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiffs: Mr. B. Mukatuka & Mr. Y. Silomba of Messrs Robson Malipenga & Company.

For the Defendant: Mrs. K. M. Chileshe of Messers Mweemba Chashi & Partners.

JUDGMENT

Cases referred to:

- 1. Zambia Electricity Supply Corporation Limited v Mukupa Mwila S.C.Z. Judgment No. 14 of 2002.***
- 2. Caroline Tomaid Daka v Zambia National Commercial Bank Limited 2008/HP/0846.***
- 3. Bank of Zambia v Kasonde (1995) Z.R .238 (SC).***
- 4. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa(1986) Z.R. 70 (SC).***
- 5. Chimanga Changa Limited v Stephen Chipango Ngulube (2010) Z.R. 208.***
- 6. ZCCM & Ndola Lime Limited v Sikanyika & Others Z.R. SCZ Judgment No. 24 of 2000.***
- 7. Luciano Chitalu and Jackson Chomba v Newstead Zimba***

(1988-89) Z.R 64.

Legislation & Other Works referred to:

- 1. The Employment Act Chapter 268 of the Laws of Zambia**
- 2. The International Labour Organization- Termination of Employment Convention 158 of 1982.**

This case is a consolidation of two actions: first, Cause Number 2012/HP/152 between Yuyi Muyenga verses Puma Energy Zambia Plc. And the second is Cause Number 2012/HP/153 between Robert Nyirongo verses Puma Energy Zambia Plc. The facts and the reliefs sought by the Plaintiffs against Puma Energy Zambia PLC (PEZ) are essentially the same. In his writ of summons and statement of claim, the first Plaintiff claims for: **(i) an order for reinstatement; (ii) an order for redundancy or early retirement at the retirement age and (iii) damages.** The claims by the second Defendant are for: **(i) a declaration that the dismissal was null and void, (ii) an order of reinstatement, (iii) an order or early retirement, and (iii) special damages.** It must be recorded that the second Plaintiff is now deceased.

Two witnesses testified in support of the Plaintiffs' case. The first witness for the Plaintiffs (PW1) was Richard Mumba, a former employee of British Petroleum (BP) Zambia Plc, the predecessor of the PEZ. He said he used to work as a Bulk Vehicle Operator (BVO) and worked with BP (Z) Plc for four and a half years from 2008 to 2012. He said he was engaged to drive tanker trucks and his duty was to safely deliver fuel from the depot to service stations. He also stated that he was the Union Chairperson.

He did explain concerning the procedure of loading and dispatching fuel to customers. He said after a customer made an order for supply of fuel. The dispatcher would thereafter raise a loading note which was passed on

to the loading bay. He said the loader would then load according to the order and seal the tanker. He said the seals contained serial numbers which were recorded on the invoice by the loader, and only unsealed at the delivery point. He added that before the truck could leave the depot; security guards were assigned to counter check the serial numbers to verify if they corroborated with what was on the invoice, and record the information in their books.

According to him, a truck was only allowed to leave the depot after the depot manager signed the invoice. That once the fuel reached its destined service station, the invoice and assize certificate was handed over to the fuel attendant and in the presence of his/her manager or supervisor a verification of the seals together with the invoice was done. And once satisfied that everything was in order, at the instruction of the service station supervisor, he would then break the seals on the truck and verify the fuel levels in the truck as well. And if satisfied, the driver was taken to the receiving tank, where the fuel was decanted.

He further explained that after the fuel was decanted, the fuel attendant would climb on top of the tanker and take the last dip to check if fuel had remained. He said after this the owner of the service station or the supervisor signed the invoice to acknowledge receipt of the product. He said in case of shortages or surplus it was recorded on the invoice and if all was well nothing was recorded on the invoice. He stated that after delivery, the driver was then given a copy of the invoice to take back to the depot. That once at the depot, if there were shortages, a driver was to fill in a "constraint form" to report the loss.

In relation to the present case, he said it was on Friday, October 14, 2011, after he and others did all their deliveries for the afternoon that another

urgent order was received from a customer around 17:00hrs. He said according to the policy of the Defendant, deliveries after 17:00hours were not allowed unless with permission. He explained that his truck and that of Robert Nyirongo were loaded scheduled to deliver fuel to customers. He said all the requisite procedures as to delivery of fuel were done. He said Robert Nyirongo's truck was granted permission to do night delivery, but his was to deliver the next day. He said Robert Nyirongo delivered fuel to Longacres Service Station called Taja Service Station and only finished offloading at 19:30hours.

He said on Saturday 15th October 2011, he was supposed to make a delivery, but fell sick and the late Robert Nyirongo was assigned to make the delivery to Chelston on his behalf. He stated that after the fuel was delivered, the late drove back to the depot and parked the truck, and knocked off around 15:00hrs. He added that when he went to the depot around 15:00hrs to deliver his sick note, he was denied entry including Robert Nyirongo who he met at the depot. He said when he enquired as to why they were denied entry; the security guards told him that they had been instructed not to allow anyone to enter the depot by the supervisor, because there were some inspections that were going on. He said the late, Robert Nyirongo explained to him that the auditor was inspecting trucks and that there was some fuel that was found in both trucks; one that was supposed to be driven by him and the other driven by the late.

PW1 said the inspection on a truck driven by Robert Nyirongo was done after he had knocked off, in his absence. According to PW1 the usual practice in BP Zambia PLC when inspections were done by the Energy Regulation Board (ERB) and the Zambia Bureau of Standards (ZABS) or by members of staff, a driver as the user of the truck was required to be

present. He said in this case, the drivers were not present when the inspections were done.

He said he and the late were advised to report on Monday, and when they reported for work, Robert Nyirongo handed over the invoice to him in respect of fuel delivered to Chelston on his behalf, and the same didn't indicate any shortages. He added that the Depot Manager, Mr. Jere asked some officers to offload the fuel purported to have remained in the tanker driven by Robert Nyirongo. He said some litres were offloaded, but could not remember the exact amount given the passage of time. He said the Defendant carried out investigations and came up with a report, referring to the one at page 58 of the Plaintiffs' Bundle of Documents, dubbed **Accidents and Incidents Investigation Report**, dated October 19, 2011. In which it was *inter alia* recorded

Following the interviews we have had with Robert Nyirongo, Riffle Konkola and Brian Chingobe, it was evident that there was a Break down in control procedures of checking that all products have been offloaded at the retail site. Failure by the BVO and fuel attendants to drain the truck compartments after product offloading caused the BVO to return with the product back to Lusaka Depot.

According to PW1, after the report was done, the late Robert Nyirongo was then charged, suspended, and was later dismissed. He made reference to the charge at page 65 of the Plaintiffs' Bundle of Documents. The Charges were as follows:

1. Charge: Gross negligence of duty resulting in potential loss of the Employer's funds or property (clause 1.21.1.2(10)).

Nature of the Offence: On 14th October, 2011, whilst making a delivery at Taja Service Station you neglected to follow the offloading procedure by deliberately leaving 22ltrs of ULP and 158litres of gas oil on truck number AAX 7179 driven by you.

2. Charge: Dishonest conduct (clause 1.21.1.2(33))

Nature of the offence: On 15th October, 2011, you attempted to drain 22 litres of ULP and 158 litres of gas oil which you deliberately left from the previous delivery in compartment number 1, 3, and 4 of truck number AXX 7197 in the Lusaka depot yard.

And reference was made to the letter of dismissal addressed to the late dated November 14, 2011, wherein it was *inter alia* recorded:

Dear Robert,

DISCIPLINARY INQUIRY OUTCOME

Reference is made to the charge of 'Gross Negligence of Duty resulting in potential loss of the Employer's funds or property' and 'Dishonest Conduct' raised against you under clauses 1.21.1.2. (10) and 1.21.1.2. (33) respectively of the Puma Energy Zambia Collective Agreement and the subsequent disciplinary hearing you attended on 09th November, 2011.

The Disciplinary Committee that sat to hear your case after reviewing the evidence submitted to it, found you guilty as charged of the offences. This is because of the evidence pointing to the fact that you neglected to follow the offloading process and deliberately left 22 litres of ULP and 158 litres of gas oil on truck number AAX 7197 and proceeded to park the same truck at the Wash-bay against advice of the Guard Commander on duty on the first charge. Further evidence provided by the Guard Commander during the hearing confirmed that you parked the vehicle at the wash bay against his advice to facilitate draining of the said product from your truck and that you confirmed to him that there was product on your truck that you needed to drain. You clearly failed to exonerate yourself when the witness narrated the sequence of events during the hearing and the conclusion that you were dishonest could not be disputed.

Consequently, Puma Zambia Management has found you culpable of the charge and decided to dismiss you from employment effective 10th November, 2011. This is in line with the provisions of clause 1.21.1.2 (33) of the Puma Energy

Zambia Plc Collective Agreement whose penalty is higher between the two offences you were charged with.

Signed
CHAIRMAN-DISCIPLINARY PANEL

PW1 said the appeal by the late was unsuccessful. He made reference to the Schedule of Offences and Sanctions exhibited at page 44 of the Plaintiffs' Bundle of Documents, recorded as follows:

21.1 The following schedule of offences and penalties is provided to establish broad uniformity in the description of offences and application of sanctions. However, this is only a guide and the list of offences is not exhaustive.

21.1.1 Offences have been classified into five major categories as follows:

- (a). poor time -keeping/ absenteeism;***
- (b). offences relating to negligence/ incompetence/ unsatisfactory work performance;***
- (c). offences relating to ill-discipline or disorderly behaviour;***
- (d). offence relating to dishonest conduct; and***
- (e). offences relating to illegal industrial action.***

He alleged that the late was charged with an offence that was not in the Disciplinary Code.

PW2 was Yuyi Muyenga, the first Plaintiff herein. He said that he was employed as an Administration Supervisor by BP (Z) PLC in February 2010 until 2011. He said his duties included: to carry out administrative works, verify payments, verify invoices and stand in for the Depot Manager whenever he was unavailable. He said his work hours were 44 hours a week and worked from Monday to Saturday. He said his work relationship

with his employer was governed by the **BP Zambia PLC, HR Policy and Administration Manual dated May 1, 2006.**

He recounted that on Friday, October 14, 2011, his Supervisor, Mr. Jere directed him to work on Saturday to authorize some invoices on his behalf. He said on October 15, 2011, he authorized an invoice pertaining to the truck driven by the late Robert Nyirongo. He said as he was about to knock off, his colleague, Mr. Konkola called for a meeting to pass instructions to Mr. Nyirongo that upon his return from making deliveries to Chelston Service Station, he should park the truck in the inner yard and not the outer yard as instructed by the Depot Manager. He said as the instructions were passed, a workmate named Brian Chingobe came in, and that Mr. Lapton Lungu the security officer was nearby.

He added that on Sunday he travelled to Mongu to attend to a funeral, and leave for him to travel was granted. He said when he reported for work on October 20, 2011, he was served with a suspension letter by his supervisor Mr. Jere, and on October 27, 2011, he was served with the charge which alleged the offence of dishonest conduct; wherein it was stated:

Charge: Dishonest conduct (clause 1.21.1.2(33) of the collective agreement.

Nature of the offence: On 15th October, 2011, you in the company of Brian Chingobe, Fredrick Konkola and Robert Nyirongo conspired to drain, for your personal benefit, 22 litres of ULP and 158 litres of gas oil from truck number AXX 7197 in the Lusaka yard.

He said he responded and denied the charge, and that the case hearing was held on November 9, 2011. He made reference to his letter of dismissal dated November 2011, wherein it was recorded *inter alia* as follows:

Dear Yuyi,

DISCIPLINARY INQUIRY OUTCOME

Reference is made to the charge of 'Dishonest Conduct' raised against you under clause 1.21.1.2. (33) of the Puma Energy Zambia Collective Agreement and the subsequent disciplinary hearing you attended on 09th November, 2011.

The Disciplinary Committee that sat to hear your case after reviewing the evidence submitted to it, found you guilty as charged of the offence. This is because of the evidence pointing to the fact that evidence provided by the Guard Commander during the hearing confirmed that you solicited for draining of 22 litres of ULP and 158 litres of Gas Oil on truck number AAX 7197. The Guard Commander confirmed that you approached him more than once requesting to drain the said product. First when you were with Brian Chingobe as the Commander was getting to his office and second at the depot gate where you found Fedrick Konkola speaking to the Commander on requests to access the product from the Truck. You failed to convincingly justify your presence at the depot on the material date and you could not dispel the allegation of connivance as asserted by the Guard Commander. Therefore, the disciplinary committee concluded that your presence at the depot on that material date was to access product from the truck as confirmed by all the witnesses.

Consequently, Puma Zambia Management has found you culpable of the charge and decided to dismiss you from employment effective 10th November, 2011. This is in line with the provisions of clause 1.21.1.2 (33) of the Puma Energy Zambia Plc Collective Agreement you were charged with.

...

Signed

CHAIRMAN-DISCIPLINARY PANEL

According to him, there were no adverse comments on the invoice for truck number AAX 7179, relating to shortages.

He said he lodged an appeal on November 21, 2011 with the Managing Director and on December 7, 2011, he received a response that his appeal was unsuccessful. He observed that he was charged with the offence of conspiracy with Mr. Robert Nyirongo, but the latter was never charged with the same offence. He explained that the offence of conspiracy was not in the Collective Agreement. He said he sought to seek legal recourse because the whole episode tarnished his reputation, and occasioned mental anguish.

The Defendant called two defence witnesses (DWs). DW1 was Masautso Jere, who at the material time was the Depot Manager for BP (Z) limited. He said on October 14, 2011, against the backdrop of the happenings at the depot, he issued instructions to the security guards and those directly reporting to him that after offloading fuel to service stations, no trucks should park at the washing bay unless with express permission. He said the instruction came about because it was rumored that drivers would park at the washing bay after delivery and would drain fuel from the trucks for personal use. He said this conduct was not acceptable. He said he also issued instructions that there was no need for employees to report for work the next day, a Saturday as there was no pending work, and that they had pressure to deal with "expenses", unless there was an emergency.

He explained that given his other commitments outside the depot, he requested Mr. Yuyi (PW2) to stand in for him.

He said on October 15, 2011, he received a phone call from the Guard Commander, Mr. Lungu alleging that that Fredrick Konkola, Brian Chingobe, Yuyi Muyenga and Robert Nyirongo had approached him to ask him to allow them to drain some products from truck number AAX 7191, which had previously returned from making deliveries, and was parked at

the washing bay against his instructions. He said upon receipt of the heads-up, he rushed to the depot, but did not find the four alleged conspirators, and was informed by the guard that they had left. He said the Guard Commander reported to him that at more than one occasion, he was approached by the said quartet, pleading with him to drain fuel from the truck. DW1 said he immediately called Brian Chingobe and asked him why he had reported for work against his instructions; he said that Brian Chingobe explained to him that he had to report for work because he had the keys to the gate, and when asked over the fuel, DW1 said, he was not given a satisfactory response by Brian Chingobe. He said as for the first Plaintiff, his phone was off. And as for Fredrick Konkola, DW1 said, he admitted having such intentions, but was stopped by the guard.

He added that an investigation team was constituted, followed by suspension letters. That after investigations were concluded charge letters were issued to the quartet. He said after the case hearing, the quartet was dismissed. He said when the subject truck was drained it had 22 litres of petrol and 158 litres of diesel. He maintained that the fuel was deliberately left in the tanker, and added that if the truck returned with fuel there was something wrong. But he also stated that if there was shortages in the delivery of fuel, a customer ought to indicate. He said the Guard Commander refused to aid the quartet to drain the said fuel.

DW2 was Godfrey Mwila, he said at the material time he worked for the Defendant as an Assurance Manager. He said in October 2011, he received a call from his Operations Manager, Mr. Mbabara, informing him that there was an incident at Lusaka terminal and asked him to be part of the investigation process. He said he was given terms of reference by Mr. Mbabara to investigate why a truck returned to the depot with fuel on it. He said he went to the depot to see Mr. Jere (DW1) who by then was

assembling a team to assess the quantity of fuel allegedly left in the truck/tanker. He said there were three trucks that were being assessed, two driven by Robert Nyirongo and the other by Riffle Mwiinga. He said among the people present at the material time were: the Depot Engineer, a Union representative, two drivers, Nyirongo and Mwiinga, and Mr. Jere (DW1).

He said when the truck driven by Mr. Nyirongo was drained; they found 60 liters of diesel in one compartment, 98 liters of diesel in another compartment and 22 liters of unleaded petrol.

DW1 said he was also part of the team that was assigned to interrogate the process from loading of fuel, dispatch and delivery of fuel at service stations. He said the conclusion they reached was that there was a breakdown in the process, which could have contributed to the trucks returning to the depot with the fuel, and made recommendations. He made reference to his report exhibited at page 18 in the Defendant's Bundle of Documents.

In cross examination he confirmed that customers that received the subject fuel did not complain of shortages at the point of delivery. He added that it was highly unlikely that a tanker can be overloaded from the depot.

Respectively, both parties filed written submissions. On behalf of the first Plaintiff, Mr. Yuyi, it was submitted that his presence at the depot on October 15, 2011, was justified. And that having regard to the fact that there was no adverse comment as regard the delivery of fuel to Taja Service Station, it was inconceivable to conclude that Mr. Yuyi connived with his colleagues to drain fuel from the tanker for personal use. It was therefore submitted that his dismissal was unfair and wrongful.

terminated or deemed to be terminated whether under the provisions of this Act or otherwise.

Reference was also had to the **International Labour Organisation- Termination of Employment Convention 158 of 1982, Article 4** which provides:

The employment of a worker shall not be terminated unless there is a valid reason for the termination connected with the capacity or conduct of the worker based on the operational requirements of the undertaking establishment of service.

In addition, reliance was placed on the case of **Caroline Tomaid Daka v Zambia National Commercial Bank Limited 2008/HP/0846** wherein it was held:

Unfair dismissal arises from statutory provisions and involves the protection of the right to employment ...in considering whether or not there was unfair dismissal it must determine the merits and demerits of dismissal. That is to say are the reasons given for the dismissal just.

Having regard to the foregoing, it was argued that since there was no loss suffered by Taja Service Station, and the invoice contained no adverse comments, there was no valid reason to dismiss the first Plaintiff, but malice. It was further argued that there was no evidence of dishonest conduct on the part of the first Plaintiff to engage in conspiracy to drain fuel from the truck, AAX 7197, and as such the dismissal was wrongful. The case of **Bank of Zambia v Kasonde (1995) Z.R. 238 (SC)** was vouched wherein it was held:

The respondent was employed by the appellant in a clerical capacity and was summarily dismissed for dishonesty but the important invoices were never produced in the disciplinary hearing... the allegation of dishonesty was not proven and the dismissal therefore wrongful. Finding furthermore, that special circumstance existed to justify order of reinstatement.

It was submitted that the first Plaintiff was entitled to the remedy of reinstatement. And that the two Plaintiffs were entitled to damages for wrongful dismissal and unfair dismissal.

In defense, defence Counsel observed that the subject procedural requirements were set out in the Collective Agreement executed between the Defendant and the National Union of Transport and Allied Workers. Hence, it was argued that the requirements were not statutory, and only formed part of the conditions of service as such their breach were incapable of rendering the dismissal null and void. In support, the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70 (SC)** was cited in which it was stated:

Where the procedural requirement before disciplinary action are not statutory but merely form part of the conditions of service in the contract between the parties, a failure to follow such procedure would be a breach of contract and could give rise to a claim for damages for wrongful dismissal but would not make such dismissal null and void.

It was also observed that at no point did the Plaintiffs allege procedural irregularity or that the disciplinary process was marred by unfairness.

It was argued that the argument in favour of Mr. Nyirongo that the charge of gross negligence of duty resulting in potential loss to the employer was not part of the Collective Agreement, or the Disciplinary Code was misconceived. It was stated that clause 1.21.1 of the Disciplinary Code was only a guide, and was not exhaustive. According to the Defendant's Counsel, the charge was proper. Additionally, it was argued that there was no condition or term in the Collective Agreement that required the presence of a BVO when inspecting a truck.

In addressing each remedy, it was argued that there was no specific ground provided by the first Plaintiff to justify reinstatement, and that there was no basis to declare the dismissal null and void.

Regarding unfair dismissal, it was stated that having argued that the dismissal of the Plaintiffs was not wrongful; the reasons for dismissal were equally justified. And as to the standard of proof to be observed by an employer in hearing a charge of misconduct, reference was made to the case of ***Chimanga Changa Limited v Stephen Chipango Ngombe (2010) ZR 208***, in which it was remarked as follows:

The appellant...believed, from its investigations, that the respondent was responsible for the loss.... The employer does not have to prove that an offence was committed or satisfy himself beyond a reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear: an employment relationship is anchored on trust and once that trust is eroded, the very foundation of the relationship weakens. In this case we are satisfied that the appellant carried out its investigations on the basis of which the respondent was dismissed. We do not find the dismissal wrongful.

It was contended that it cannot be argued that the Defendant acted unfairly.

Finally, it was submitted that since the dismissal of the Plaintiffs was lawful and fair, the claim for redundancy was baseless, and that the claim for early retirement was unsubstantiated.

I have carefully considered the evidence adduced and the submissions made thereof. It is not in dispute that the Plaintiffs were first employed by BP Zambia PLC, which was succeeded by Puma Energy Zambia Plc. Incidentally, it should be recorded that change of ownership of shares

cannot result in the corporate entity becoming a new employer and will be bound by the contracts of employment (see **ZCCM & Ndola Lime Limited v Sikanyika & Others SCZ Judgment No. 24 of 2000.** The first Plaintiff, Mr. Yuyi was employed to work as an Administration Supervisor, while the second Plaintiff was employed as a Bulk Vehicle Operator (BVO) (driver).

I am satisfied that on October 14, 2011, Mr, Nyirongo, as the BVO of truck number AXX 7179, was assigned to deliver fuel to Taja Service Station located in Longacres Lusaka. The fuel was duly delivered and the customer acknowledged receipt of the fuel. And no adverse comment was endorsed on the invoice. And there is consensus on both sides that there was no shortage. It is understood that since the delivery of the fuel was completed after 17:00hrs and at least in line with the Defendant's policy that no driver was allowed to drive tankers at night or after sunset. Mr. Nyirongo only drove the truck back to the depot on Saturday October 15, 2011. There was nothing irregular with him taking back the truck to the depot on Saturday.

However, what is in contention is that at the time of making the delivery of fuel to Taja Service Station, Mr. Nyirongo deliberately retained 22 litres of petrol and 158 litres of diesel with a view to drain the same from the depot, upon his return in conjunction with Mr. Yuyi, and two others, Mr. Konkola and Mr. Chingobe. I find it probable that when the truck/tanker was drained by management in the course of investigating the case (s), 22 litres of petrol and 158 litres of diesel were decanted. It is immaterial whether the decanting was done in the presence of the Plaintiffs or not, what is material is that after the truck was decanted, it was found to have a residue of 22 litres petrol and 158 litres diesel. It is also probable that the Guard Commander notified the Depot Manager, Mr. Jere (DW1) that

Mr. Yuyi, Mr. Nyirongo, Mr. Konkola and Mr. Chingobe, had approached him on October 15, 2011, on several occasions to seek his participation to aid the quartet drain the said remainder of fuel for their personal use, to which he declined, and decided to whistle blow the intentions of the quartet to the Depot Manager, Mr. Jere.

Based on the report by the Guard Commander, Mr. Lungu, the Defendant instituted investigations which culminated into disciplinary proceedings leading to the Plaintiffs' dismissal.

Starting with the first Plaintiff, Mr. Yuyi, I find that the first Plaintiff was duly charged with dishonest conduct contrary to clause 1.21, 21.1, 21.1.1 read together with the Schedule of Offences and Sanctions of the Disciplinary Code, which provide that, the sanction for dishonest conduct was dismissal. The particulars of the alleged dishonest conduct were sufficiently stated in the charge. The erroneous reference that the offence were in the Collective Agreement, instead of making reference to the Disciplinary Code, is not fatal to the Defendant. In any event the Plaintiff, understood the charge and responded accordingly.

The charge dated October 27, 2011, was served on the first Plaintiff, and he rendered his exculpatory letter, a case hearing was conducted on November 9, 2011. The Disciplinary Panel that was constituted to hear and determine his case found the first Plaintiff guilty as charged. Thereafter management decided to dismiss him. And on appeal, his appeal was unsuccessful. Both the Disciplinary Panel and the Appeals Committee *inter alia* decided to believe the statement by the Guard Commander that Mr. Yuyi, Mr. Nyirongo and two others on several occasions on October 15, 2011, engaged the Guard Commander with a view to solicit for his hush to enable the quartet unlawfully drain fuel from the said tanker.

It is abundantly clear to me that the dismissal of Mr. Yuyi cannot be said be wrongful. The Defendant duly followed the procedure spelt out in the Disciplinary Code. Both in terms of affording the first Plaintiff the right to be heard on a charge founded on the Disciplinary Code. Secondly, the disciplinary organs were well vested with the power to hear and determine his case. Therefore, there was no want of authority to render the dismissal null and void. As earlier noted, the dismissal was essentially based on the report by the Guard Commander, and the Disciplinary Panel choose to believe the Guard Commander.

There is no basis on my part, who had no opportunity to hear or see the said witness in order to assess his credibility, and hold otherwise that, the version of facts presented by Mr. Yuyi is more probable and truthful, and more reliable than that of the Guard Commander. Further, the charge cannot be rendered defective on account that the particulars of offence alleged against Mr. Nyirongo did not disclose conspiracy with Mr. Yuyi. In addition, it's to be noted that it's not only Mr. Yuyi and Mr Nyirongo that were charged and dismissed, the other two, Mr. Konkola and Mr. Chingobe were dismissed as well. This I believe goes to show that the conduct of the Defendant was not malicious or purely targeted at agonizing or hounding Mr. Yuyi at all costs.

Furthermore, I cannot distill unreasonableness or perverse conduct on the part of the Defendant's disciplinary organs in the manner they dealt with the case. Certainly, I cannot sit as an appellate court to review the decision of the Disciplinary Panel or the Appeal Committee, and substitutes its findings with my *contra* opinion as to whether the Guard Commander was believable, reliable or not. I am well grounded to so hold by making reference to the case of **Luciano Chitalu and Jackson Chomba v Newstead Zimba (1988-89) Z.R 64** wherein it was held:

The Court does not sit as a Court of appeal from the decision of a domestic tribunal to review its proceedings or to inquire whether the decision is fair or just or reasonable. The jurisdiction is limited to the question of whether the Court has power to intervene; that is to say, is limited to the questions of (1) whether the union has valid disciplinary powers and (2) if so, whether such powers have been validly exercised. (Emphasis supplied).

The Defendant made an assertion that Mr. Yuyi's presence at the depot was suspect, because he was not supposed to be on duty on October 15, 2011; this allegation was unfounded, it was not supported by evidence. On that date, the Depot Manager was out of station, and had asked Mr. Yuyi to act on his behalf, as Depot Manager. It is therefore inconceivable to allege that he solely reported for work to execute an unlawful act to steal fuel from the tanker/truck for personal advantage. In any case there was a truck that had to be dispatched on that day destined for Chelston Service Station. Completion of the dispatch process for the said truck required his presence and approvals. Although his presence was justified, it does not render the dismissal unfair; having resolved that the Defendant's decision to consider the Guard Commander to be truthful and reliable regarding Mr. Yuyi's alleged dishonest conduct was faultless. As it was lucidly stated in the case of **Chimanga Changa**, an employment relationship is based on trust. And having regard to the fact that the offence/allegations herein related to dishonest conduct, the Defendant cannot be faulted to have resorted to take the ultimate sanction to dismiss the first Plaintiff, thereby making the claim for reinstatement unavailable.

I now turn to consider the case for the second Plaintiff, the late Mr. Nyirongo. I find that the second Plaintiff was duly charged with gross negligence of duty resulting in potential loss of the employer's fund or property contrary to clause 1.21,21.1,21.1.1 of the Disciplinary Code as

read together with Offence No. 10 in the Schedule of Offence and Sanctions, which clearly stipulate the offence and quoted verbatim in the charge. Therefore, the argument or assertion that the offence is alien to the disciplinary process is misleading. Even under the general categorization of offences under clause 21.1, 21.1, 21.1.1, of the Disciplinary Code, the offence falls under the categorization of offences relating to negligence. As regard the charge of dishonest conduct in count two, as stated earlier, the offence was provided for under the Disciplinary Code. The particulars of the offences were adequately stated in the charge.

The charge dated November 1, 2011, was served on the second Plaintiff, and the case hearing was conducted on November 9, 2011. The Disciplinary Panel that was constituted found the second Plaintiff guilty as charged in both counts. Thereafter management decided to dismiss him. And on appeal, his appeal was unsuccessful. The findings that I have made in respect of the first Plaintiff apply *mutatis mutandis* in the case of the second Plaintiff.

The decision by the Disciplinary Panel to find Mr. Nyirongo guilty in the first count of gross negligence of duty resulting in potential loss of the employer's fund or property, coupled with its particulars that: "On 14th October, 2011, whilst making a delivery at Taja Service Station you neglected to follow the offloading procedure by deliberately leaving 22ltrs of ULP and 158litres of gas oil on truck number AAX 7179 driven by you" are certainly without supporting evidence. This also defied commercial sense. Firstly, if at all, the tanker was overloaded, the blame cannot be shouldered by the second Plaintiff. Secondly, the correct quantity of fuel was delivered to the customer, and the customer made no adverse comment on the invoice. It was confirmed by the Defendant's witnesses that the invoice had no adverse comments, which meant that the customer

irretrievably break down the relationship. And the proportionate sanction is invariably a dismissal.

Notwithstanding the second Plaintiff's vindication in count one regarding the charge of gross negligence etc; this does not alter the net effect that, his dismissal was neither wrongful nor unfair on the charge of dishonest conduct.

In view of the foregoing, I come to the inevitable conclusion that having resolved that the Plaintiffs' dismissal was neither wrongful nor unfair; the Plaintiffs' claims are totally dismissed.

I make no order as costs.

DELIVERED THIS 31ST DAY OF JANUARY, 2020.



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THE HON. MR. JUSTICE CHARLES ZULU