

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA
(Industrial Relations Division)**

IRC/ND/62/2021

BETWEEN:

RONALD CHIMBAYA

AND

KALUMBILA MINERALS LIMITED



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 1st day of November, 2022.

For the Complainant: Mr. E. Sakala, Messrs J.B. Sakala & Co
Mr. M. Kamanga, Messrs John Kayuni & Partners

For the Respondent: Mr. H. Pasi, Messrs Mando and Pasi Advocates

JUDGMENT

Cases referred to:

1. Eston Banda and another v The Attorney-General, Appeal No. 42 of 2016.
2. Chilanga Cement v Venus Kasito, Appeal No. 86 of 2015.
3. The Attorney-General v Phiri (1988-1989) Z.R 121 (S.C).

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021.
2. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.

By notice of complaint supported by an affidavit filed into Court on 15th November, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. An order that the termination of the complainant's employment was wrongful, unfair and unlawful.
2. An order for payment of damages for wrongful and unfair termination.
3. Interest on (2) above from the date of termination to date of payment.
4. Costs of and incidental to these proceedings.
5. Any other order the Court may deem fit.

In his affidavit in support, the complainant stated that he was employed by the respondent company as an Operator on 15th August, 2015 as per his contract of employment, exhibit, "RC1" until 20th August, 2021 when he was summarily dismissed from his position as an Area Supervisor on allegations of unauthorized removal of company property; and an action against the best interests of the company.

It was the complainant's evidence that on 26th June, 2021, he was assigned to go to the light vehicle workshop (LV workshop) of the plant to have a pool vehicle inspected by Road Traffic and Safety Agency (RTSA) agents who were to be on site conducting fitness tests on pool vehicles. That upon arriving at the LV workshop, he

was instructed by the foreman of the workshop to first have the vehicle washed before the fitness test could be conducted. That a gentleman he later came to know as Duncan, whom he perceived to be a contractor's employee and was eavesdropping on his conversation with the foreman, approached him to wash the vehicle on his behalf on condition that he assisted him to pick up a few items from the main warehouse of the plant. That after they returned from the main warehouse, the vehicle was washed by the said Duncan as agreed but the RTSA agents were not yet ready to inspect the vehicle as they were not yet at the LV workshop. That by that time, it was already lunch hour and he had lunch delivery errands to run and thought he could do this in the hope that the RTSA agents would be ready to inspect the vehicle by the time he would have returned. That as he left, Duncan asked if he could assist him take two tyres to the Sentinel workshop as his lunch errand was in the same direction as the Sentinel workshop. That when he got to the Sentinel workshop as discussed with Duncan, he called him on his line 0968414541 to get further instructions as to where the tyres should be delivered exactly but his line went unanswered. That after that, he proceeded to the Sentinel quarry where he was expected to deliver lunch with the tyres still in the vehicle. That when he was done with his lunch delivery errands, he began to drive back to the LV workshop in an effort to get the car inspected as earlier planned. That on his way, he met with a gentleman who requested for a lift as he was heading in the same

direction as the location of the LV workshop. That it was on that trip that the gentleman told him that he had bags of maize and cassava outside the premises of the plant which he thought he might be interested in. That after expressing interest in the said bags, they made a slight detour to the Mukila check point, one of the exit points of the plant where they were to pick the bags. That upon arrival at Mukila check point, he conversed with the Security Guard on duty and explained his mission to him. That as they were liaising their plan to pick up the bags with the Security Officer, he noticed the two tyres which at that point were still in the vehicle. That the Security Guard immediately became curious and started questioning the origin of the tyres and their intended purpose. That he told the Security Guard that the tyres were for use within the plant and that he was merely doing a colleague a favour by transporting them to Sentinel workshop, as earlier planned. That the said Security Officer proceeded to radio the security staff at the main security office in order that he might prove the veracity of his story. That the Security Officer was instructed to detain him until his supervisor arrived. That upon the arrival of his supervisor, he narrated how the tyres had come into his possession. That the security officers asked him to call Duncan who had handed him the tyres but unfortunately his phone went unanswered. That the security officers instructed him to return the following morning to work like normal and keep the details discreet. That on 30th June, 2021, he received a text message from the Security Officers asking him to report to

the station in order that he would put up a written statement. That after writing the statement, he continued to work normally. That on 19th July, 2020, he was summoned once more to the plant police station where he was asked to repeat his initial statement, which he did. That it was at that point that the Police Officer accused him of having attempted to bribe a Security Officer in order to exit with the tyres something which he vehemently denied. That after that, he was told to go and continue working normally. That on 4th August, 2021 he was served with a suspension letter, "RC2" until further notice to facilitate investigations. That on 20th August, 2021, after investigations he was summarily dismissed as shown by the dismissal letter, exhibit "RC3"; and he was advised to appeal the matter. That on 24th September, 2020, he officially filed his appeal, exhibit "RC4". That on 22nd October, 2021, he was handed his final dismissal letter, "RC5", after being informed that his appeal was unsuccessful. That throughout his exculpatory statements, he was clear that he did not exit the plant with the said tyres and thus could not have been found guilty of the offence of unauthorized removal of company property. That Duncan, the gentleman who handed him the tyres escaped and was not available to answer to his actions after he possibly became aware of this matter. That he never attempted to bribe anyone in the purported effort to exit the plant with the tyres. That the codes used in his disciplinary procedures were not what was reflected in the company code of conduct, exhibit "RC6".

That the action of the respondent to unfairly dismiss him left him a destitute and had the potential to make his prospects of finding another job quite difficult. That he was craving the Court to award him damages for unfair termination of employment with interest and costs.

On 15th February, 2022, the respondent filed into Court an answer and an affidavit in support thereof, sworn by one Arnold Shabolyo, the Human Resources Superintendent in the respondent company. He deposed that the complainant was employed by the respondent on 15th August, 2015 as a Bobcat Operator for a period of 12 months. That upon expiry of his initial fixed term contract of employment, he was employed as a Machine Operator on a permanent and pensionable contract and was later promoted to the position of Area Supervisor-Site Services, a position he held until his employment was summarily terminated on disciplinary grounds on 20th August, 2021 as per the exhibit, "AS1". That the respondent's Policies, Disciplinary, Capability and Grievance Procedure Code and the First Quantum Code of Conduct as amended from time to time formed part of the contract of employment between the complainant and the respondent as shown by exhibit, "AS2". That the disciplinary code which was approved in February, 2018 which the complainant produced in his affidavit as exhibit, "RC6" was reviewed, revised and replaced with the Disciplinary, Capability and Grievance Procedure Code which became effective on 1st

May, 2021 which was the disciplinary code applicable to complaint at the time of the disciplinary proceedings as shown by the exhibit, "AS3"; and the memorandum, "AS4" dated 30th April, 2021 written by the respondent to all employees notifying them of the review, revision and replacement of the disciplinary code. That on or about 26th June, 2021, the complainant attempted to exit the mine site using the Mukila Wantambu gate in a Motor vehicle while in possession of two brand new tyres belonging to the respondent. That when he was prevented from exiting the mine premises with the said property, the complainant attempted to bribe the Security Officer who was manning the gate with K500.00 which they refused and reported the incident. That following the incident, the complainant was suspended with full pay; and investigations were instituted and a report on the incident was produced by the respondent's security department as shown by exhibit, 'AS6'. That following the aforementioned investigations, the complainant was charged with the offences of "Unauthorized Removal of Company Property; and "Any Actions Against the Best Interests of the Company" which offences are provided for under Clause 13 of the Disciplinary, Capability and Grievance Procedure Code (Schedule of Offences) and defined under Clause 14 of the said code. That the charges were explained to the complainant by his immediate supervisor who charged him and the complainant signed on the charge form to acknowledge receipt thereof as per exhibit, "AS7". That the complainant was given a statement form

and requested to give a written exculpatory statement to the charge which he did and statements were also obtained from witnesses, namely, one Derrick Machayi an eye witness who was in the company of the accused at all material times and one Oliver Matulu, the Security Officer who intercepted the complainant when he tried to exit the mine site with company property and whom the complainant attempted to bribe as per statements. The complainant's statement was exhibited as 'AS8' whereas the witnesses' statements were exhibited as 'AS9' and 'AS10'. That a disciplinary case hearing was held on 20th August, 2021 at which the complainant was present and heard as shown by the notification to attend the disciplinary case hearing, 'AS11'; and the minutes of disciplinary hearing, 'AS12'. That the complainant appealed against the summary dismissal to the General Manager, but his appeal was not successful as shown by the exhibits, "AS14" and "AS15". It was the respondent's position that following the disciplinary hearing, the complainant was found guilty of both offences as charged and consequently dismissed in accordance with the respondent's Disciplinary, Capability and Grievance Procedure Code; and the company policies applicable to the complainant and in compliance with the law. That, in the premise, the complainant was fairly and lawfully dismissed.

At the trial, the complainant testified that he was employed by the respondent company which was now called Trident Limited.

That his last position was that of Area Supervisor. That he was initially employed as Bobcat Operator on 15th August, 2015, and became the Area Supervisor in 2016. That as Area Supervisor, his duties were to supervise sentinel quarry section, drill and blast, load and haul.

He testified that Saturday, on 26th June, 2021, he was given an assignment to take a light vehicle, LV 1115 Hilux to the light vehicle workshop for RTSA inspection and fitness. That when he arrived at the workshop, he found that the RTSA officials who were supposed to do the inspections were not yet on sight. That he spoke to the Foreman of the workshop who told him to wash the car stating that the RTSA officials were not going to inspect it if they found it dirty. That there was a gentleman who offered to help him wash the car on condition that he too was going to help him collect some items from a warehouse. That they reached an agreement. That when they arrived at the warehouse, that gentleman collected some items. That after he was done, he also asked him to pass through the Zambian camp within the mine premises to buy hot dogs. That after buying the hot dogs, they went back to the workshop where that gentleman offloaded the items they collected except for two tyres. According to him, he did not know whether the tyres were from the warehouse. That they then washed the car between 11.00 and 12.00 hours. That after washing the car, he told the gentleman that he was going to the sentinel workshop which had a kitchen where they used to get

food. That, that gentleman asked him to do him a favour by leaving the tyres at the sentinel workshop. The gentleman gave him his phone number and asked the complainant to call him whilst at the workshop so that he could tell him who to leave the tyres with. That he later found out that the name of the gentleman was Duncan. That he drove to the sentinel camp but when he phoned Duncan to ask him about where to leave the tyres, he did not answer the phone. That because he was running late, he went to collect his lunch with the tyres on the vehicle since he did not know where to leave them. That he collected lunch and drove to sentinel quarry where they all ate lunch from. That in his team at the mine site, there were some workers who used to stay nearby the mine and that he was approached by one of them named Derrick Machayi whom he had given a request to take him cassava. That Derrick told him that he had brought cassava but because he could not carry the cassava into the mine premises, he had left it near the access gate. That the complainant drove to Mukila Wantambo access gate with Derrick to pick up the cassava. That upon reaching the gate, the complainant spoke to the Security Guard who was at the access gate and asked him to look after the vehicle and all the properties that were in the vehicle as they had to walk to pick up the cassava. That when the Security Guard inspected the vehicle to see what was in there, he told the complainant that he needed to consult from the control room whether he was allowed to look after the items. That after the Security Guard called the control

room, he asked the complainant and Derrick to wait for the supervisor from the control room. That the supervisor went there and asked the complainant and Derrick about the purpose of the items. That the complainant told the supervisor that the items they had in the vehicle were not meant to be taken outside the mine premises. That they meant to leave them there as they walked to pick up a bag of cassava. After a chat with the supervisor, he asked them to accompany him to go and show him where they got the tyres from. That the supervisor drove his vehicle while the complainant drove behind him. That to his surprise, the supervisor did not turn where the complainant had told him that he got the tyres from but went to his office. That when they reached his office, the supervisor asked him to remove the tyres and put them in the security office. That after leaving the tyres, the supervisor asked the complainant to park his vehicle behind and to jump on the security supervisor's vehicle as they went to Zambia Police. That when they reached Zambia police, the supervisor asked the complainant for Duncan's number but when he called the number, Duncan did not answer. The supervisor then asked the complainant to wait at the Zambia Police reception. After waiting for two hours, the supervisor went and asked him to go home and report the next day for his normal duties.

It was the complainant's testimony that on 30th June, 2021, the supervisor asked the complainant to go to their offices and give

a full statement of what had transpired. That when he went there and gave a statement of what had transpired on 26th June, 2021, he went back to work. After a few weeks of working without hearing from the supervisor or anyone, the supervisor sent him a text message asking him to go to his office on 19th July, 2021. That when he went to the office, the supervisor asked him to give a statement after which he asked him how his working relationship with his supervisor was. After that, the supervisor asked him to continue working. On 4th August, 2021, the complainant was called to the Human Resources office and served with a suspension letter. That on 20th August, 2021, he was called for a disciplinary hearing after which he was dismissed from work for attempting to leave the mine site with two tyres and attempting to bribe the Security Guard. That he was advised to appeal if he so wished which he did on 24th August, 2021 and on 22nd October, 2021, he was informed that his appeal was unsuccessful.

The complainant denied having offered any money to the Security Guard in order for him to exit the mine site. That he did not attempt to exit the mine site with the tyres but meant to leave the vehicle there so that they could walk to go and pick up the cassava. That he was charged with stealing and he wanted the Court to clear his name which had been dented because of the charge of stealing; that he could not get employment because of the bad name.

During cross-examination, the complainant stated that he did not know Duncan's name until he was taken to the Police station. That he never bothered to find out his name despite the considerable time they spent together because it was not necessary. That he did not find it necessary to know whether Duncan was an employee of the respondent because he found him with the Workshop Foreman. That he later found out that Duncan was an employee. That he never saw him afterwards because he did not call him. That whilst at the Police station, the Security Supervisor told the complainant to call Duncan and put the phone on loud speaker but the phone was not going through. The witness admitted that Duncan used to work from the light vehicle workshop. That Duncan got the tyres from the respondent's warehouse. That all the items were meant to be taken to the light vehicle workshop. He stated that Derrick Machayi was a General Worker under the complainant's supervision. That they used to send him to do blasting, watering as well as cleaning the offices. That he was the one whom he asked to accompany him to get cassava from the Mukila Wantambo exit gate. That they never used that gate to go out. He stated that the Security Guard searched the vehicle and found the tyres in the vehicle. That the Security Guard was working for a contracted company. That the case was reported to the respondent's security. That they got a statement from the complainant and the Security Guard. That they also got a

statement from Derrick. That the Security Guard and Derrick did not state that the complainant wanted to exit the mine premises at that point. That they later stated that the complainant wanted to bribe the Security Guard with K500.00 to exit the mine premises. He admitted having been charged by his immediate supervisor and that he was served with a disciplinary charge form. That the two offences he was charged with were clearly stated on the charge form. That after he was charged, he was asked to exculpate himself, and he wrote the exculpatory statement. That he was invited to attend the disciplinary hearing on 20th August, 2021 after which he was summarily dismissed. He appealed and the appeal was unsuccessful. That he signed to acknowledge receipt of the form.

RW1 was Arnold Shabolyo, Human Resources Superintendent in the respondent company. He informed the Court that his duties included overseeing the administration of disciplinary procedures at work, manpower planning, grievance handling and staff welfare.

The witness testified that the respondent's disciplinary code, 'AS3' was revised in May, 2021 and that it replaced the one that existed from 2018. That that position was communicated to all employees via emails with the emphasis to the supervisors and Managers to ensure that the new disciplinary code was shared and understood by all employees as shown in the second

paragraph of the internal memorandum, 'AS4' which was issued by the Human Resources Manager. That the disciplinary code, 'AS3' came into force on 1st May, 2021. That the complainant received the document via his email. In responding to the complainant's argument that he did not remove the tyres from the respondent's premises, RW1 explained that within the disciplinary code, there was an indicative definition of what constituted the offence of unauthorised removal.

During cross-examination, the witness reiterated that the new disciplinary code came into force on 1st May, 2021. That prior to that date, the disciplinary code that was applicable was the 2018 one. That the whole disciplinary code was replaced. That an email was sent to the complainant to ensure that he had access to the document. He confirmed that he had not exhibited the said email. RW1 confirmed that of the witnesses that gave the statements during the disciplinary hearing, Derrick Machayi was still an employee of the respondent while the Security Guard was not as they had contracted him.

I have considered the parties' affidavit and *viva voce* evidence.

The facts which are common cause were that the complainant was employed by the respondent on 15th August, 2015 as Bobcat Operator and he was later promoted to the position of Area Supervisor. On 26th May, 2021, the complainant was intercepted

by the Security Officer at the respondent's Mukila Wantambu exit gate upon being found with two brand new tyres belonging to the respondent in the vehicle. The complainant was then suspended from work with full pay pending investigations. He was later charged with the offences of: 'unauthorised removal of company property' and 'any actions against the best interests of the company' contrary to clauses 48 and 58 of the respondent's disciplinary code, respectively as shown by the charge form, 'AS7'. The complainant was asked to exculpate himself which he did as shown by his exculpatory statement, 'AS8'. A disciplinary hearing was held on 20th August, 2021 after which the complainant was found guilty of the subject offences and summarily dismissed from employment. The complainant appealed against his dismissal but his appeal was unsuccessful.

From the evidence on record, the following are the issues for determination:

1. Whether the Disciplinary, Capability and Grievance Procedure Code, 'AS3' of 2021 was applicable to the complainant at the time he was subjected to the disciplinary process which resulted in his summary dismissal.
2. Whether the complainant's dismissal from his employment was wrongful and unfair thereby entitling him to the payment of damages.

I will start with the first issue.

The complainant has contended that the codes (clauses) under which he was charged were not what was reflected in the disciplinary code, 'RC6' of 2018 and, therefore, were not applicable to him. On the other hand, the respondent argued that the 2018 disciplinary code, 'RC6' was revised and replaced with the 2021 disciplinary code, 'AS3' which came into force on 1st May, 2021. That all the employees, including the complainant, were communicated to about the new disciplinary code via email and the internal memorandum, 'AS4' which was issued by the Human Resources Manager.

I have considered the opposing arguments from the parties. It is not in dispute that the complainant was charged under clauses 48 and 58 of the 2021 disciplinary code, which came into force on 1st May, 2021. The respondent produced an internal memorandum, exhibit 'AS4' dated 30th April, 2021 addressed to all its members of staff. The said memorandum, 'AS4' clearly stated that the respondent's disciplinary code which had been approved in February, 2018 had been reviewed, revised and replaced with the policy (Disciplinary, Capability and Grievance Procedure, 'AS3') that became effective on 1st May, 2021. It also clearly stated that all new offences, breaches and charges relating to conduct and performance were to be referenced to the new disciplinary code, 'AS3'. The offences with which the complainant was charged were alleged to have been committed

on 26th June, 2021. Therefore, I am satisfied that the disciplinary code that was applicable to the complainant at the time he was alleged to have committed the offences was the new disciplinary code, 'AS3' of 2021. In the result, the complainant's argument is bereft of merit and is accordingly dismissed.

I now turn to the second issue for determination, which is whether the complainant's dismissal from his employment was wrongful and unfair thereby entitling him to the payment of damages.

The complainant has claimed for an order that the termination of his employment was wrongful, unfair and unlawful.

I have analysed the evidence in this case and I am quite satisfied that the complainant was dismissed from his employment after the respondent had instituted disciplinary proceedings against him. Therefore, the claim by the complainant does not border on termination but should be anchored on his summary dismissal.

The Supreme Court in the case of **Eston Banda and Another v the Attorney General**¹, has guided that:

"There are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of a term for which the employee is engaged; whilst 'unfair' refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be

"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question."

With regard to the concept of unfair dismissal, the learned authors, Judge W.S. Mwenda and Chanda Chungu, in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:

"Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified."

On the above authority, for the complainant to succeed in his claim that he was unfairly dismissed, he must show that a specific statutory provision was breached by the respondent or that the dismissal was based on unsubstantiated reasons.

I will start by determining whether the complainant's dismissal from employment was wrongful.

Having looked at the procedure that the respondent adopted during the disciplinary process against the complainant, I am quite satisfied that the complainant was formally charged for the offences that were alleged against him as shown by the charge form, 'AS7' exhibited to the respondent's affidavit in support of its answer; he was called upon to exculpate himself; and

dismissed. A loose reference to the term '*unlawful*' to mean '*unfair*' is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book *Employment Law in Zambia: Cases and Materials*, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute."

On the above authority, I am of the view that the relief that the complainant is seeking is for an order that his dismissal from employment was wrongful and unfair, and I will proceed to determine the issue as such.

It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer breached the disciplinary procedures under the contract of employment or the rules of natural justice. Hon. Dr. Judge W.S. Mwenda, learned author of the book entitled '*Employment Law in Zambia: Cases and Materials*' states at page 18 that:

"The concept of wrongful dismissal is the product of common law. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why, but

eventually invited to attend the disciplinary hearing held on 20th August, 2021 as shown by the minutes of the case hearing exhibit, 'AS12'. In toto, I am satisfied that the complainant was accorded an opportunity to be heard before his dismissal was effected in accordance with the provisions of section 52(3) of the Employment Code Act No. 3 of 2019. In summary, I am satisfied that the respondent complied with the disciplinary procedures, the rules of natural justice and the Employment Code Act in determining the complainant's case and his eventual dismissal. On the totality of the evidence in this case, I am satisfied that the complainant was accorded all his rights to a fair hearing. In this regard, the complainant has, on a balance of probabilities, failed to prove that his dismissal from employment was wrongful.

However, the matter does not end there. This now brings me to the question whether the complainant's dismissal from employment was unfair.

In the case of **The Attorney-General v Phiri**,³ 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 it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice 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."

I have considered the events that led to the respondent taking disciplinary action against the complainant and his eventual dismissal from employment in this matter.

The complainant was found guilty of the offences of unauthorised removal of company property; and any action against the best interests of the company. It was established by the respondent that on 26th June, 2021, the complainant had attempted to exit company premises with 2 x 7.50 R16 tyres without authorisation; and that he had attempted to bribe the Security personnel who had intercepted him on his way out of the company premises with a K500.00 in order to allow him to exit the company premises with the tyres. The complainant vehemently denied that he was the person who had loaded the tyres on the vehicle that he was driving but that it was Duncan who had asked for a lift from him. According to him, he stated that Duncan had requested for a lift from him so that he could help him collect some materials from the respondent's warehouse within the company premises and that when they reached the respondent's warehouse, the said Duncan loaded some materials which included two tyres. Upon delivery of the materials to the LV workshop, they offloaded all the items except the two tyres which Duncan requested him to leave at the Sentinel workshop with someone Duncan was to introduce to him by phone. That when he reached the Sentinel workshop, he

phoned Duncan who could not pick up his phone calls. The complainant vehemently argued that the said Duncan could no longer be located by phone or otherwise although in cross-examination, he stated that Duncan was an employee of the respondent at the LV workshop.

Further, the complainant denied having attempted to bribe the Security Guard they found at Mukila Wantambu exit gate. It was his evidence that in the course of the day on the material date, he was again approached by one Derrick Machayi who had brought him a bag of cassava for which he had earlier paid. That Derrick informed him that he had left the bag of cassava outside the respondent's premises near Mukila Wantambu access gate. Subsequently, they drove together to Mukila Wantambu exit point where upon reaching, they requested a Security Guard to look after the vehicle he was driving and its contents. That in the process, the Security Guard on duty was skeptical about their request and had to consult his supervisor who later came and directed the complainant to go to their security office where upon he was asked to park the vehicle he was driving and removed the tyres and put them in that office. He was eventually taken to the Police.

On the other hand, the respondent argued that the on 26th June, 2021, the complainant attempted to exit the respondent's mine site using Mukila Wantambu gate with two brand new tyres

belonging to the respondent without authority. That when intercepted, the complainant attempted to bribe the Security Guard but he declined. It was the respondent's evidence that the complainant was properly found guilty of the offences with which he was charged and consequently dismissed in conformity with the respondent's disciplinary code and the law. The respondent contented that the complainant was, therefore, fairly dismissed.

It is not in dispute that the complainant was found in possession of the two tyres in question which he had loaded on the vehicle he was assigned to take for fitness at the LV workshop. It is also not in dispute that the respondent's Security Guard who was on duty at Mukila Wantambu exit gate intercepted the complainant while in possession of the two tyres without any official documentation authorising for their conveyance.

The complainant has forcefully argued that the respondent should not have found him guilty since it was one Duncan, whom he had given a lift on his vehicle, who loaded the said two tyres on the vehicle; and that the said Duncan could not be traced as he did not pick up his calls to show him the person to whom he was supposed to deliver the tyres at the Sentinel workshop. Further, he has argued that he had never intended to exit the respondent's premises with the same tyres but meant to leave the vehicle on which the tyres were loaded at the said exit gate

and to walk to the place where they were to pick some cassava. He also denied having attempted to bribe the Security Guard on duty in order to egress the respondent's premises with the two tyres in issue.

What is of particular interest in this matter is how the complainant came into possession of the two tyres in issue; and how he found himself at Mukila Wantambu exit gate with the two tyres in the car which he was specifically assigned to take for inspection by RTSA officials at the LV workshop, which inspection never took place. I have found it extremely difficult to believe that it was Duncan, whom the complainant described to have been a complete stranger to him, who loaded the two tyres on the vehicle the complainant was driving, without his consent. Above all, without any official documentation for their conveyance. Even if the said Duncan was called as a witness on behalf of the complainant and confirmed that he was the one who loaded the two tyres on the vehicle the complainant was driving and asked the complainant to deliver them to the sentinel workshop to an unknown person whose identity was to be disclosed later by Duncan, such a position would not help the complainant's case because he had no any form of authority from the respondent for the conveyance of the tyres in issue, and to remain in possession of such items which were only recovered after the interception by the alert Security Guard at the point of exit from the respondent's mine premises. From the evidence on

record, I find that it was the complainant who had orchestrated and actively participated in the removal of the two tyres from the respondent's warehouse with a view to taking them for his own purposes without any kind of authorisation from the respondent.

How the tyres found themselves at Mukila Wantambu exit gate is another puzzle. In his affidavit evidence, the complainant indicated that he went to the said gate after expressing interest in the cassava a certain gentleman had which cassava was left outside the respondent's mine premises near Mukila Wantambu exit gate. However, in his oral testimony, he contradicted himself and stated that he had earlier on asked Derrick Machayi to buy the cassava for him and the said Derrick Machayi had brought it on the material date but left it outside the respondent's mine premises. I find that the complainant's story relating to the collection of the purported cassava is untrue and I reject it to have been the reason the complainant went to Mukila Wantambu exit gate.

On the totality of the evidence in this case, I am satisfied that the respondent validly exercised its disciplinary powers, and there was a substratum of facts to support the summary dismissal of the complainant from employment. Further, I am satisfied that the sanction of summary dismissal which was imposed on the complainant was the proper punishment for the offences for which the complainant was found guilty. In the result, the

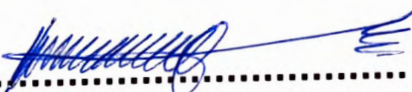
complainant has, on a balance of probabilities, failed to prove that his dismissal from the respondent's employment was unfair.

Having found that the complainant's dismissal from the employment was not wrongful and was not unfair, his claim for damages for wrongful and unfair dismissal has also failed and is hereby dismissed accordingly.

I make no order for costs. Each party will bear own costs.

Leave to appeal is granted.

Delivered at Ndola this 1st day of November, 2022.


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Davies C. Mumba
HIGH COURT JUDGE