

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

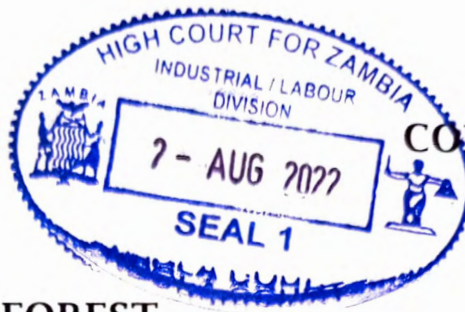
IRC/ND/57/2021

BETWEEN:

DAVID KANYIKA

AND

**ZAMBIA FORESTRY AND FOREST
INDUSTRIES CORPORATION PLC**



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 2nd day of August, 2022.

For the Complainant: Mr. K. Tembo, Messrs K. Tembo and Co. Advocates
For the Respondent: Mr. M. Mwaba with Mr. J. Lubinga- Inhouse Counsel

JUDGMENT

Cases referred to:

1. Eston Banda and another V The Attorney-General, Appeal No. 42 of 2016.
2. George Chisenga Mumba v Telecel (Zambia) Limited³, Appeal No. 156 of 2006.
3. Chilanga Cement v Venus Kasito, Appeal No. 86 of 2015.
4. 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. 2021.

By notice of complaint supported by an affidavit filed into Court on 19thOctober, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

- 1. Damages for wrongful and unlawful dismissal;**
- 2. Interest and costs on (1) above;**
- 3. Any other relief which the Court deems fit and just under the circumstances.**

It was the complainant's evidence that he was employed by the respondent in April, 2005 as a Foreman on a date he could not remember. That On 20thNovember, 2020, he reported for work for fire patrols in Misaka and Maposa areas using the respondent company's fire tender. Around 12.00 hours, he went back to the office for lunch. After having lunch around 14.00 hours, he instructed Patrick Malunga, driver to take him to Chichele for fire patrols. Before leaving, the driver went to refuel the truck and he placed 21 litres of petrol and 40 litres of diesel in some containers inside the fire truck. As they were about to leave the gate, and at a point the driver was signing in the log book, the security personnel searched their vehicle as per the routine procedure and found 21 litres of petrol and 40 litres of diesel in the fire truck. The complainant stated that he had not seen the fuel before it was found by the security personnel. That when he asked the driver about the same fuel, he told him that the fuel was meant for weekend activities; and that he had drawn it in advance since the pump man did not work on weekends. In

support of the foregoing averment, he produced to Court the respondent's memorandum, exhibit "DK1" dated 31st March, 2020. That the security personnel then asked the driver whether he had a material gate pass allowing him to carry the fuel. In response, the driver indicated that he had just forgotten to leave the fuel at the control room. That the driver indicated that he was not supposed to carry the fuel in question. The driver then asked the complainant for time to go back to the office so that he could get a gate pass. They both went back to the office; and the driver requested the complainant to tell the stores man, Malilwe Haroma to prepare a gate pass for him. Thereafter, the complainant told him to go and see the Stores Man. The Stores Man then told him to ask the complainant to go and confirm the issuance of the gate pass. The complainant later went and told the stores man to issue the gate pass based on the details that were to be provided by the driver. Whilst the Stores Man was writing the gate pass, he asked the driver as to where he was taking the fuel. The driver told him that it was for use by vehicles at the office. The Stores Man then asked the driver as to why he had requested for the gate pass when the fuel he had was meant for use by vehicles at the office. The Stores Man then told the complainant that in those circumstances there was no need for the gate pass since the vehicles were supposed to be refueled within the company premises. At that point, the complainant cancelled the material gate pass before it was issued because the fuel in issue was to be used by vehicles at the office.

The complainant testified that after all that had happened, he decided to continue with his programme. He decided to leave the fire tender that they had used at first and proceeded on his patrols with the same driver using a different fire tender. When they reached the gate, the security personnel asked the complainant for a gate pass. He explained to them that there was no need for a gate pass because the fuel was to be used by vehicles at the office. The security personnel then asked for the same fuel which they had carried earlier on. In response, the complainant told them that it had remained in the other fire tender that they had used at first. The security personnel demanded for all the three containers of fuel. Eventually, the complainant instructed the driver to go and collect the fuel and leave it with the security personnel. The driver fetched the fuel and left it at the gate with the security personnel. After that, they proceeded to Chichele and whilst in Chichele, the complainant received a phone call from his immediate supervisor, Aaron Chikongoma, the Fire Control Officer who asked him to go back to the office. That they went back to the office and found Aaron Chikongoma with security personnel, Malisawa Kaabo and Linda Chibulu. They asked the driver why he had carried the fuel and the driver explained that he had collected the fuel in advance since it was Friday; and that the said fuel was to be used in the fire tender to conduct fire patrols during the ensuing weekend. It was his testimony that on Saturday and Sunday he was working conducting fire patrols.

When he reported for work on Monday, the security personnel called him and interrogated him from Monday to Friday. Between 10th and 18th December, 2020, his supervisor, the Fire Control Officer wrote him a letter asking him to write an exculpatory letter to explain why he should not be charged over the fuel. That in his exculpatory letter, the complainant explained that he did not know anything about the fuel. That he was not there at the time the driver was taking the fuel and that he did not know what its purpose was. That after writing his exculpatory letter, his supervisor suspended him from work.

The complainant referred the Court to the letter from his supervisor, 'DK2'; his exculpatory letter, 'DK2a'; and the charge letter, 'DK2b' which he said was given to him after he was suspended based on the charge of dishonest conduct. Later, he was invited to attend a disciplinary hearing before a disciplinary committee where he explained that he did not know anything about the charge because he was not there when the driver took the fuel; and that he was not the one who used to sign on the cards, the basis on which fuel was issued. That the Dispatcher, a Mr. Ngámbi was the one that used to prepare the cards and the complainant's supervisor was the one who used to approve the said fuel cards after which the driver would go and collect fuel using the same cards. That upon drawing the fuel, the driver would then sign in a book. That about three to four weeks after the disciplinary hearing, he was issued with a dismissal letter

"DK3" in which he was also informed of his right to appeal to the appeals committee. That by the letter, "DK4" he appealed and explained the reasons why he had denied the charge. After about two weeks, he was called by the appeals committee for a hearing which was chaired by the Managing Director and in attendance were other Directors. That he was first asked if he was comfortable with the people that were on the panel and he informed them that he was not comfortable with the Secretary, Mrs. Kaumbu. Therefore, he did not want her to attend the appeals hearing. However, the Chairman said that her duty was just to record the proceedings so she could still be part of the meeting. During the appeal hearing, the complainant still denied knowing anything about the fuel in issue. In responding to the appeals committee's question as to why he had facilitated for the issuance of a gate pass, the complainant explained that he did so because he was pressurized by the security personnel who demanded for a gate pass. That that was the reason he had allowed the driver to be issued with a gate pass but since the Stores Man who knew his job very well advised him that there was no need for a gate pass, he cancelled it. After a few weeks, he received another dismissal letter, 'DK5a' dated 28th July, 2021 in which he was advised that his appeal was unsuccessful and therefore, he stood dismissed from employment of the respondent company.

It was the complainant's further testimony that he was not happy with his dismissal from employment because he knew nothing about the fuel that the driver took. Further, that whilst he was attending hearings at the respondent's company, he was also appearing in the Magistrate's Court over the same issue in a criminal case where he was eventually acquitted. The complainant referred the Court to 'DK2c' being the charge form; 'DK2d' being the suspension letter; 'DK3' being the invitation to attend the disciplinary hearing; 'DK3a' being the dismissal letter; 'DK4' being an appeal letter to the appeals committee; 'DK5' the invitation to attend the appeals committee hearing; 'DK5a' being his dismissal letter. He also referred the Court to the memorandum, exhibit 'DK1' which the respondent wrote advising that the pump man would not be issuing fuel on weekends and public holidays. This meant that all those who were intending to work during a weekend were supposed to draw fuel in advance.

When referred to paragraph 3 of the respondent's affidavit in support of the answer, the complainant stated that he knew nothing about the fuel and that he was not even there when it was being drawn. He explained that he had agreed to have a gate pass issued to the driver because the security personnel had pressurised him for the same. That the driver had tried to explain that he had just forgotten to leave the fuel at the control room but the security personnel insisted on having a gate pass.

That that was why they decided to go back to get a gate pass. However, the Stores Man advised that there was no need for the gate pass and therefore, he canceled it. When referred to paragraph 7 of the respondent's affidavit in support of the answer, the complainant confirmed that he was the one that had cancelled the gate pass following the advice of the Stores Man. That he was not aware about the whole issue of fuel and that all the details were given by the driver and not him.

In reference to paragraph 8 of the respondent's affidavit in support of the answer, the complainant stated that at the time they went back to get the gate pass, he had admonished his driver and told him that what he had done was not good. That because everything happened within a short time, there was no time for him to charge the driver. He explained that shortly after the incident, they were called back from Chichele by his supervisor and the security personnel started questioning the driver and that he (the complainant) was also implicated.

Regarding paragraph 9 of the respondent's affidavit in support of the answer, he denied being the in-charge of the motor vehicle registration no. AJD 8573 that they had used. He testified that he was just a passenger in the vehicle and he was not aware of the fuel that was loaded on the vehicle and the time that it was put on the vehicle.

With respect to paragraph 10 of the respondent's affidavit in support of the answer, the complainant's evidence was that his driver got the fuel in advance for use in the fire tender over the weekend in case of an emergency and that it was signed for. That this was done in conformity with the memorandum, 'DK1' that had been issued by the respondent. Finally, the complainant urged the Court to grant him all the reliefs tabulated under paragraph 5 of his notice of complaint.

During cross-examination, the complainant confirmed that he had only two issues with the procedure that was adopted by the respondent when it dismissed him. The first being that Mrs. Kaumbu had attended the appeal hearing despite his objection to her attendance. The second being that the respondent had embarked on the disciplinary process against him whilst at the same time he was being prosecuted in the Magistrates Court over the same issue. In response to the question whether there was anything wrong concerning his appearing in a criminal matter before the Magistrates Court, the complainant confirmed that there was nothing wrong as the same procedure was provided for under clause 12.2 of the disciplinary code, 'TM4'. He further admitted that Management was not precluded from instituting its own internal disciplinary process; and reporting him to the Police for the same allegations. That, therefore, the respondent had committed no wrong as it had the right to do so. When referred to the minutes of the appeal hearing, 'TM8', the complainant

confirmed that there was nothing on the record of the minutes that he had raised an issue with Mrs. K. Muo sitting as the Secretary for the appeals committee. That he did not also mention the same issue in any of his pleadings filed into Court that he had an issue with Mrs. K. Muo having been Secretary for the appeals committee. He conceded that he was raising the issue for the first time in Court.

Still under cross-examination, the complainant confirmed that when the security personnel stopped them at the time they were going to Chichele, the vehicle they were using was the fire tender registration no. AJD 8573. He denied that, as the Foreman, he was in charge of the vehicle. When referred to paragraph 3 of his exculpatory statement 'DK2a', the complainant admitted that in the said letter, he clearly stated that he was in charge of the fire tender contrary to his statement in cross-examination that he was not in charge. When pressed, the complainant confessed that what he had stated in the exculpatory letter was the correct position and not the statement he had just given to the Court. He recalled testifying that when they reached at the gate, the security personnel engaged with the driver and not him. That after that, the driver decided to drive back. That the second time the complainant interacted with the security personnel was when they tried to leave for the second time after the issue of getting the gate pass had been attended to and he had even cancelled the gate pass. When asked at what point the security personnel had

pressurised him into getting the gate pass, the complainant stated that one of the security Guards had been sent to the office to collect the gate pass. However, he confirmed that there was no evidence either in his exculpatory letter or pleadings to show that there was a Guard who was sent to his office to collect the gate pass. He recalled testifying that when they reached the gate, the driver asked for his help to get the material gate pass. When referred to page 9 of the respondent's affidavit in support of the answer, the complainant admitted that he was the one that had instructed Mr. Malilwe, Stores Man, to issue the material gate pass to the driver. He stated that the gate pass was not for the vehicle registration no. BCC 9555. He confirmed that when they decided to go on patrols for the second time, they did not go back with the vehicle registration AJD 8573, but went with the fire truck registration no. BCC 9555. He admitted that neither of them informed the Stores Man about what had transpired at the gate when they went to get the gate pass. He stated that such information was not important to the Stores Officer. The witness explained that a material gate pass was supposed to be obtained before going to the exit gate. When asked whether he and the driver knew that they were required to obtain a gate pass before taking anything out of the station, the complainant stated that he did not know that that was the procedure. When pressed further, he changed his position and stated that he had known that the gate pass had to be obtained before getting to the exit gate for a

long time and that even on 20th November, 2020 he had such knowledge.

According to him, it was not wrong to go out of the company premises with 61 litres of fuel without the material gate pass. He stated that he was not happy with what the driver had done as it was wrong. That, however, he decided to proceed with his journey with the same driver without having charged him because he had a lot of work to do. He confirmed that when he was asked, during the disciplinary hearing, whether there was an emergency in Chichele, he told the committee that there was no emergency. That he did not lie to the disciplinary committee when he stated that there was no emergency. When referred to page 10 of the minutes of the disciplinary hearing, 'TM5', the complainant at first denied having stated that the driver, when asked for a gate pass, responded that his boss, the complainant, would issue the gate pass. Later, after reading paragraphs 6 and 7 of the minutes, he changed his position and admitted that the foregoing statement was what his driver stated. That, thereafter, he did not say anything but instead instructed his driver to drive back. After making the decision to go back to the office, he did not inform his supervisor of what had transpired at the gate as he did not consider it to be important. He stated that his supervisor was not around. However, when referred to page 10 of the minutes of his disciplinary hearing, exhibit 'TM5', the

complainant stated that his supervisor, the Fire Control Officer was present but not in the office and the reason he did not tell him was because he was busy. He stated that he was suspended on 7th January, 2021. That from 7th November, 2020 to 7th January, 2021 he never had at any point asked the driver to exculpate himself over what had transpired because he (the complainant) had proceeded on leave. He admitted that there was nothing on the record showing that he had gone on leave. He stated that he was a mere passenger in his capacity as a Foreman and that he was in charge of the vehicle but not any fuel. When pressed, the complainant stated that the fuel in question had actually been approved by the supervisor. He later changed his position and stated that he did not know anything about the fuel, even when the cards were signed and he did not see anyone sign them. He stated that even though he did not see the fuel cards being approved, he later came to learn that the issuance of the fuel was authorised. He admitted that he had nothing to show to the Court that the issuance of the fuel was approved by the respondent.

The complainant explained that the reason he stated that he had so much work to do was because he went to Misaka and Maposa areas on fire patrols to assess whether trees would get burnt if fire broke out as the fire season was coming to an end. That that was what prompted him to go to Chichele as well. He also explained that when it came to the issue of drawing fuel, the

driver used to report to his supervisor, the Fire Control Officer and not to him. That the driver would only report to him after the vehicle had left the station and not while it was within the station. Further, he explained that what transpired at the gate was not material to the Stores Man as his job was only to issue the gate pass. That he did not charge the driver because everything happened within a short time. That he was being interrogated and he was also implicated in the matter so he had no time to charge the driver.

RW1 was Frazier Mwewa, Security Guard in the respondent company. He testified that on 20th November, 2020, he reported for work at 12.00 hours and he was deployed at the ZAFFICO headquarters main gate by Linda Chibulu. That whilst working, he noticed a fire tender approaching and they stopped it. That the fire tender was from within the premises and was heading out. That it was being driven by Patrick Malunga and the complainant, who was Patrick Malunga's supervisor, was in the passenger's seat. That he stopped the vehicle to search it as per routine instructions. That as he was searching the vehicle, he found three containers of fuel in the vehicle, all 20-litre containers. That two of the containers contained diesel while the other one contained petrol. That after discovering the fuel, he asked the driver for a gate pass who responded that he was with his boss (the complainant) and that his boss was going to provide the gate pass. That the complainant then told the driver that they

should go back to obtain the gate pass and the vehicle turned back. He stated that the complainant did not seem to be upset when the driver said that he was going to provide the gate pass. That the complainant just told the driver that they should go back to obtain a gate pass.

Later, the complainant and Patrick Malunga returned to the main gate with a different fire tender. That the witness stopped them at the main gate and searched the vehicle but he did not find any property for the company which was not allowed to leave the premises without a gate pass. That when he asked the complainant about the three containers of fuel that they had in the other vehicle without a gate pass, the complainant asked the witness to allow them to leave. He said that since the fuel had remained in the other vehicle, they would deal with the issue later upon their return. That the witness refused and asked them to go and get the fuel so that they could leave it at the main gate. That the complainant and Patrick Malunga then went back and came back with the first fire tender they had used together with the fuel. They left the fuel at the main gate. That the witness got the three containers of fuel from the vehicle and put it in the office and allowed the complainant and the driver to proceed to do their work.

During cross-examination, when referred to the memorandum, 'DK1', the witness confirmed that the said memorandum was

already in effect in November, 2020 and that it allowed anyone working over the weekend to draw fuel a day before. He also confirmed that the incident happened on a Friday and that the fire tender that had the fuel belonged to the respondent. He stated that Patrick Malunga never told him that he was going to be working over the weekend, that is, on Saturday and Sunday. That he only asked Patrick Malunga about the fuel he was carrying and a gate pass and not about where they were going. That after searching the vehicle and finding the fuel, he asked the driver about where the fuel was being taken to. That he asked the driver and not the complainant because he was the one driving the fire engine. He stated that he was part of the investigations but he never found out that the one who had drawn the fuel was the driver. He also stated that he did not find out about the role Mr. Chipongoma played regarding the fuel. When asked whether he was aware that the complainant did not sign the subsequent gate pass that was issued, the witness stated that he did not see the gate pass as Mrs. Linda Chibulu, who was the Shift in-charge took over the matter. He stated that supervisors for the drivers were the ones who used to sign on gate passes following requests by the drivers. That Patrick Malunga was the one who was supposed to request for the gate pass in this case and that he was the one to blame for not requesting for a gate pass.

In re-examination, the witness stated that when he asked Patrick Malunga for a gate pass, he responded that his boss, the complainant was present and he was going to sign the gate pass. He confirmed that the driver was the one who was supposed to request for a gate pass because whenever a vehicle was leaving the premises, even without a supervisor, if they had a gate pass for the company property, they would allow them to leave.

RW2 was Terrence Muyakwabo Musa, Human Resource Manager in the respondent company. The witness testified that on 20th November, 2020, the complainant was charged with the offence of dishonest conduct contrary to clause 17.30 of the respondent's disciplinary code, 'TM4' as shown by the charge letter and charge form, 'TM3'. He was later suspended from work. That the sanction for the offence was summary dismissal. That upon charging the complainant, he was notified to appear before a disciplinary committee and he appeared for the hearing of his case. That the disciplinary committee upheld the charge of dishonest conduct and the complainant was summarily dismissed from employment. When referred to the minutes of the disciplinary committee hearing, 'TM5', the witness confirmed that the committee observed that the complainant did not report to his supervisor about what had transpired at the gate when the driver was asked to produce a gate pass while the complainant was on board the same vehicle. That the complainant did not take any action against the driver nor reprimand the driver for

not producing the gate pass but instead, after the fuel in question was intercepted at the gate, the complainant instructed the driver to gate a materials' gate pass for the fuel in retrospect. That it was also observed that the complainant misinformed the Storeman to raise a materials' gate pass for another vehicle and not the one they were using at the time that the fuel in question was discovered. The witness further explained that when the driver was asked to produce a materials' gate pass at the gate, he said that his boss, the complainant, would issue the gate pass. That the complainant did not say anything but instructed the driver to go back. That according to the minutes of the disciplinary hearing, 'TM5', during the disciplinary hearing, the complainant stated that when the driver was asked about the gate pass, he did not say anything but asked the driver to drive back to the plantations. The witness stated that after his dismissal, the complainant appealed against the dismissal. An appeals committee was set up and the complainant appeared before the said committee. That the appeals committee upheld the decision to dismiss the complainant from employment. The witness testified that he had no record of the complainant's objection to Ms. Muwo being part of the appeals committee. That Ms. Muwo was the secretary of the committee and her role was to take minutes of the committee hearing. That the appeals committee was made up of Directors and the Directors made the decisions.

The witness testified that the materials' gate pass that was issued was for another vehicle which had a full tank of fuel.

During cross-examination, the witness stated that a gate pass was generated by departments, and in this particular case it was the plantations department. That it was supposed to be generated by the Storesman and approved by the Fire Control Officer or Plantations Manager. He stated that the complainant issued the instruction to generate the materials' gate pass. That the said gate pass was recorded in the investigations report and that it was in the possession of the respondent company. That he was not sure if it was before Court. When referred to the affidavit in support of the notice of complaint, and the affidavit in support of the respondent's answer, the witness stated that the gate pass was not before Court and there was no proof that it was cancelled. He stated that the registration number for the first fire tender which had the fuel was AJD 8573 while the registration number for the other fire tender on which the materials' gate pass was supposed to be raised against the fuel was BCC 9555. He stated that during the disciplinary hearing, the complainant stated that he was not comfortable when the driver mentioned to him that the fuel was for another vehicle which was parked but it was carried in another vehicle which had a full tank. The witness stated that the complainant did not report the incident to the supervisor. That he was supposed to report immediately it happened but the complainant went to the immediate supervisor

who authorised gate passes. He stated that he was aware that the charging officer, Mr. Chipongoma, to whom the complainant was supposed to report, was around when the incident happened. When referred to page 6 of the minutes of the disciplinary hearing, 'TM5', the witness stated that Mr. Chipongoma became aware of the incident after it had already happened. That when the committee asked the complainant why he did not inform Mr. Chipongoma, the complainant stated that Mr. Chipongoma was busy. He admitted that the gate pass was cancelled by the complainant because it was raised for a vehicle which was parked inside the company premises. When referred to paragraph 3 of the respondent's affidavit in support of the answer, the witness stated that the materials' gate pass was cancelled because the vehicle was within the premises. The witness confirmed having told the Court that the complainant was aware of the three containers of fuel in the fire tender. The witness also confirmed that in his exculpatory letter and appeal letter, the complainant stated that he was not aware that there was fuel in the containers. That the complainant also told the disciplinary committee that he was not aware about the fuel. He stated that the drivers of the vehicles were the ones who used to draw fuel and in this case, it was Patrick Malunga who had drawn the fuel and not the complainant.

In re-examination, the witness stated that the complainant was aware about the fuel in the containers in the sense that when the

driver was asked to produce a materials' gate pass whilst both the driver and the complainant were on board, he just asked the driver to go back and gate the materials' gate pass. The witness confirmed that the fuel was drawn by the driver.

I have considered the affidavit and *viva voce* evidence from both parties. I have also taken into account the final written submissions filed by both parties.

The facts which were common cause are that the complainant was employed as a Foreman by the respondent in April, 2005 until he was summarily dismissed from employment on 31st March, 2021 for the offence of dishonest conduct. The history leading to his dismissal was that on 20th November, 2020 between 15.00 and 16.00 hours, he instructed Patrick Malunga, one of the respondent's drivers, to take him to Chichele area for fire patrols using the respondent's fire tender registration no. AJD 8573. As they were about to leave the company premises through the main exit gate, the security personnel searched their fire truck and found 1 x 21 litres container of petrol and 2 x 20 litres containers of diesel inside the fire truck. Upon this discovery, the security personnel requested the driver for the gate pass in respect of the said fuel which he said he did not have. According to him, the fuel in question was supposed to be left at the control room but he had forgotten to do so. The driver then requested the complainant to go back so that he could

obtain a gate pass that was needed by the security personnel. The complainant agreed to do so and they went back to the offices. Upon arrival at the offices, the driver requested the complainant to tell the Stores Man to issue him with a gate pass but the complainant instead told the driver to see the Stores Man for the gate pass. The Stores Man advised the driver to see the complainant to confirm the issuance of the gate pass and subsequently, the complainant went and told the Stores Man to issue the gate pass. The Stores Man asked the driver why he had requested for a gate pass for fuel; and when the driver told him that it was for use by the vehicles at the office, the Stores Man advised the complainant that there was no need for the gate pass since the vehicles were supposed to be refueled within the company premises. Upon receiving that advice, the complainant cancelled the gate pass and left the fire tender, registration no. AJD 8573 which had the fuel and proceeded on patrols with a different fire tender, registration no. BCC 9555. When they reached the exit gate, the security personnel asked for a gate pass and after they were told that there was no need for the gate pass, they requested for the fuel in question. The driver went and collected the fuel and left it at the gate with the security personnel. The complainant and the driver then proceeded on patrols to Chichele and whilst there, the Fire Control Officer, Mr. Chipongoma, who was the complainant's supervisor called him and asked him to go back to the office. At the office, the duo were questioned about the fuel. Later, the complainant was asked

to exculpate himself after which he was charged with the offence of dishonest conduct. A disciplinary hearing was held after which the complainant was found guilty and dismissed from employment. He appealed against the dismissal but his appeal was unsuccessful.

Based on the evidence in this matter, the question for determination is whether the complainant's dismissal from his employment was wrongful and unfair.

The complainant's claim is for damages for wrongful and unlawful 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 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."

In light of the above authority, the complainant's claim should have been for damages for wrongful and unfair dismissal, and I will deal with the claims as such.

Firstly, I will deal with the complainant's claim for damages for wrongful dismissal. In determining this issue, I will consider the procedure that was adopted by the respondent in dismissing the complainant and whether in doing so, the respondent complied with its disciplinary code, the rules of natural justice and the Employment Code Act No. 3 of 2019.

It is settled that the legal and evidential burden rests on the complainant to prove that his dismissal from employment was wrongful. Hon. Judge Dr.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 how the dismissal was effected."

Further, in the case of **Chilanga Cement v Venus Kasito²**, the Supreme Court held that:

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

On the above authorities, it is clear that for the complainant to succeed in his claim for wrongful dismissal, he must prove that the respondent breached the disciplinary procedures when it dismissed him.

It is on record that before the complainant was dismissed from employment, he was asked to exculpate him in relation to the fuel in question. After his exculpation, the complainant was charged with the offence of dishonest conduct, contrary to clause 17.30 of the respondent's Disciplinary Code, exhibit 'TM4'. The complainant was later invited to appear before a disciplinary committee which found him guilty of the subject offence and he was subsequently dismissed from employment. Further, when the complainant was cross-examined, he confirmed that he had no issue to raise against the procedure that was adopted by the respondent when it dismissed him, except for the attendance of the appeals committee by Mrs. Kaumbu as its Secretary; and his subjection to the respondent's internal disciplinary process whilst at the same time being prosecuted for criminal charges in the Magistrates Court based on the same facts.

As regards the attendance of the appeals committee by Mrs. Kaumbu, I find that the complainant did not advance any reasons as to why he did not want Mrs. Kaumbu to be part of his appeal hearing. Therefore, his objection to such attendance would be of

no value and I dismiss it accordingly. Further, as rightly conceded by the complainant, there was absolutely nothing wrong for the complainant to be subjected to the respondent's internal disciplinary process whilst at the same time appearing in the Magistrates Court to answer to the criminal charges based on the same facts. In the case of **George Chisenga Mumba v Telecel (Zambia) Limited**³, the Supreme held that:

"From our previous decisions, we wish to re-state that a disciplinary proceeding by a company against its erring employee, just like a civil proceeding in a Court of Law, is not relevant to a criminal proceeding and that the evidence obtained in a disciplinary proceeding cannot be used in a criminal trial. So it was wrong for the appellant to mix the two and make them appear as if they are the same or inter-related."

Therefore, I am satisfied that the complainant did not suffer any prejudice in this regard and the respondent cannot be faulted in any way. The complainant's argument that he was exposed to two systems has no legs to stand on and is accordingly dismissed.

From the evidence on record, I am satisfied that the respondent complied with its disciplinary procedures, the rules of natural justice and the Employment Code Act. No 3 of 2019 in dealing with the complainant's case. The complainant was formally charged for the subject offence; he was given an opportunity to exculpate himself and he was heard. In sum, the complainant was accorded all his rights to a fair hearing. Therefore, his claim for

damages for wrongful dismissal cannot stand and is accordingly dismissed.

I now turn to determine whether the complainant's dismissal from his employment was unfair.

The learned authors, Judge Dr. 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 grounds. 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.”

From the above authority, for the complainant to prove that he was unfairly dismissed, he has to show that there was no substratum of facts to support his dismissal from employment. If it is established, on a balance of probabilities by the complainant, that the dismissal was based on unsubstantiated grounds, then he will have proved his claim. In the case of **The Attorney-General v Phiri**⁴ 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."

In *casu*, the complainant was dismissed for the offence of dishonest conduct contrary to clause 17.30 of the disciplinary and grievance procedure code (Book for non-represented staff), 'TM4'. This was after the security personnel found 61 litres of fuel in the fire tender that the complainant and the driver, Patrick Malunga were using as they were about to go out of the respondent company premises for patrols. The complainant argued that the said fuel was put in the vehicle by the driver and he knew nothing about it. That he did not know at what time the driver put it in the vehicle and what it was for. That he had not seen it before until it was found by the security personnel. That when he asked the driver about it, the driver told him that he had drawn the fuel in advance to use during the weekend as per the respondent's policy. On the other hand, the respondent argued that when the Security Guard discovered the fuel in the fire tender, he asked the driver for a gate pass and the driver responded that he was with his boss, the complainant, and that the complainant was going to provide the gate pass. That the complainant did not say anything but just asked the driver to drive back to the offices so that they could go and get a gate pass. Further, that the complainant did not report the incident to his supervisor but he instead instructed the Stores Man to

prepare a gate pass in retrospect which the complainant cancelled after being told that it was not necessary as it was raised against a vehicle which was parked within the company premises and already had fuel.

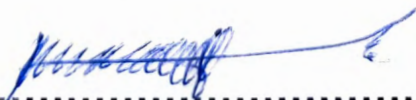
I have considered the events that led to the respondent taking disciplinary action against the complainant. It is not in issue that at the time the fuel was discovered in the fire tender, the complainant was in the said vehicle. The complainant claimed that the said fuel was drawn by the driver, Patrick Malunga and put in the vehicle without his knowledge. However, there is evidence of record to the effect that when the Security Personnel demanded for a gate pass for the said fuel at the gate, the driver told the security personnel that his boss, the complainant, was going to provide the gate pass. That the complainant did not react to the driver's response but instead instructed the driver to go back to the offices so that they could obtain a gate pass. He also made attempts to have a gate pass issued in respect of the said fuel and only cancelled it after he was told that there was no need to obtain a gate pass since the driver stated that the fuel was for a vehicle which was parked within the company premises. There is also no evidence on record that the complainant castigated the driver for attempting to go out of the company premises with the fuel without a gate pass contrary to the company policy which the complainant was aware of. In my view, the fact that the complainant decided to obtain a gate pass

retrospectively and without admonishing the driver after the security personnel found the fuel in the vehicle he and the driver were using only goes to show that the complainant was aware of the fuel in question. Therefore, the respondent cannot be faulted for having found the complainant guilty and having dismissed him for the offence of dishonest conduct which was clearly committed by attempting to go out of the company premises with fuel without authority. The complainant admitted that according to the company policy, the gate pass was supposed to be obtained before leaving the premises. In this regard, the complainant's claim for compensation for unfair dismissal is also bereft of merit and is accordingly dismissed.

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

Leave to appeal is granted.

Delivered at Ndola this 2nd day of August, 2022.


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Davies C. Mumba
HIGH COURT JUDGE