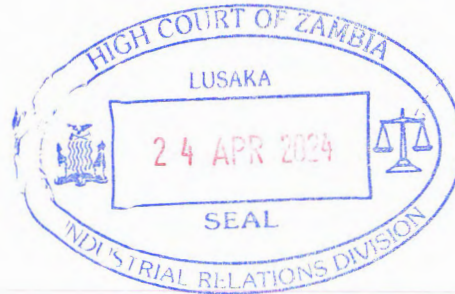


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP NO. IRCLK/15/2022

BETWEEN:



MBUWA BANDA

COMPLAINANT

AND

COCA-COLA BEVERAGES ZAMBIA LIMITED

RESPONDENT

Coram: Chigali Mikalile, J this 24th day of April, 2024

For the Complainant: Mr. W. Mwandila – OMM Banda & Company

For the Respondent: Mr. K. Kasofu – Messrs Tembo Ngulube & Associates

JUDGMENT

Legislation referred to:

The Industrial Relations Court Rules, Cap 269

Cases referred to:

1. Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172
2. Zambia Telecommunication Company v. Eva Banda CAZ NO. 2/2017
3. Konkola Copper Mines Plc v. Chileshe, SCZ Appeal No. 94/2015

4. Care International Zambia Limited v. Misheck Tembo, Selected Judgments 56/2018
5. Choonga v. ZESCO Recreation Club Itezhi Tezhi, Appeal No. 168/2013
6. Marcklins Mudenda v. JTI Leaf (Z) Limited [2020] ZMHC 123
7. Booth & Another v. R (2021) QB 685
8. Mulungushi Investments Limited v. Gradwell Mafumba, Appeal No. 141/199

Other works

Garner. Black's Law Dictionary (8th Edition): Thompson West, 2004, USA

Introduction

1. The complainant, in her capacity as Area Sales Manager in the respondent's employ diverted stock meant for one distributor to other distributors. The respondent considered the action to be dishonest and dismissed the complainant from employment. The complainant was aggrieved alleging that she was unfairly treated and wrongfully dismissed as her supervisor was aware of the diversion and allowed it. She thus launched this action via a notice of complaint filed on 12th January, 2022 seeking the following reliefs:

- a) *An order that her contract of employment be reinstated*
- b) *An order that the termination of her contract of employment was wrongful and unfair*
- c) *An order for payment of damages for wrongful and unfair termination of employment*
- d) *An order of damages for loss of income and mental stress*

- e) *Interest on damages from the date of termination of contract until payment*
- f) *Costs of and incidental to these proceedings*
- g) *Any other relief the Court deems fit.*

Complainant's affidavit evidence

2. The complainant averred that she was employed by the respondent as a Market Development Specialist on 1st January, 2020. Exhibited to her affidavit and marked "MB1" is a copy of the employment contract. On 15th October, 2020, she was promoted to managerial position as Area Sales Manager – South. Exhibited as "MB2" is the letter of promotion.
3. As Area Sales Manager, her core responsibility was to ensure that the respondent's distributors were availed with stock and that they remitted payments for the stock to the respondent. The areas under her supervisory role were Garden Chilulu, Malambo road, Sheki road, Villa ZRA, Town, Makeni, Garden house, Soweto, Kanyama, Thornpark, Northmead, Lusaka West Mumbwa road, inclusive of areas up to Itezi-Tezi. She had seven (7) sales representatives in each area
4. According to the complainant, in her line of duty, it came to her knowledge that there was a decrease in the market share of the respondent's stock amongst several distributors and that the respondent's competitors were flooding the market. In response to the decrease in the market share, on or about 6th December, 2020,

the respondent communicated that a consignment of stock was to be distributed at 10% discount to increase stock in the market. Exhibited as “MB3a” are copies of the WhatsApp messages from the Sales Regional Manager – South (hereinafter SRM) authorizing the same.

5. It was the complainant’s averment that throughout the execution of her duties, she consistently corresponded with her supervisor, the SRM, Mrs Diana Bweupe, as demonstrated by the WhatsApp messages exhibited, wherein she is captured as “Gorgeous”.
6. In order to counter competitor demands, the SRM on or about 8th December, 2020 requested that sub-accounts for specific distributors be created and that the same be separate from the main accounts in order to avoid accounts with unpaid balances on consignment stock as shown on exhibit “MB3a”. On the same date, the SRM informed her that a trade visit was scheduled to take place on 4th or 5th January, 2021 in Mumbwa, one of her supervisory areas. Exhibited as “MB3d” is the WhatsApp message carrying this information.
7. Subject to the trade visit, the SRM requested that thorough preparation and exceptional work be conducted to the best of their abilities. As a result, the complainant’s scheduled annual leave got cancelled to ensure preparations for the trade visit were exceptionally executed. The statement is captured in exhibit “MB3d”.

8. Premised on this, she communicated to the SRM that she would be opening new distributor accounts in Nangoma and Mumbwa area. The basis of opening the new accounts were the challenges that were being faced of distributors failing to make payments on previous consignments and immediate urgency to prepare for the trade visit. There was no objection on the part of the SRM. Exhibit "MB3d" shows this communication.
9. The accounts were opened, the one in Nangoma under Pwila Enterprises and the Mumbwa one under Stone Cold Hills. The complainant went ahead and made orders for Stone Cold Hills. It later occurred that some distributors namely Tik Tak and Alemed Trading were experiencing a decrease in sales, therefore, in order to fix the decrease, she suggested that stock from Stone Cold Hill be diverted to the said distributors. According to the complainant, the primary objective of diverting stock was to meet targets expected of the trade visit and this was communicated to the respondent through the SRM on 11th December, 2020. The SRM had no objection to the manner in which the consignment stock was carried out. WhatsApp messages between the complainant and the SRM indicating no objection are exhibited as "MB3 e-f".
10. Thus, not only did the respondent have knowledge of the diversion of stock to other distributors but the SRM supervised the diversion. WhatsApp messages capturing the discussion of diversion of stock are exhibited as "MB3 f-g", "MB3h", "MB3p", "MB3r", "MB3s" and "MB3t". The trade visit was however,

cancelled due to the Covid 19 pandemic and this resulted in excess stock in Mumbwa that needed to be sold.

11. As area sales manager, the complainant took it upon herself to ensure that stock was being sold and the Mumbwa sales rep, Kelvin Sikabenga, was assigned to monitor progress.
12. The respondent, through its agents and the complainant's supervisor sought updates on the Stone Cold Hills account which allegedly only reflected a payment of K 19,200.00 out of a total sum of K 1,300,000.00. According to the complainant, she informed the respondent's agents that some of the consignment to Stone Cold was diverted to Tik Tak and Aleded Trading and the relevant invoices were stated in the emails (exhibited as "MB4-8". The respondent never treated the diversion of stock as an offence.
13. The complainant later learnt that the stock diverted from Stone Cold and stock initially sent there was partly sold. However, payments were not remitted to the respondent. The complainant also learnt that the Mumbwa sales rep, Kelvin Sikabenga, had received stock on behalf of Stone Cold and signed off invoices in his personal capacity as a customer. Exhibited as "MB9-22" are invoices signed by Kelvin as recipient of stock. She made efforts to get payments from Kelvin but he failed and/or neglected to remit payments. She then charged him with dishonesty and misconduct on 15th April, 2021. The charge letter is exhibited as "MB23". He

was subsequently dismissed and much to the complainant's surprise, the respondent did not prosecute him.

14. The complainant further averred that on 18th May, 2021, she was served with a suspension letter ("MB24") to facilitate investigations on stock allegedly not accounted for. She then reported Kelvin to Westwood Police Station for the unaccounted invoices for which he failed or refused to remit payment. The police report is exhibited as "MB25".
15. On 27th July, 2021, the complainant was formally charged for dishonesty for ordering stock for the Stone Cold account but diverting it to different distributors from which some stock was unaccounted for. The charge letter is exhibited as "MB26". On 29th July, the complainant submitted her exculpatory letter ("MB27") stating that stock was diverted from the Stone Cold account to different accounts in preparation of the trade visit and also to increase sales in the market and meet targets. It was also mentioned in the exculpatory letter that the SRM did not object to the diversion.
16. On 15th September, 2021, the complainant was dismissed from employment with immediate effect after a hearing held on 6th August, 2021. The dismissal letter is exhibited as "MB28". She appealed the dismissal on 20th September, 2021 and on 24th September, she received the letter ("MB29") upholding the dismissal.

17. On 6th December, 2021, the complainant's advocates wrote a demand letter ("MB30") for reinstatement and 3 months' emoluments for wrongful and unfair dismissal. The respondent did not respond.

18. According to the complainant, the respondent's action has tarnished her reputation and ruined her prospects of future employment hence the claims made.

Respondent's affidavit evidence

19. The answer and affidavit in support were filed on 25th April, 2022. The deponent of the affidavit is Matsautso Ndhlovu, the respondent's Human Resources Manager. He deposed that it was untrue that the respondent's market share decreased. The 10% discount offered by the respondent was a marketing strategy to block a competitor. The respondent also denied the allegation that there was consistent correspondence between the complainant and the SRM, especially in relation to the reason and offence for which the complainant was disciplined.

20. It was deposed that the plan to open sub accounts was for the purpose of effecting the marketing plan of offering stock at 10% discount as opposed to the times stock is offered to distributors without according them a discount.

21. On the complainant's annual leave, the respondent denied cancelling it as asserted. It was averred that the complainant cancelled it at her own instance and volition as per exhibit "MB3d".
22. The deponent also averred that the payment challenges were only with respect to Nangoma and not Mumbwa. However, the conduct that led to disciplining the complainant related to her ordering stock for Mumbwa under the Stone Cold account, but diverted the stock to other distributors. The assertion that the SRM was aware of the opening of the new accounts – Pwila Enterprises and Stone Cold Hills was admitted and also that the complainant ordered stock for Stone Cold for the trade visit. According to the respondent, the stock was worth K 1,626,104.94 and ordered on various invoices on 11th December, 2021.
23. Having made the order for stock under Stone Cold, the complainant ought to have sold the stock under Stone Cold and was expected to follow up with payment from Stone Cold. It is for this reason that all stock ordered under a particular account or distributor is assigned the corresponding invoice in the name of that particular distributor.
24. The respondent denies the alleged decrease in sales attributed to Tik Tak and Alemed. The complainant acted on her own to divert the stock ordered under Stone Cold to other distributors as shown by her own admission at exhibit "MB3r" where she told the SRM that she knew exactly what she was doing. Further, that the SRM

did not object to the complainant diverting stock was no waiver on the part of the respondent to discipline the complainant. In any case, the SRM did not inform the respondent's management about the diversion.

25. The respondent denies knowing that stock had been diverted and/or was being diverted. It is only the complainant and the SRM that knew about it. The diverting of stock to other distributors meant that the respondent could not follow up with its debt collection as the genuine and true account holder, Stone Cold, was not indebted to the respondent despite showing that it owed K 1,300,000.00.

26. The respondent only became aware of the diversion of stock in February, 2021 as per emails exhibited as "MB4-8". The diversion was in contravention of the complainant's duties and responsibilities. It was in fact an offence and the complainant was well informed as at 28th January, 2021 as per exhibits "MB3 r,s,t".

27. The respondent admitted the averment that Kelvin Sikabenga received stock on behalf of Stone Cold, that he failed or neglected to remit payments and was subsequently charged and dismissed from employment. The respondent, however, denied the assertion that it never followed up on the payments from him. On the averment that he was not prosecuted, the respondent deposed that prosecution is the preserve of the Zambia Police Service while the

respondent reserves the right to discipline an erring member of staff as it did with Kelvin.

28. The complainant was charged for dishonesty and she exculpated herself. However, the respondent did not find her exculpation satisfactory. The respondent denied dismissing the complainant with immediate effect and averred that she was dismissed following disciplinary proceedings. Exhibited to the affidavit and marked "MN 1-6" are the suspension letter, disciplinary charge, hearing notice, minutes of the disciplinary hearing, dismissal letter and appeal letter. According to the deponent, the minutes of the hearing show that the respondent established a substratum of facts to warrant the dismissal.

29. It was further deposed that contrary to the complainant's assertion, her demand letter was responded to as per exhibit "MN7". It was emphasised that the diversion of stock amounts to dishonesty in accordance with the disciplinary code which is exhibited as "MN8" and the complainant acted on her own without informing the SRM.

30. The respondent denies wrongfully and unfairly dismissing the complainant and also denies tarnishing her name as it was agreed in her contract of employment at clause 12 that in the event that she committed an offence, the respondent would discipline her. The complainant has not denied committing the offence of diverting stock amounting to dishonesty as charged. She is,

therefore, not entitled to an order for reinstatement or any of the reliefs prayed for.

Evidence at trial

31. The complainant gave evidence on her own behalf and called no other witness. The respondent called one witness.

Complainant's case

32. The complainant testified in line with her affidavit evidence and highlighted that she did not agree with the charge of dishonesty given her. Her supervisor was aware that she diverted stock as they were in constant communication. There were a number of times that they diverted stock together in order to meet their targets. When they achieved success, they would all celebrate. She gave an example of what occurred in December, 2020 where they allegedly diverted stock meant for Pwila Enterprises to Alemed Tradings. That stock was sold and money was paid into the Pwila account by Alemed.

33. The complainant gave other examples and told court that money was collected and deposited in the accounts as reflected on the invoices and the surplus was handed over to the supervisor. She lamented that it was unfair that she took the blame alone. That is why she is of the view that she was wrongfully dismissed. After all, the finding from the disciplinary hearing was that there was no proper procedure being followed in the sales department.

34. She testified that her role was to ensure that stock was in the market, meeting targets, supervising the 7 sale reps under her, one of whom was Kelvin Sikabenga in Mumbwa. Kelvin was arrested and held in police custody for about 15 days because he was pulling stock from the distributor to sale but was not remitting the sales to the respondent. According to the complainant, Kelvin squandered about K 700,000.00 paid by Stone Cold Hills. He and the respondent sat down to discuss the issue and he agreed to pay back the money.
35. According to the complainant, she is a very honest person based on her track record. She had never been caught stealing or cheating before. Further, she was a high performing person who met her targets. Because of being labelled dishonest, her name was tarnished and people now look at her differently. She said she had to undergo counselling because the process was unfair on her.
36. In *cross examination*, the complainant stated that she neither had evidence of the counselling received nor evidence of her tarnished image. She admitted that she is in employment despite the tag of dishonesty.
37. The complainant denied there being Standard Operating Procedure (SOP) from the commercial department. She was then referred to the minutes of her hearing at page 11 where she was asked if what she did was in line with the commercial SOP and her response was that it was not the right procedure. In reacting, she

insisted that there was no procedure. She also admitted to not telling the tribunal that she was not aware of the procedure.

38. When asked about targets, the complainant stated that proof that she met her targets was on her payslip where the incentive was added. She admitted that no such payslip or indeed any other proof was on record.

39. She denied being dishonest. She stated that everything was transparent as her supervisor was aware of the diversions. When referred to the WhatsApp exchanges with her supervisor ("MB3"), the complainant admitted that the supervisor neither agreed to nor denied diverting stock. The complainant, however, denied conceiving the plan alone. She said that the supervisor would not have agreed to opening the Stone Cold account if she did not approve. She admitted that she could not order stock on an account that was owing and that is why she could not order for TiK Tak and Alemed. She then agreed with Alemed to order from Stone Cold.

40. She further stated that she found diversion being practiced when she joined the respondent. She insisted that there was no procedure being followed.

41. In *re-examination* the complainant testified that her boss never gave her a definite answer to go ahead and draw stock from one

distributor and give it to another. She said she used her own initiative based on the practice she found.

42. She reiterated that she never heard of the SOP throughout her employment with the respondent.

Respondent's case

43. The respondent's witness was Matsautso Leslie Ndhlovu, the respondent's Human Resources Manager who relied on his affidavit evidence. He emphasised that there was a standard operating procedure in the commercial department although it was not on record. It was his evidence that there was a standard way of operating whereby stock ordered on one account could not be diverted to another account. This was for accountability purposes and also for the right client to be followed up in the event of default.

44. He testified that the complainant decided to engage clients, Tik Tak and Alemed, on her own knowing that they were unable to withdraw stock at the time because they were owing the respondent. She then diverted stock from Stone Cold to Alemed and Tik Tak without the express permission of her supervisor and against the normal operating procedure. This is contained in the minutes of her hearing. It was on this account that she was dismissed for dishonesty.

45. The witness was not cross examined as neither the complainant nor her counsel were in attendance. Reasons for their absence were unknown to court hence proceeding in their absence.

Submissions

46. Only the complainant filed written submissions. I will not reproduce the submissions but I will refer to them as necessary.

Consideration and determination

47. I have considered the pleadings and the submissions from the complainant for which I am indebted. From the evidence, it is a fact that the complainant was employed by the respondent on 1st January, 2020 as a Market Development Specialist on an open ended contract. She was promoted on 16th October, 2020 to the position of Area Sales Manager to report to the Sales Regional Manager (SRM) South. It is common cause that the complainant diverted stock from the account of one of the respondent's distributors called Stone Cold Hills, to the accounts of distributors called Tik Tak and Alemed.

48. The respondent, on the other hand contends that the complainant diverted the stock without permission and against standing operating procedure and that her dismissal was justified.

49. The issue for determination as I see it, therefore, is whether or not there is merit in the complainant's contention that her

employment was wrongfully and unfairly terminated. The claims for damages and reinstatement are predicated on the determination of this issue in favour of the complainant.

50. Before I delve into the outlined issue, I remind myself that he who alleges must prove. In the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**⁽¹⁾, the Supreme Court put it this way:

I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case.

Wrongful dismissal

51. In determining this aspect of the issue, I have had recourse to the case of **Zambia Telecommunication Company v. Eva Banda**⁽²⁾ where it was stated that it is trite that wrongful dismissal is dismissal by the employer in breach of the contract and gives rise to an action for wrongful dismissal at common law. In the case of **Konkola Copper Mines Plc v. Hendrix Mulenga Chileshe**⁽³⁾ the Supreme Court held that wrongful dismissal focuses on how the dismissal was effected. Thus, it is the form rather than the substance that ought to be considered.

52. What I am called upon to resolve, therefore, is whether or not the respondent breached the complainant's contract of employment such as not complying with the disciplinary procedure.

53. It must be noted that the complainant did not draw Court's attention to any clause in the contract that may have been breached by the respondent. A perusal of the contract has not revealed any breach. The complainant was suspended in accordance with the disciplinary code; was given an opportunity to exculpate herself; was charged under clause 14 of the code; was heard and dismissed. The offence of dishonesty calls for dismissal for first breach. Her appeal was considered and was unsuccessful.

54. In the circumstances, I have come to the conclusion that the disciplinary committee properly exercised its powers. As such, the claim for wrongful dismissal cannot stand.

unfair dismissal

55. In the case of **Care International Zambia Limited v. Mischeck Tembo**⁽⁴⁾ it was held that unfair dismissal is dismissal that is contrary to statute or based on unsubstantiated grounds. The Supreme Court has further held that in order to determine whether the dismissal was fair or unfair, an employer must show the major reason for the dismissal. Such a reason must relate to among other things, the conduct of the employee. Ultimately, the

employer must only terminate for a valid reason. (See **Moses Choonga v. Zesco Recreation Club, Itezhi Tezhi**⁽⁵⁾)

56. According to the respondent, the act of diverting stock amounted to dishonesty. It was the respondent's evidence that the complainant made the decision to divert stock on her own and the respondent was unaware of the diversion.
57. In arguing the case for the complainant, counsel submitted that there was nothing in the conduct of the complainant which could have entitled the respondent to arrive at a conclusion that the complainant was guilty of dishonesty. It was submitted that there was no bad faith on the part of the complainant; that she did not intend on deriving any pecuniary advantage for herself; the diversion of stock was not only an act which the complainant's supervisor was aware of but also an act which the complainant's supervisor had expressly asked her to do on more than one occasion and this benefited the respondent itself. Reliance was then placed on a High Court decision of **Marcklins Mudenda v. JTI Leaf (Z) Limited**⁽⁶⁾.
58. In arguing that diversion of stock did not amount to dishonesty, counsel referred Court to Black's Law Dictionary which defines "dishonesty" also known as 'fraudulent act' at page 687 as "*conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.*"

- 59. Further reliance was placed on English cases which discuss dishonesty including a fairly recent case of **Booth & Another v. R**⁽⁷⁾ where the Court of Appeal stated that the test for dishonesty is now whether an ordinary and honest person, believing the same facts as the defendant, would consider the defendant dishonest.
60. I have carefully considered the opposing positions. Indeed, as pointed out by the complainant, the respondent's code of discipline does not define dishonest conduct. As such, the Court ought to rely on the definition as supplied by the dictionary as well as case law. The question that ought to be answered, therefore, is whether or not the complainant acted in bad faith, lacked integrity or moral turpitude when she diverted stock meant for the distributor called Stone Cold Hills to other distributors namely Alemed and Tik Tak. In other words, can an ordinary honest person consider the complainant's act of diverting stock as dishonest?
61. The facts have established that the distributors, Alemed and Tik Tak, to whom the stock for Stone Cold Hills was given or diverted were indebted to the respondent and as admitted by the complainant in cross examination, would not have been issued fresh stock by the respondent before settling their respective debts. The evidence has also shown that these distributors, after receiving stock which was accessed using another distributor's account, failed to pay and this ultimately led to the complainant being subjected to disciplinary action. Her charge letter dated 27th July, 2021 reads in part:

Further, arising from your conduct, the business has been unable to recover the money or stock that was invoiced in the name of Stone Cold Hills.

62. It is evident why the respondent took the route it did and cannot be faulted for preferring the charge of dishonesty. The distributors favoured by the complainant, Alemed and Tik Tak, had both exhibited a failure to pay and yet the complainant still deemed it fit to give them more stock. The question is: why? It is no surprise that they failed to pay yet again. She clearly acted in bad faith, contrary to the best interest of the employer and against her obligation to fulfil the job assigned to her with due care and diligence as per clause 19(f) of her contract.
63. The case of **Marcklins Mudenda** cited by the complainant can be distinguished from the case at hand in that in that case, my learned sister, Justice Lombe-Phiri, determined that the plaintiff was dismissed for carrying out the instruction of his superior officer and as such his dismissal was unfair. In the case in casu, it has been established that the complainant was not instructed by her supervisor, the SRM, to divert stock from Stone Cold Hills to Tik Tak and Alemed. The other instances when she may have been instructed are not in issue, therefore, have no bearing herein.
64. In my view, therefore, the complainant's dismissal was substantiated and not contrary to the law. The respondent has discharged its burden of proving that the termination of the

complainant's contract of employment was fair and for a valid reason.

65. In the circumstances, the complainant's claims for reinstatement and damages for wrongful or unfair dismissal or indeed damages for loss of income and mental stress must fail. As was held in the case of **Mulungushi Investment v. Gradwell Mafumba**,⁽⁸⁾ where the Court finds that a dismissal on the facts is justified, then the claimant is not entitled to damages.

Costs

66. Costs ordinarily follow the event. However, in this division, costs are only slapped on a party in accordance with rule 44 of the Industrial Relations Court Rules, Cap 269. According to this provision, a party may bear costs or expenses if he is guilty of unreasonable delay, or of taking improper or vexatious or unnecessary steps in the proceedings or indeed if he is guilty of other unreasonable conduct.
67. The complainant herein is not guilty of conduct outlined in rule 44 to warrant an order of costs against her.

Conclusion and Order

68. The complainant has failed to prove on a balance of probabilities that she was wrongfully or unfairly dismissed. The complaint therefore fails in its entirety and is accordingly dismissed.
69. Each party shall bear own costs.

The complainant is informed of the right to appeal.

Dated at Lusaka this 24th day of April, 2024



M.C. Mikalile

HIGH COURT JUDGE