

IN THE INDUSTRIAL RELATIONS COURT  
HOLDEN AT NDOLA

COMP/25/2014

BETWEEN:

HARRISON MUBANGA

AND

LUMWANA MINING COMPANY LIMITED



COMPLAINANT

RESPONDENT

BEFORE: HON. JUDGE Dr. W. S. MWENDA - DEPUTY CHAIRPERSON  
HON. J.M. BWALYA - MEMBER  
HON. W. M SIAME - MEMBER

For the Complainant : Mr. P. Chamutangi of Messrs Peter M.  
Chamutangi & Company

For the Respondent : Mr. N. Siamoondo of Messrs Corpus Legal  
Practitioners

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## JUDGMENT

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### Cases referred to:

1. Kunda v KCM Plc., Appeal No. 48 of 2005
2. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172
3. ZESCO Limited v David Lubasi Muyambango (2000) ZR 22
4. Chimanga Changa v Stephen Chipango Ngombe, SCZ Judgment No. 5 of 2010

Harrison Mubanga filed a complaint against his former employer Lumwana Mining Company Limited, on 4 March, 2014 for unlawful

dismissal. We shall refer to the parties as "Complainant" and "Respondent," respectively.

The Complainant now seeks the following relief:

- i. A declaration that his dismissal was unfair and unlawful;
- ii. Damages for unlawful termination of employment;
- iii. Interest on "ii" above;
- iv. Respondent be condemned in costs for this action in any event;
- v. Any other relief that the Court may deem fit and just.

The Complainant filed an Affidavit in Support of Complaint wherein he deposed that he was employed as Marketing Co-ordinator by the Respondent until his employment was terminated on 29 January, 2014. On 29 November, 2013 he was charged by the Respondent's Security Manager, a Mr. Collin Hodgson, with two offences which were allegedly committed on 28 November, 2013, namely:

- (a) Inappropriate communication of sensitive company information outside the company; and
- (b) Inappropriate Communication with a potential business partner involved in an on-going concentrate haulage tender.

The Complainant deposed that he was suspended from work and charged. The case hearing took place in February, 2014 but he had written to the General Manager on 24 January, 2014 (although the letter is dated 27 January 2014) as shown by exhibit "HM 4" annexed to the Affidavit in Support of Notice of Complaint which explains the circumstances and events that led to the charge and suspension.



The Complainant averred that the letter of suspension dated 28 November, 2013 outlined the charges for his lay off which were different from the charges appearing on the charge sheet. He stated that he was dismissed for the two charges which appeared on his letter of suspension and not for the two he was charged with. He averred that his appeal was rejected by the General Manager.

In its response the Respondent has stated that the Complainant was dismissed in accordance with the law and the Respondent's Disciplinary Code, and that the Respondent exercised due process in dismissing the Complainant from employment. The Respondent has denied that the Complainant is entitled to any relief as the claim lacks merit.

In an Affidavit in Support of Answer sworn by one Robert Kantumoya, a Human Resources Officer at the Respondent Company, the Respondent affirmed that the Complainant was employed as a Marketing Co-ordinator on 1 October, 2010. He was charged with two offences of: "leaking information that will cause significant loss or reputational damage, and Code of Conduct violation" as shown by exhibit "RK2" in the Affidavit in Support of Answer. The Respondent has denied that the Complainant was charged with the offences of:

- (a) Inappropriate communication of sensitive company information outside the company; and*
- (b) Inappropriate communication with a potential business partner in ongoing concentrate haulage tender.*

The Respondent's position is that the two "charges" referred to by the Complainant are mere details of the specific offence in the Respondent's Disciplinary Code under Category A (20) of leaking company information which will cause significant loss or reputational damage as well as Code of Conduct violation.

The Respondent has deposed that following the charge, the Complainant was suspended on full pay as evidenced by exhibit "RK3" to pave way for further investigations which were conclusively carried out. At the end of the investigations the Respondent withdrew and replaced the offence of Code of Conduct violation with an offence under Category B (10) of Non-Compliance with company procedures or regulations as provided in the Disciplinary and Grievances Procedure Code. The replacement of the charge entailed a change in the details of the offence as shown at exhibit "RK6" of 24 January, 2014. A disciplinary case hearing was held on 29 January, 2014, and the Complainant was found guilty and summarily dismissed for the offence under category A (20) of leaking company information which will cause significant loss or reputational damage.

The Complainant filed an Affidavit in Reply on 4 July, 2014 and gave his oral testimony on 22 July and 15 August, 2014. The Complainant (hereinafter called "CW") testified that he was employed as Marketing Coordinator - Copper Concentrates from December, 2010 to 24 January, 2014 when he was summarily dismissed. On 28 November, 2013, Mr. Collin Hodgson, the Respondent's Security Manager and Mr. Steven Olivier, the Security Superintendent picked him up from his office and took him to the Respondent's Marketing Superintendent, a Mr. Martin Raubenheimer, where Mr. Hodgson informed him that he was suspended



due to certain allegations made against him and was directed to go and collect his personal property from his office. Mr. Hodgson also grabbed the company phone from him, took him back to his office to pack his belongings and drove him home in Lumwana Mine Township where he was left.

On 29 November, 2013, a Security Officer by the name of Lawrence Sindima took the Charge Sheet raised by Colin Hodgson, the Security Manager, shown at exhibit "HM2" to his home at 14.30 hours. On the incident that occurred on 28 November, 2011 the Charge Sheet reduced the offences to two, namely;

- (a) Category A (20) leaking company information which will cause significant loss or reputational damage.
- (b) Code of Conduct violation.

The details of the complaint or charge were indicated as (1) inappropriate communication of sensitive company information outside the company and (2) inappropriate communication with a potential business partner involved in ongoing concentrate haulage tender.

CW testified that on the same day, 29 November, 2013 at 19.00 hours a Human Resources Officer from the Respondent Company, by the name of Ms Vanessa Ntemba, took a suspension letter to his house which advised him of his suspension from work with pay pending investigations. The suspension letter dated 28 November 2013 and exhibited as "HM3" in the Complainant's Affidavit in Support of Complaint stated the reasons for the suspension as:

- (a) Leaking information which will cause significant loss or reputational damage;
- (b) Code or Conduct violation.

CW testified further that two weeks after receipt of the suspension letter, the Security Officer, Mr. Michael Mapemba went to his house and asked him to go and give a statement at the Security Office. He refused to go and give a statement as he had already been charged and suspended. From this day there was no contact with the Respondent until 24 January, 2014 when Ms. Kasonde Musonda, a Human Resources Officer took new charges replacing the Charge Sheet issued on 29 November 2013. These new charges were now raised by his supervisor, Mr. Martin Raubenheimer and new details and dates on the occurrence of incident were given as shown in exhibit "RK6". CW testified that he refused to sign the new Charge Sheet as he became suspicious considering the period of time it had taken management to revert to him. He therefore told the Human Resources Officer that he would attend the disciplinary hearing to respond to the initial charges.

CW testified that the new charges preferred against him were as shown on exhibit "RK6" namely:

- (a) Category A (20). Leaking Company Information which will cause significant loss or reputational damage and
- (b) Category B (10). Non-Compliance with Company procedures or regulations.



The details of the complaint or charge were spelt out on the charge sheet as:

*Between 15 and 27 November, 2013 you down loaded and transferred business information in relation to an open tender externally without express permission from your supervisor. This was a total violation of the Barrick Lumwana Computing and Telecommunications Policy. You are also alleged to have asked for financial help from a potential business partner when you knew very well that he was tendering in the open bid contrary to the Code of Conduct and Business Ethics.*

CW appeared at a disciplinary case hearing at which Mr. Chris Faulkner, the Respondent's Commercial Services Manager as Administering Official read out the amended set of charges and proceeded with the case hearing after persuading CW to plead and answer to the new charges. At the end of the process, CW was summarily dismissed and was informed of his right to appeal. He appealed and his appeal was rejected.

CW testified that he was not shown a copy of the document which he allegedly leaked. He further stated that the computer he was using at the company had been retrieved from him by Security and Information Technology personnel. He further wondered if the computer had not been tampered with by officers from IT and Security departments.

Four witnesses testified on behalf of the Respondent. The first witness (RW1) was Collins Spencer Hodgson, the Security Manager. He testified that the then Respondent's IT Superintendent, Mr. Henk Botha on 28 November, 2013 brought to his attention an unusual e-mail traffic which had the potential for fraud and corruption and that a confidential

document, namely a tender proposal document, was being transmitted from a Barrick Lumwana computer to an external source and was being uploaded into a yahoo mail box. RW1 testified that based on this report he instituted investigations since all official communication regarding the tender process is done through official e-mail. In his investigations he found that the Complainant had communicated this sensitive company information to a company caller Mineral Link, and in so doing influenced the ongoing tender process for copper concentrate haulage.

RW1 further testified that the Complainant had also approached Mr. Hudson, a business partner requesting for financial assistance. Mr. Hudson, (RW2), was a Senior Manager at a Company known as JCB Haulage which was involved in the tender process and had been shortlisted for the Concentrate Haulage Tender. RW1 testified that these activities went against the business ethics of Barrick Lumwana. RW1 proceeded to interview and record statements from Mr. Henk Botha, Mr. Hilton Hudson, and Mr. Martin Raubenheimer which are exhibited as "RK4" and "RK5". RW1 averred that the Complainant was a senior employee and was not expected to act and behave in the way he did.

The Respondent's second witness (RW2) was Hilton Hudson, the Operations Manager at JCB Haulage who testified that he had known the Complainant for over four (4) years. He testified that prior to joining JCB Haulage, he had worked as Operations Manager for Zalawi Transport. Zalawi Transport had business dealings with Barrick Lumwana and in this process he had come to know the Complainant. He testified that a year after leaving Zalawi Transport, the contract between Zalawi Transport and Barrick Lumwana came to an end and copper concentrate haulage was



coming up for open tender. He testified that he travelled to Barrick Lumwana for a tender meeting. When he returned to his station, he received a phone call from the Complainant on a social note and they exchanged pleasantries. The next day he received another sms from the Complainant asking for financial assistance. Later on he received an sms asking him to forget about the earlier request as the issue had been resolved. The next morning RW2 received yet another sms from the Complainant saying the arrangement he had made had fallen through and he wanted to borrow K2000 from him. Being concerned that with the tender process taking place this could be construed wrongly, RW2 reported the incident to Mr. Raubenheimer, the Complainant's manager who advised him not to give the Complainant any money if he asked gain. After that, he did not have any further contact with the Complainant.

The Respondent's witness number three (RW3) was Masialeti Masieleti, the current IT Superintendent at the Respondent Company. RW3 testified that he replaced Mr. Henk Botha as IT Superintendent and did not write the report exhibited as "RK4". He was however, conversant with Barrick Lumwana IT operations which are operated through the Esscentire System which captures the network traffic and makes it possible to establish who has downloaded details from Lumwana Computers and uploaded on another address. He stressed that the operations of the Lumwana system made it possible to identify who had interfered with the system. RW3 therefore interpreted and confirmed the findings of his predecessor who had also explained the details of the case in his hand over notes, that the Complainant had down loaded the tender and uploaded it before signing it out. RW explained in detail how the Esscentire System operates.

The fourth and last witness for the Respondent was Ms. Kasonde Musonda (RW4), a Human Resource Co-ordinator who testified that the Complainant had worked as Marketing Co-ordinator and had been dismissed after investigations and a disciplinary case hearing in conformity with Barrick Lumwana Mining Company Limited Disciplinary Code of Conduct procedures. She stated that she took the suspension letter to the Complainant and attended the disciplinary hearing as shown by exhibit "RK 7" which are Minutes for the Disciplinary Case Hearing. She testified that the Complainant was firstly charged in November 2013 with:

- (a) Leaking of information which will cause significant loss or reputational damage; and
- (b) Code of Conduct violation.

She added that in January, 2014 after investigations and before the case disciplinary hearing was held, the Respondent dropped and replaced the second charge of Code of Conduct violation with another charge of Non-compliance with established procedures or regulations. She stated that the Respondent had the right to alter or amend the charge following the information that was gathered during the investigations. She averred that the first charge of leaking information that will cause significant loss or reputational damage was not amended. She also testified that alteration to the second charge was before the hearing of the case.

RW4 testified that the penalty for the category A (20) offence of leaking information which will cause significant loss or reputational damage is summary dismissal and the penalty for Non-compliance with company



significant loss or reputational damage, and

(ii) Code of Conduct violation.

- (g) After further investigations on 24 January, 2014 the Complainant was informed that the charge of Code of Conduct violation was being dropped and replaced by the charge of non-compliance with company procedures or regulations;
- (h) The Complainant requested for financial assistance in the sum of K2000 from Mr. Hilson Hudson, an Operations Manager at JCB Haulage, a company which was tendering for the haulage contract with the Respondent;
- (i) The Complainant attended a disciplinary case hearing and the Committee chaired by Chris Faulkner recommended that the Complainant be dismissed from employment. A letter of dismissal was delivered to the Complainant's house by Ms. Kasonde Musonda, the Human Resource Co-ordinator; and
- (j) The Complainant appealed to the General Manager against dismissal, which appeal was unsuccessful.

After perusing the evidence before us, we have identified the issue to be addressed as being whether the dismissal of the Complainant was unfair and unlawful. In resolving this issue, the questions to be answered are as follows:

- a. Whether there was evidence that the Complainant had committed the offence he was charged with; and
- b. Whether the company's disciplinary procedures were followed in effecting the dismissal;
- c. Whether the penalty of summary dismissal was provided for in the Respondent's Disciplinary Code.

We have reminded ourselves that the burden of proof is on a balance of probabilities and that it lies on the Complainant. We are guided in this regard by the Supreme Court in the case of **Kunda v KCM (1)** where it was held:

*He who alleges must prove the allegations and this principle is so elementary in law; the Court has had on a number of occasions to remind litigants that it is their duty to prove their allegations.*

We are further guided by the principle set out in **Wilson Masautso Zulu v Avondale Housing Project (2)** wherein it was held that:

*where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.*

As we consider the evidence we are mindful of our role as a Court as the Supreme Court guided in the case of **ZESCO V David Lubasi Muyambango (3)**, namely that:

*"It is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the Court is to examine if there are necessary powers, and if it was exercised in due form.*

In reviewing the evidence it is common cause that the Respondent's IT and Security departments undertook and conducted investigations into the leakage of information to an external source and that from the Respondent's computer used by the Complainant a review proposal



document had been transmitted to an external source and was being uploaded into a Yahoo mailbox. Further investigations revealed that the information was transmitted by the Complainant. There is also evidence on record that the Complainant had requested for a personal financial assistance from Hilton Hudson, a business partner. The Complainant was suspended, charged and appeared before a disciplinary committee for the offence of leaking information which will cause significant loss or reputational damage to the Respondent. The first charge was a dismissible offence under the Respondent's Disciplinary Code while the second one attracted a warning.

The Complainant avers that the offences he was charged with were different from those that were contained in the suspension letter. Our view of the charges and as conceded by the Complainant under cross examination, is that the offences he was charged with and those in the suspension letters were the same. It is clear from exhibits "RK2" and "RK3" that the Complainant was charged with leaking company information which will cause significant loss or reputational damage, the charge on which his dismissal was based.

The Complainant further avers that the charge of Code of Conduct violation was amended and replaced by a category B (10) offence of non-compliance with company procedures or regulations.

We agree with the Complainant in this regard except that the evidence on record shows that the Complainant was informed about the amendment of the charge on 24 January, 2014, which was five (5) days prior to the hearing date of 29 January, 2014 as shown by the Respondent's exhibit "RK6". It is

our view that the Complainant was given ample time to prepare his defence. We note, as the record shows, that the Complainant refused to sign for the amendment on 24 January, 2014. We, are however, satisfied that the Complainant proceeded to defend himself on the amended charge on 29 January, 2014 as shown by the Minutes of Disciplinary Committee exhibited as "RK7".

The evidence further shows that the penalty for the charges of Code of Conduct violation and for Non-compliance with company procedures or regulation was a warning and not dismissal. It is our finding that the Complainant was summarily dismissed for leaking company information which will cause significant loss or reputational damage which was a Category A (20) offence and not on the amended charge of Non-compliance with established procedures or regulations.

A question might rise as to whether the Respondent was in order to amend the second charge. Our view is that the Respondent was on firm ground to amend the charge following further investigations. Further, the Respondent was in order to give the Complainant ample time to defend himself and react to the complaint or the charges raised by his immediate supervisor. That the Complainant refused to sign the amended charge but agreed to be heard on it during the disciplinary hearing leads us to conclude that the principle of *audi alteram partem* was adhered to.

Our position is that the Complainant was given ample time to defend himself on the amended second charge whose penalty was final warning. Our conclusion is that the Complainant was not dismissed for the offence of non-compliance with company procedures or regulations as the penalty



was not dismissal, but on the dismissible offence of leaking company information which will cause significant loss or reputational damage.

Uncontroverted evidence has also been adduced that the Complainant contacted a client who was bidding for copper concentrate haulage and requested for financial assistance from him. It is our view that the Complainant's act of asking for financial assistance from a client bidding for copper concentrate haulage when he was on the tender committee was inappropriate conduct. We agree with the Chairman of the disciplinary committee who described the act as inappropriate conduct and a total violation of the Code of Conduct and business etiquette.

Our view is that the request for financial assistance by the Complainant from a bidder led to the breakdown in trust between the Respondent and the Complainant. This breakdown in trust is further shown by the Respondent's submission that a confidential document containing bidding information was downloaded, transferred to a bidding company and later the Respondent received a submission from one of the tendering parties similar to the information downloaded and transferred to a yahoo email address by the Complainant. The Complainant alleges that his supervisor Mr. Martin Raubenheimer might have down loaded and transferred the document. He also alleges that the IT and Security departments might have tampered with his computer. Further, the searching of his computer without his approval is a violation of the law and also that the dates on which the act occurred vary.

It is not our duty to decide on the truthfulness or otherwise of these allegations which have been substantiated.

Learned Counsel for the Complainant has submitted that the act by the Respondent of altering the charge and the time it took for the Respondent to hear the case are a clear testimony that the Respondent was trying to fish for evidence to fix the Complainant. On the other hand, the Respondent has submitted that the investigation took long in order to establish the validity of the allegations so that the truth could be established. The Respondent has also argued that in any case the Complainant was on full pay during the investigations.

The Respondent has submitted that while the investigations took place, the Complainant was given ample time by the administering official to respond to the allegations against him. The administering official also took into account the exculpatory letters and explanations from the Complainant in arriving at the decision. The Complainant has not rebutted this. Further, the assertion that the Complainant was given an opportunity to respond to the observations of the administering official before the decision to summarily dismiss him was made has not been challenged by the Complainant.

To answer the three questions we posed earlier, it is our finding that sufficient evidence has been adduced whose credibility we do not doubt which shows that the Complainant committed the offence for which he was charged and dismissed. It is also our finding that the whole disciplinary process of the Respondent was followed in effecting the dismissal. Thus the Complainant was charged by his immediate



supervisor and a hearing took place where he was afforded an opportunity to be heard before he was summarily dismissed. He was informed of his right to appeal which he did and his appeal was rejected. Consequently it is our conclusion that the procedure laid down in Respondent's Disciplinary Grievance Procedure Code for senior staff was substantially complied with.

It is our further finding that the category A (20) offence of leaking information which will cause significant loss or reputational damage is a dismissible offence under the Respondent's Disciplinary Code.

It is also our view that the principles enunciated in the case of **Chimanga Changa v Stephen Chipoya (4)** apply. It was held in that case that:

*What is crucial is that the employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct. The employer does not have to prove that the offence took place or satisfy himself beyond reasonable doubt that an employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear; an employment relationship is anchored on trust and once that trust is eroded, the very foundation of the relationship weakens.*

In our view in the case in casu the Respondent's trust in the Complainant had been eroded. Therefore, on the basis of the evidence before it, the Respondent was on firm ground to take disciplinary measures against the Complainant. While from the authority of the Chimanga Changa v Stephen Chipoya case, the Respondent need not have proved that the Complainant did commit the offence or satisfy itself beyond reasonable

doubt that he committed the act in question and that all it needed to do was act reasonably in coming to its decision, the Respondent went further and found the Complainant guilty of the offence he was charged with after hearing him. He was given the opportunity to appeal against the dismissal and the appellate tribunal upheld the dismissal.


Under the Respondent's Disciplinary Code the Category A (20) offence of leaking confidential information which will cause significant loss or reputational damage summary dismissal was the appropriate penalty.

Having considered the case in the manner that we have done, we find that the Complainant has failed to prove on a balance of probabilities that his dismissal was unfair and unlawful and we dismiss it altogether.

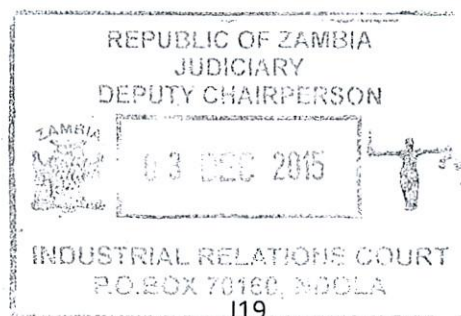
We make no order costs.


Leave to appeal to the Supreme Court within thirty (30) days from today is granted.

Delivered at Ndola this.....3<sup>rd</sup> day.....December.....2015.

  
Judge (Dr) W.S. Mwenda  
**DEPUTY CHAIRPERSON**

  
J.M. Bwalya  
**MEMBER**



  
W.M. Siame  
**MEMBER**