

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/ 69 /2014

BETWEEN:

DYSON GALATIA

AND

METOREX



COMPLAINANT

RESPONDENT

**BEFORE: JUDGE Dr. W. S. MWENDA – HON. DEPUTY CHAIRPERSON
SITTING WITH J.M. BWALYA AND G.M. SAMUSUNGWA –
HON. MEMBERS.**

For the Complainant : Mr. Mr. V.K. Mwewa of Messrs. V.K. Mwewa & Co.

For the Respondent : Mr. A. Imonda of Messrs. A. Imonda & Co.

JUDGMENT

Cases referred to:

1. **Chimanga Changa v Stephen Chipango Ng'ombe SCZ Judgment No. 5 of 2010.**
2. **Zambezi Ranching and Cropping Limited v Lloyd Chewe Appeal No. 128 of 1999 (SC).**
3. **Attorney General v Richard Jackson Phiri (1988-89) ZR 121 (SC).**

Dyson Galatia (hereinafter referred to as “the Complainant”) filed a Notice of Complaint against Metorex (hereinafter referred to as “the Respondent”) on the following grounds:

- (a) The Complainant was unfairly, wrongfully and unlawfully dismissed from employment.

- (b) The Complainant was a victim of crude machination and hatred by the Respondent's General Manager.
- (c) The grounds of dismissal were fabricated and unsubstantiated.
- (d) The manner in which the disciplinary hearings were conducted left much to be desired and decisions appeared to have been predetermined.

He is thus seeking the following relief:-

- (i) An Order and declaration that the Complainant's dismissal was unfair, wrongful, illegal and unlawful.
- (ii) An Order that the Complainant be paid his full salaries which were withheld from him from the date of the suspension to the date of dismissal.
- (iii) Damages for unfair, wrongful illegal and unlawful dismissal.
- (iv) Interest on the amount due.
- (v) In the alternative an order for reinstatement.
- (vi) Costs.

Following the termination, the Complainant filed the complaint before this Court. He deposed that he was employed by the Respondent until 4th June, 2014 when he was summarily dismissed from employment.

A brief summary of the Complainant's case is that on or about 31st March, 2014 he received a letter from the General Manager in which he was accused of unethical conduct for allegedly hiring out his motor vehicles to the Respondent. He exculpated himself against the charge. He was further charged with the offence of unauthorised removal of company property. However, although the letter was headlined 'unauthorised

removal of company property', he was being charged with condoning, concealing an illegal act and failing to take corrective action against a subordinate, one Besa Katebe. He also exculpated himself against this charge.

The Complainant appeared for the first disciplinary hearing whose outcome was summary dismissal from employment for alleged failure to declare interest. He was given a severe warning on the charge of condoning an illegal act and failure to take corrective action against a subordinate.

According to the Complainant, at the initial hearing he was informed that there were a number of statements taken from various witnesses and some of these statements were read out to him.

The Complainant further deposed that his subsequent appeals failed at two other stages.

In response to the allegations by the Complainant, the Respondent filed an Answer in which they explained the two charges levelled against the Complainant as follows:-

(i) Failure to declare interest

That on 28th February 2014, the Transport Coordinator at Chibuluma Mines Plc. Mr. Dickson Mwitwa hired a minibus to ferry employees who were scheduled to attend a security awareness workshop at Moba Hotel in Kitwe claiming that the company bus had broken down and was taken to the garage for repair works.

That a Hino Bus registration number ACR 7574 driven by John Bwalya transported the employees from Chibuluma Mines Plc in Lufwanyama to Moba Hotel in Kitwe and back to Lufwanyama.

That whilst at Moba Hotel, information was received that the hired bus belonged to a Chibuluma Mines Plc employee in the Engineering Department.

That investigations into the matter revealed that:-

- (a) The Hino bus Registration Number ACR 7574 belonged to the Complainant according to documents obtained from Road Transport and Safety Agency (RATSA).
- (b) The driver of the Hino bus Mr. John Bwalya was an employee of the Complainant in charge of two (2) minibuses often hired by the Respondent through the transport Coordinator, Mr. Dickson Mwitwa.
- (c) Artificial transport crises were deliberately created at Chibuluma Mines Plc to allow one or both buses belonging to the Complainant operate at the mine at a hiring charge of ZMW 1,000 per bus per day.
- (d) The hiring and payment was being done through Chimule Enterprises Limited, a contractor company that was not registered to provide transport and did not own any buses. Following conclusions of the investigations, the Complainant was charged with the offence of failing to declare interest.

(ii) Condoning, concealing an illegal act and failing to take corrective action against a subordinate

That on 31st March, 2014, the Respondent received a report about stolen wheel hubs from No. 2 shaft.

That the report indicated that an employee in the Engineering Department by the name of Besa Katebe had unlawfully removed two wheel hubs for a Toro 40-30 truck from the plant which he later sold to Chibuluma Mines Plc through a Company called Chalube at ZMW 70,000.

That the report further indicated that the theft was reported to the Complainant who condoned and concealed the illegal act and never took corrective action against Besa Katebe.

That following conclusion of investigations into the matter, the Complainant was charged with the offence of condoning, concealing an illegal act and failure to take corrective action against a subordinate.

The rest of the information concerning the disciplinary process was as deposed by the Complainant in his affidavit in support of his complaint.

At the hearing of this complaint, the Complainant, whom we shall hereinafter refer to as "CW1", called two witnesses in addition to himself. We shall refer to these witnesses as "CW2" (John Bwalya) and "CW3" (Obet Galatia), respectively.

It was CW1's testimony that on 26th March, 2014 around 15.00 hours the General Manager called him to his office in the presence of the Human Resources Manager, Mr. George Mutono. The General Manager handed him a letter of suspension which contained a charge of unethical conduct. CW1 confirmed that the letter on page 1 of the Respondent's Bundle of Documents is the one he received from the General Manager, Mr. Jackson Sikamo.

CW1 averred that he read through the letter and did not do anything. He said he immediately left the plant. On his way he received a phone call from one of the engineers, Hazell Makungu, who informed him that he had received a phone call from a contractor in Chingola saying he (CW1) had been fired. The information was said to have come from the General Manager.

According to CW1 he responded to the letter within 48 hours as per the exculpatory letter exhibited at page 2 of the Respondent's Bundle of Documents.

CW1 further referred to page 20 of the Respondent's Bundle of Documents which contained the second charge levelled against him of condoning, concealing an illegal act and failing to take corrective action against a subordinate.

CW1 claimed that he denied the charge as the subordinate concerned, Mr. Katebe, was far below him in hierarchy. He further averred that he was surprised because the incident happened a year before and no one brought it to his attention.

CW1 says he denied the charge of unethical conduct during the case hearing because he had two buses which were being used by his brother Obet Galatia. The buses were being used for hiring in Kitwe. He said anyone could hire these buses and he did not even know that the buses were coming to the mine because he was not running them.

The rest of CW1's evidence is already contained in his affidavit in support of complaint and will not be repeated.

During cross-examination, CW1 admitted that the Transport Section which was responsible for hiring private vehicles fell under Engineering Department. He agreed that the Foreman was under his administration.

CW1 was referred to page 5 of the Respondent's Bundle of Documents and identified the document as a report on hiring of buses at Chibuluma Mines Plc. He was further referred to pages 16 to 17 in the same Bundle of Documents. CW1 admitted that the motor vehicles in the said documents belonged to him.

During further cross-examination CW1 averred that it was a requirement for an employee doing business with the company to sign a document, an expression of interest. All employees doing business with the company were required to declare their interest.

When referred to pages 18 and 19 of the Respondent's Bundle of Documents which contained a Memorandum on Corporate Governance

and a Declaration of Interest Form, respectively, CW1 testified that he did not have any interest to declare and hence did not declare anything.

CW1 conceded that John Bwalya was one of the drivers of his vehicles. He however, said the hiring of vehicles to Chibuluma Mines was being done by subordinates.

CW1 conceded that the money raised from hiring out the buses was being deposited in his account.

On the charge of unlawful removal of property, CW1 admitted that he did not appeal against the severe warning given to him.

During re-examination, CW1 was referred to pages 18 and 19 in the Respondent's Bundle of Documents. He said he did not have any bus at the time the Memorandum on Corporate Governance was issued on 28th May, 2009.

During further re-examination CW1 averred that he regarded the relationship between himself and the General Manager as tricky.

Asked to comment on pages 22 and 24 in the Respondent's Bundle of Documents which were documents related to the stolen wheel hubs from shaft 2, CW1 said he learnt of the incident on 26th March, 2014.

CW2 was John Bwalya, a taxi driver who testified that CW1 was not his employer. He also testified that the connection between him and Obet Galatia (CW1's brother) was that he used to drive his buses.

During cross-examination CW3 claimed that the buses were handed over to him at the end of 2012 without a driver.

When directed to a document at page 11 of the Complainant's Bundle of Documents referenced: "Justification of the usage of the two minibuses", CW3 admitted that he wrote the letter in question.

During further cross-examination, CW3 averred that John Bwalya was brought to him by his brother (CW1). He testified that John was getting a commission.

It was CW3's testimony that whatever money was realised was going to CW1's account and that John Bwalya was being paid commissions by CW1.

CW3 was asked whether there was any difference in the fonts of the letters on pages 9 and 10 in the Complainant's Bundle of Documents. He said there was no difference. Documents 9 and 10 are copies of a letter written by John Bwalya, the driver of the buses in issue.

CW3 was asked to state the dates of the letters at pages 3 - 4 and 5- 6 of the Complainant's Bundle of Documents. He said they were both dated 15th May, 2014. He conceded that the letter at page 3 was written by the Complainant but the one on page 11 was handwritten by him but printed by the Complainant.

According to CW3, he wrote the letter in Livingstone and sent it to the Complainant who printed it.

CW3 testified that CW1 wrote the letter at pages 3 and 4 in the Complainant's Bundle of Documents but the other letters at pages 9, 10 and 11 were written by him and printed by the Complainant who sent them back to him for his signature.

In re-examination CW3 said that he did the printing and maintained that he employed John Bwalya.

This marked the close of the Complainant's case.

The Respondents called two witnesses in support of their case. These were Captain Poulson Mutinta Malambo, Security Manager (RW1) and Justin Pepulani Ndhlovu, Human Resources Head of Department (RW2).

Most of the evidence which RW1 gave is already on record and therefore, shall not be repeated.

RW1 testified that it was an offence for CW1 to do business with the company while he was still working there. According to RW1, it was easy for CW1 to know that his buses were being used for business with the Respondent because they used to be parked in such a way that you could easily see them as you drove in and out of the plant and the buses had been operating there for a long time.

On being asked what offence CW1 had committed regarding the stolen wheel hubs, RW1 said that a former employee had removed two wheel hubs from the plant without authority and then resupplied them to the mine. The matter was reported to the Mine Mechanical Engineer who reported it to the Engineering Manager, CW1. CW1 promised to deal with the case but did not do anything. The case was allegedly swept under the carpet. According to RW1, the offence which CW1 committed in this regard was not dealing with the matter or even reporting it to his boss, the General Manager.

During cross-examination RW1 averred that Mr. Chimule mentioned that he was hiring buses from John Bwalya. He stated that CW1 was dismissed for not declaring interest in the buses and not for concealing an illegal act.

RW1 testified that Chimule hired a bus and paid John Bwalya K600 for it. RW1 testified that Chimule was charging Chibuluma Mine K1,000 per bus for hiring the buses and to his knowledge there was no time when Chibuluma Mines paid John or CW1 for hiring a bus.

Justin Pepulani Ndhlovu, the Human Resources Head of Department (RW2) also testified and in a nutshell his evidence was about the events leading to CW1's dismissal, including the disciplinary process from beginning to end. He said he was the recorder in the disciplinary hearing chaired by Trevor Faber. He also testified that CW1 should have declared interest in the buses when they were hired to provide services to the mine. The failure to declare interest constituted a breach of the company's Code of Conduct and Business Ethics.

This marked the close of the Respondent's case.

Counsel for both parties undertook to file written submissions into court but at the time of writing the judgment only Counsel for the Respondent had done so. We are grateful to learned Counsel for the submissions.

As we consider the evidence adduced in this case, we are mindful that the onus is on the Complainant to discharge the burden of proof on a balance of probabilities. From the evidence before this Court, we find the following facts to be common cause:

- (i) The Complainant was employed by the Respondent as Engineering Manager and was summarily dismissed following a disciplinary hearing on a charge of failing to declare interest. The Complainant was also charged with condoning, concealing an illegal act and failing to take corrective action against a subordinate for which he was only issued with a severe warning.
- (ii) The Complainant's dismissal was preceded by a disciplinary hearing held on 4th June, 2014 where he was found guilty of the charge of failure to declare interest and was summarily dismissed.
- (iii) His two appeals against the summary dismissal were dismissed.
- (iv) The two buses in contention namely, ACR 7574 and ADC 1099 were registered in the Complainant's name.
- (v) The said buses were hired to the Respondent Company on a number of occasions through Chimule Enterprises as per page 4 of the Complainant's Bundle of Documents which indicates the dates when the buses were so hired.

Having considered the evidence on record, we have identified the following as issues to be determined by this Court:

- (i) Whether the Respondent had reasonable grounds for believing that the Complainant had committed the offence levelled against him;
- (ii) Whether the Respondent had the necessary disciplinary power and whether it was exercised reasonably; and
- (iii) Whether the Complainant was unfairly, wrongfully or unlawfully dismissed from employment.

With regard to the first issue Counsel for the Respondent has submitted that the facts indicate that the Complainant's motor vehicle Hino bus registration number ACR 7574 driven by John Bwalya was being used for business with the Respondent's Company through Chimule Enterprises Limited without the Complainant declaring interest to the Company.

Further Counsel has referred the Court to the Memorandum on page 18 of the Respondent's Bundle of Documents entitled 'Corporate Governance' which required employees to submit a declaration of interest in any business or organisation having trading connection with Chibuluma Mines Plc. According to Counsel for the Respondent, a perusal of the Complainant's declaration appearing on page 19 of the same bundle shows that he declared no interest in any organisation with trading connections with Chibuluma Mines or Metorex Group.

We concur with the submission by Counsel for the Respondent that the two buses belonging to the Complainant were being used for business with the Respondent and that the Complainant did not declare any interest to the Respondent as per the requirement of the Corporate Governance document. In cross-examination the Complainant did in fact admit that it was a requirement for every employee doing business with the Respondent Company to declare interest. He also testified that he did not declare any interest and that he should have done so.

Further, we find it hard to believe on the facts and evidence before us that the Complainant was not aware that his buses were doing business with the Company. We are of the opinion that he knew or ought to have known about the same. We find the evidence of RW1 to the effect that it was easy for the Complainant to see his two buses at the plant as they could easily be seen as one entered or exited the plant and that the buses had been operating from the plant for a long time to be credible.

We are of the view that the Complainant's explanation in re-examination that he did not have any bus at the time the Memorandum on Corporate Governance was issued on 28th May, 2009 does not let him off the hook because as he admitted in cross-examination, he was aware at the time his buses were being hired by the Respondent Company that he had a duty to disclose his interest to the company but decided not to do so.

After evaluating the evidence before us, we are of the view that the Respondent had reasonable grounds for believing that the Complainant had committed the offence levelled against him of failure to declare interest. We are also alive to the guidance given by the Supreme Court in

the case of **Chimanga Changa v Stephen Chipango Ngombe (1)** wherein it held that an employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question.

The Supreme Court outlined the function of the employer in such a case as to act reasonably in coming to a decision. What matters is that the employer carried out investigations as a result of which he reasonably believed that the employee was guilty of misconduct. On the evidence before us, we believe that this is what happened in the case in *casu*.

As regards the second issue, that is, whether the Respondent had the necessary disciplinary power and whether it was exercised reasonably, we are mindful of the duty of the Court as elucidated by the Supreme Court in the case of **Attorney General v Richard Jackson Phiri (3)**. In that case the Supreme Court indicated the duty of the Court as to examine if there was the necessary disciplinary power and if it was exercised in due form.

In the same case the Supreme Court stated that once the correct procedures have been followed, the only question for consideration of the Court would be whether there were facts established to support the disciplinary measures.

It is our opinion that in the case in *casu* the necessary disciplinary power existed and was exercised in due form. We are also of the view that facts are there to support the disciplinary measures taken against the Complainant.

Regarding the third issue for determination, namely, whether the Complainant was unfairly, wrongfully or unlawfully dismissed from employment, it is our view that the offence which he committed was a serious one which hinged on his integrity and honesty. At the level the Complainant was in the company it was important for him to adhere to the tenets of corporate governance as outlined in the Memorandum exhibited at page 18 of the Respondent's Bundle of Documents. He should have declared interest to the company as expected of him.

We cannot gloss over the offence the Complainant committed and for which investigations were carried out by the Respondent who reasonably believed that the Complainant was guilty.

We are fortified in our decision by the Supreme Court judgment in **Zambezi Ranching and Cropping Limited v Lloyd Chewe (2)** where the higher Court held:

The Industrial Relations Court misdirected themselves when they glossed over the wrong doing by the Complainant thereby coming to a conclusion on a view of the facts and the evidence which could not reasonably be entertained.

We have also noted that the Complainant has not adduced any evidence of discrimination or any unfairness, procedurally or otherwise, on the part of the Respondent to back his claim of unfair dismissal. Additionally, the evidence before us shows that after being charged with the offence of failure to declare interest, the Complainant was asked to exculpate himself and was only dismissed after a hearing at which he was heard in his defence. Further, he was given an opportunity to appeal


against the dismissal on two occasions as per the company's disciplinary process, albeit unsuccessfully. We therefore, find that he was not unfairly, wrongfully or unlawfully dismissed.

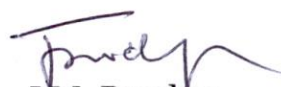
On the facts and evidence before us, we find and hold that the Complainant has failed to prove his case against the Respondent on a balance of probabilities. We accordingly dismiss the complaint for lack of merit.

Each party to bear his/its own costs.

Informed of Right of Appeal to the Supreme Court within thirty (30) days of the date hereof.

Delivered at Ndola the.....day of June, 2016.


Judge Dr. W. Mwenda
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER


G.M. Samusungwa
MEMBER