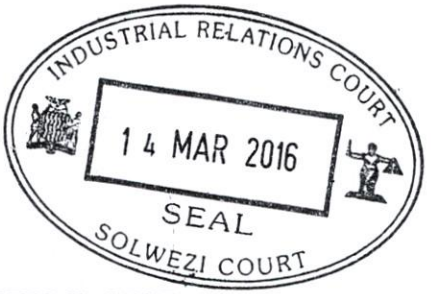
Registry

IN THE INDUSTRIAL RELATIONS COURT HOLDEN AT NDOLA **COMP/83/2014**

BETWEEN:



SAMUEL CHIPILI **COMPLAINANT**

AND

FIRST QUANTUM MINING AND OPERATIONS LTD, MINING DIVISION **RESPONDENTS**

BEFORE:

Hon. E.L. Musona – Judge

MEMBERS:

1. **Hon. W.M. Siame**
2. **Hon. J. Hasson**

For the Complainants : **Mr. T. Shamakamba of Messrs Shamakamba and Associates**

For the Respondents : **Ms Kapaipi of Messrs Abha Patel and Associates**

JUDGMENT

Date: 14th March, 2016

Statutes referred to:

1. **Act No. 8/2008**

Cases referred to:

1. **Wilson Masauso Zulu v Avondale Housing Project, (1982) ZR**
2. **Galaunia Farms Ltd v National Milling Corporation Ltd (2004) ZR 1 (SC)**

This Complaint was filed by M/Samuel Chipili against First Quantum Mining and Operations Ltd, Mining Division. We shall, therefore, refer to M/Samuel Chipili as the Complainant and to First Quantum (FQM) Mining and Operations Ltd, Mining Division as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

1. Damages for unfair, unjustified, illegal and void termination of employment.
2. Damages for breach of rules of natural justice.
3. Interest
4. Costs

The duty of this court is to ascertain whether or not the Complainant has proved his claims.

This case is not without history. The history of this case is that hearing commenced on 29th July, 2015. The Complainant testified and closed his case on the 29th July, 2015.

The Respondents, too, called their first witness (RW1). RW1 testified and was cross examined. The matter was adjourned to 25th

August, 2015 for re-examination of RW1. It was also ordered on 29th July, 2015, that the Respondents should avail their RW2 on 25th August, 2015.

Contrary to the order of this court, when this court sat on 25th August, 2015, RW1 was not available for re-examination. Counsel for Respondent reported that RW1 was sick. RW2 was also not availed.

The matter was adjourned to 31st August, 2015 with an order by the court that if the Respondents do not avail their witnesses on 31st August, 2015 the matter would adjourn for judgment. This was in the presence of counsel for the Respondents and for the Complainant.

On 31st August, 2015 both Respondents' witnesses were present but counsel for the Complainant was not present. There was a notice of motion for variation of hearing date accompanied by an Affidavit in Support filed by counsel for the Complainant. We refused to accept that approach of seeking adjournment because of the following reasons:

1. Counsel for the Complainant was in court when the matter was adjourned to 31st August, 2015 and raised no objection. Counsel for the Complainant averred in his Affidavit in Support that he had by mistake agreed that the matter comes up on 31st August, 2015, that on 31st August, 2015 he was travelling to Nakonde for a criminal matter. We must state that counsel should not

mislead the court. It is misleading the court if counsel agrees to a date when he could not be available. Counsel must own a diary and to consult the diary before committing oneself to a date. If in the process of consulting the diary counsel makes a mistake, that should not affect the court's sitting. That Affidavit sworn by counsel further shows that counsel was attending to a criminal matter in a Subordinate Court. This court takes precedence over the Subordinate Court. Although, ordinarily, criminal cases are given preference, that should not be a norm but must be dealt with on a case by case basis. There is no law which obligates a court sitting in a civil matter to give preference to a criminal matter. Act No. 8 of 2008 obligates the Industrial Relations Court to conclude a matter within 12 months from the date when the matter is filed. There is no such time limitation imposed on criminal proceedings. On those basis this court shall not give preference to criminal matters except on a case by case basis.

2. A notice of motion to vary hearing date is not per se an adjournment. It is not an application for adjournment either. It is a mere notification of the intention to vary hearing dates. As adjournments are in the discretion of the court, the party seeking such variation of hearing date or adjournment must attend court to make the application for variation of hearing date or adjournment. No such application was advanced to this court. On those basis we proceeded to hear the case and RW1 was re-examined. After RW1 was re-examined, RW2 also gave his evidence and was cross examined by the Complainant in

person. He was also re-examined. The matter was then adjourned to 21st October, 2015 for judgment. That was on 31st August, 2015.

What followed is that on 18th September, 2015 counsel for Complainant filed summons for leave to open the matter and cross examine RW2. On 21st October, 2015 the application by counsel for the Complainant to open the matter and cross examine RW2 was granted. Hearing of the main matter was set for 23rd October, 2015, on 23rd October, 2015 counsel for the Complainant at whose instance the hearing was set to this day was absent. No communication was advanced to court to warrant non-attendance by counsel for the Complainant.

Counsel for the Respondent asked for an adjournment but that application was rejected for being destitute of good grounds.

Since counsel for the Complainant who had applied that the matter be reopened, and at whose instance the matter was reopened to allow cross examination of the Respondents' witness was not present to institute the cross examination which he prayed was thirsty of, and the Respondents having closed their case we adjourned for judgment.

Having given that background to this case, we shall now consider the evidence in this case.

The evidence for the Complainant was that he was employed as a Mechanic by the Respondents on 20th July, 2012. He was dismissed on 24th October, 2013.

The Complainant explained that while driving a Respondents' motor vehicle returning from his scheduled work he was involved in a road accident. There were tyre bursts on the front to the right of the driver and also rear right. This happened at a curve and the motor vehicle overturned.

He was subsequently charged with over-speeding and damage to company property.

The safety department for the Respondents released a report indicating that the motor vehicle was running at 46 km/h. On the charge sheet the Complainant was charged with driving at 131 km/h. When the motor vehicle was taken to Ndola for examination at the Geo Tab it was revealed that the motor vehicle was running at 133 km/h at the time of the accident.

The first witness for the Respondents was M/Zacharia Phiri a Human Resources Officer for the Respondents. We shall refer to this witness as RW1.

The evidence for RW1 was that the Complainant was dismissed after he was involved in a road accident which was a

result of over speeding. That accident resulted into damage of the Respondents' motor vehicle.

The second Respondents' witness was M/Shane Bright a Geo Tab Branch Manager based in Ndola. We shall refer to this witness as RW2.

The evidence for RW2 was that he provides satelite trucking. RW2 told this court that the first report which was presented was for the previous day. The operator who generated the report did not look at the date. That is the report showing 46 km/h. The correct report is one for 133 km/h which corresponds with the date of the accident. Having stated the evidence in this case, we shall now determine the relief sought.

1. Damages for unfair, unjustified, illegal and void termination of employment

The lingo expression in this claim is so jumbled that it requires extreme caution to make sense out of it. We say so because the words which have been grouped together such as unfair and illegal are distinct legal aspects which constitute different heads of claims. We shall treat them as such.

a. Unfair termination

The term 'unfair' is used when the dismissal is in violation of rules of natural justice. We have seen no evidence that the

dismissal was unfair because procedure leading to his dismissal was followed. We say so because he was charged. He appeared before the Disciplinary Committee and was given a hearing. He was also given an opportunity to appeal. The appeal was heard by Mr. Shon Gibson who was a nominee of the Operations Manager and lost the appeal. To the extent, as we have seen in evidence that the procedure was followed, the dismissal cannot be said to be unfair. It was not in breach of rules of natural justice either. The claim for unfair dismissal is, therefore, not sustainable.

b. Unjustified termination

A dismissal is not justified if either the procedure leading to dismissal was not followed or simply the dismissal was in breach of the rules of natural justice. It is also unjustified dismissal if the charges against the employee were not proved. As to procedure, we have already stated that the procedure was followed. We shall later determine whether or not the charges were proved against the Complainant.

c. Illegal termination

"Illegal" is synonymous with unlawful dismissal. Unlawful or illegal dismissal is a dismissal of an employee in breach of a statutory provision. We have not seen any statute which can be said to have been breached by the Respondents. The

claim for illegal or unlawful dismissal is, therefore, unfounded and unsustainable.

d. Void termination

There are two things to note.

First, termination of employment is different from dismissal from employment. The difference is that dismissal from employment is the ending of employment relationship as a consequence of commission of a dismissible offence by the employee. Termination of employment is the ending of employment relationship in the exercise of an option to do so unrelated to disciplinary grounds. What happened in this case was not a termination of employment. It was a dismissal from employment. Here lies the significance of not jumbling words in a claim.

Secondly, a termination of employment or a dismissal from employment is void if it is so clear that it was wrongly effected and that it ought not to have been done in the first place, further, that as a result, the status quo should be reverted to. The claim, therefore, must be reinstatement with the claim for damages in the alternative.

Whether the dismissal of the Complainant from employment can be held void or not, shall be determined when we discuss whether or not the charges which were laid against the Complainant were proved.

2. Damages for breach of rules of natural justice

When we determined whether or not the dismissal was unfair, we also determined whether or not there was breach of the rules of natural justice. We held that there was no such breach. Suffice to state that we have hitherto, given our reasons, needless, therefore, to repeat.

This claim, therefore, fails.

We stated earlier that we would determine whether or not the charges were proved against the Complainant. We now turn to those charges.

The charges upon which the Complainant was dismissed were two (2). These were over speeding and causing damage to company property.

i. Over speeding

We have looked at the evidence in this case. It is clear that when the accident happened the Complainant was driving at 133 km/h. The report which showed that the motor vehicle was running at 46 km/h was disputed by RW2 who showed that the report of 46 km/h was a recording for the previous day before the accident. The

report which showed that the motor vehicle was running at 131 km/h was disputed by RW1 as a typing error.

We have looked at the Geo Tab report which was exhibited as "JC3". The second page of "JC3" is clear. JC3 shows 9th October, 2013 at 11.28 hrs as the date and time of the accident. This has not been disputed. The only dispute is that the motor vehicle was running at 133 km/h at the time of the accident.

Our finding is that the motor vehicle was running at 133 km/h at the time of the accident. We say so because this is what is reflected in the Geo Tab report which is a computerized devise imbedded into the motor vehicle to record events, and it accordingly recorded the accident event as having occurred on 9th October, 2013 at 11.28 hrs. This is shown on exhibit "SC2c" and "SC2d".

The evidence is clear. The evidence is that the accident occurred on a gravel road while the Complainant who was driving the motor vehicle was ascending (not descending). The Complainant himself added in his statement dated 21st October, 2013 that the accident happened at a "sharp curve" on that road. We have seen exhibit "SC2f" which is a sketch plan of that road. "SC2f" has not been disputed. We have seen the nature of that "sharp curve" on "SC2f".

Our finding, therefore, is that driving on a gravel road, ascending at a "sharp curve" at a speed of 133/km/h or even at 131 km/h is indeed over speeding. This ground was, therefore, proved by the Respondents against the Complainant.

ii. Causing damage to company property

We have looked at the photographs of the motor vehicle in question. It is a Toyota Land Cruiser. This has been exhibited as "SC2b". We have seen the extent of the damage. Even if the Complainant claimed that this same motor vehicle was involved in another road accident earlier, we have seen that the Complainant indeed caused damage to this motor vehicle. We say so because:

i. the Complainant admitted having driven this motor vehicle and overturned.

ii. The nature of the damage to the motor vehicle as seen on exhibit "SC2b" is consistent with the circumstances alleged.

iii. Even if a motor vehicle has a history of previous road accidents it is not a defence to additional damages caused to the same motor vehicle in a subsequent road accident. Whosoever causes damage to a supposedly partially damaged motor vehicle is liable for each additional damage so caused. Each additional damage is actionable.

The previous history of this motor vehicle (if any) cannot be relied upon by the Complainant as a defence to the subsequent damage caused by himself in the subsequent road accident.

We are satisfied that the Complainant caused damage to company property, namely, Toyota Land Cruiser. The charge of causing damage to company property was, therefore, proved by the Respondents against the Complainant.

An employee who is guilty of commission of a dismissible offence and who is infact dismissed has no claim against the employer, provided that the charges have been proved and the procedure for dismissal has been complied with.

We have looked at the case of **Wislon Masuso Zulu v Avondale Housing Project (1)** and have been well guided. In that case it was held that a Plaintiff who fails to prove his case cannot obtain judgment whatever may be said of the opponent's case.

We have also looked at the case of **Galunia Farms Ltd v National Milling Corporation (2)** where it was held that a Plaintiff must prove his case. Again we have been guided.

On the above basis we have found that when the Respondents dismissed the Complainant, the Respondents were indeed on firm ground.

This Complaint is, therefore, dismissed for destitute of merit.

We shall order no costs.

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

Delivered and signed at Solwezi this the 14th day of March, 2016.

Hon. E.L. Musona
JUDGE

Hon. W.M. Siame
MEMBER

Hon. J. Hasson
MEMBER