

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/54/2015

BETWEEN:

DERRICK N. SIBAMBA

AND

NATIONAL MILLING CORPORATION LIMITED



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 : Ms. E.I. Banda, Senior Legal Aid Counsel, Legal
Aid Board

For the Respondent : Mrs. N. Simachela of Nchito and Nchito
Advocates

JUDGMENT

Cases referred to:

1. **Agholor v. Cheeseborough Ponds (Z) Limited (1976) Z.R.1**
2. **Masauso Zulu v. Avondale Housing Project (1982) Z.R. 172**
3. **Zambia Electricity Supply Corporation Limited v.
Muyambango (2006) Z.R. 22**
4. **British Home Stores v. Burchell (1979) IRLR 379**
5. **Stockdale v. The Woodpecker Inn Limited and Another (1967)
Z.R. 164**

- 6. Mulungushi Investment Limited v. Gradwell Mafumba SCZ
Appeal No. 141 of 1990**
- 7. Zambezi Ranching and Cropping Limited v. Lloyd Chewe
Appeal No. 128 of 1999 (SC)**
- 8. Mary Musole v. Borassus Estates Limited IRC/Comp/303/2004**

Works referred to:

Gwyneth Pitt, *Employment Law – 6th Edition* (Thomson Sweet and Maxwell) 2007.

On 23rd July 2015, Derrick Njamba Sibamba, the Complainant herein, filed a Notice of Complaint against National Milling Corporation Limited, the Respondent.

The sole ground upon which his Complaint was presented was that he was unlawfully/wrongfully dismissed from his employment on 11th March 2015 and his appeal was dismissed on 25th March, 2015.

Consequently the Complainant seeks the following relief:-

- (a) Damages for unlawful/wrongful dismissal;
- (b) Damages for loss of expectation of income, embarrassment, pain and anguish;
- (c) Any other relief that the Court deems fit.
- (d) Interest; and
- (e) Costs.

- The Notice of Complaint was supported by an affidavit sworn by Derrick Njamba Sibamba, the Complainant, wherein he asserted that he was employed in the Respondent Company on 1st July, 2014 as a Depot Assistant on a permanent and pensionable basis. That on 13th February, 2015 he was suspended from duty without pay on allegations that he, together with his supervisor Ms. Doris Sibale, had misappropriated company funds.

The Complainant averred further that on 26th February, 2015 whilst on suspension he received a charge sheet from the Respondent Company charging him with theft. That it was alleged that on 12th February, 2015 an audit was conducted and the findings were that the Complainant, whilst working together with his supervisor Ms. Doris Sibale, misappropriated funds amounting to K39, 748.50.

The Complainant deposed that he did not misappropriate the funds as alleged because never at any given time was he in charge of daily sales transactions or reconciliation of the depot takings where the shortages were incurred as the same was done by his supervisor Ms. Doris Sibale.

The Complainant averred that he could not account for missing funds when he was not even aware in the first place that funds were missing at the depot.

The Complainant stated further that a case hearing was convened by the Respondent where he gave the explanations given above but was summarily dismissed from his employment with effect from 13th March,

- 2015. He appealed against the dismissal and received a response from the Respondent confirming its earlier decision.

In addition, the Complainant asserted that he carried out his duties honestly without any fraud or theft as alleged by the Company and therefore his dismissal was unlawful and wrongful as the allegation of misappropriation against him was not proved. He said had the allegation been proved, he could have been arrested and prosecuted just like his former supervisor Ms. Doris Sibale.

The Complainant further stated that when he reported the matter to the Labour Officer in Ndola he was assured of a positive result. However, in May, 2015 he received a telephone call from the Respondent Company saying they wanted to meet him at the Kitwe office on 1st June, 2015. According to the Complainant, on the material day he went to Kitwe for the meeting and to his "total disbelief" he was subjected to another hearing over the same allegation of misappropriating K39, 748.50.

In rebuttal the Respondent Company filed an Answer wherein it stated that the Complainant's employment as Depot Assistant was properly and lawfully terminated by way of summary dismissal on 15th March, 2015 according to the terms and conditions of his employment.

That sufficient evidence was adduced at the Complainant's disciplinary hearing to support the finding of theft and/or misappropriation of company funds, gross negligence of duty which are dismissible offences according to the Respondent's Disciplinary Code.

- The Complainant, hereinafter referred to as "CW" gave sworn evidence at trial. It was CW's testimony that he was employed by the Respondent Company in July 2014 as a Depot Assistant stationed at Masala Sales Depot. He said his duties included making daily sales, orders for replenishment of stock as well as merchandising goods and other related marketing and sales activities.

It was CW's testimony that while at the depot he was reporting to his Depot Supervisor Mrs. Doris Mutambo Sibale. He said whilst working at the Respondent Company everything went on well.

CW testified that one afternoon in February, 2015 the Chief Accountant and the Sales Coordinator from Kitwe came to conduct a spot check. They checked on stock and records for day old chicks. According to CW, the Respondent sells day old chicks on behalf of Hybrid Poultry Farm. The Chief Accountant by the name of George Chanda and the Sales Coordinator, Christopher Chikonde did the physical stock-taking of the chicks which he witnessed.

It was CW's evidence that after the duo finished the stock-taking, the Chief Accountant asked him to leave the store for about 40 minutes. According to CW, while outside he could not hear much of what was being discussed but could hear voices being raised suggesting to him that something could have gone wrong with whatever they were checking.

CW testified that around 19.00 hours the Chief Accountant and the Sales Coordinator left the store and did not mention anything to him when they found him outside.

It was CW's evidence that when he went inside the depot after the two officers had left, his immediate supervisor did not explain to him what transpired. However, he could read from his supervisor's face that things were not okay. He asked her what was happening. The response she gave him was that things were not okay but did not elaborate.

CW testified further that the following morning the Sales Coordinator Mr. Chris Chikonde, called his immediate supervisor Mrs. Doris Sibale on the phone and told her to handover everything to CW. CW said the two of them counted the stock, including cash in hand for sales for the previous day.

According to CW, afterwards his supervisor was asked to hand over the store to Samuel Simwanza, a colleague from town. CW testified that the Coordinator later told him and his supervisor verbally that they were being suspended.

The rest of CW's testimony is a repeat of the evidence already before the Court in his Affidavit in Support of Notice of Complaint and the Respondent's Affidavit in Support of Answer.

During cross-examination CW conceded that he signed the Depot Procedures document which outlines the do's and don'ts at the depot, that is, what is expected of one at the depot.

CW explained the procedures for handling daily sales. He testified that the procedure for day old chicks was that customers would make orders

for specific dates and make payments in advance. Receipts would be issued either by himself or his supervisor, Mrs. Sibale. He reiterated that either his supervisor or himself would receive the money and issue a receipt.

During further cross-examination CW stated that they did monthly stock-counts every last weekend of a given month.

CW testified that during his stay at the depot neither the Chief Accountant nor the Sales Coordinator conducted any sport checks other than the one done prior to his dismissal. Under further cross-examination he reiterated his earlier testimony that he was present when the two officers conducted a physical count of all the items in the depot. He also stated that the stock-count information was recorded as usual, on a reconciliation sheet.

It was CW's further testimony that sales were cashed in by his supervisor and the money deposited at Barclays Bank. He testified that at no time did he ever deposit money. He admitted during further cross examination that it was his job to ensure that records were kept properly.

This marked the close of the Complainant's case.

Two witnesses testified on behalf of the Respondent. The first witness (RW1) was Christopher Bwalya Chikonde, the Sales Coordinator, Northern Region who testified that his duties included ensuring that all outlets in the entire Northern Region are well stocked with their products and all monies are accounted for.

- RW1 testified that in February, 2015 he conducted an audit of all stocks and money at their outlet in Masala, Ndola in the presence of their Chief Accountant, Mr. George Chanda. Upon completion of the audit of stocks and money they discovered a shortfall of about K39,000.00. They enquired from the depot personnel, namely, Mrs. Doris Sibale and Mr. Derrick Sibamba who both gave verbal explanations which were found to be unsatisfactory by the Respondent.

RW1 testified further that they asked the two officers to report to the Head Office for Northern Region in Kitwe where a case hearing was conducted. According to RW1, both were unable to account for the money and as per depot procedures, were charged and subsequently relieved of their duties.

RW1 stated further that before the case hearing, he charged the duo as their immediate supervisor and recommended that a case hearing be held. He testified that he charged the Complainant with the offence of theft and that he relied on the Depot Procedures which are standard guidelines in each and every outlet under the Respondent Company. He identified the document produced and exhibited in the Notice to Produce Document filed by the Respondent on 8th February, 2016 as being the Depot Procedures document for the Respondent Company. He said that the document served as a guideline for all personnel in their outlets to adhere to. In the case of the Complainant, RW1 relied on procedure numbers 1, 5 and 9 because they involved handling of money, proper record keeping and petty cash, which is found in outlets.

- According to RW1, the failure by the Complainant to follow the procedures meant that he was answerable for the missing money. It was RW1's evidence that the Complainant was aware of his responsibilities because he was given the document to read and he signed for it on 1st June, 2014.

During cross-examination RW1 conceded that Doris Sibale the Supervisor at Masala depot was convicted in a magistrate's court of the offence of theft of about K39, 000.

RW1 stated that the audit conducted in February, 2015 was not his first audit and that the first one at Masala depot was done in December, 2014. He said the Complainant was present when the February, 2015 audit was conducted.

RW1 testified that they asked CW to step out when they interviewed Doris Sibale because they wanted to interview her on her own. He said Doris Sibale said she tried to cover up for this missing money after she had discovered the loss; that she wanted to borrow money from money lenders to cover up the loss.

It was RW1's testimony that from the onset CW denied knowledge of the missing money and recalled that Doris Sibale told them that the Complainant was not aware of the missing money. He confirmed that Doris Sibale was in charge of daily reconciliations at the depot but that she was doing the reconciliations hand in hand with the Complainant; hence both the supervisor and the assistant were accountable.

- During Re-examination RW1 testified that the Complainant and his supervisor attended on the Area Manager the day after the audit was done at Masala depot when they took their individual written explanations. RW1 was present when the Area Manager asked the two individually what happened. The Area Manager also found the duo's explanations unsatisfactory. RW1 testified that they linked the Complainant to the K39,748.50 shortfall based on the Depot Procedures because they felt that he was equally responsible for the shortfall.

The Respondent's second witness (RW2) was Annie Mwiinga, Head of Human Resources and Corporate Affairs at the Respondent Company. She testified that she was in charge of the Human Resources Department, human resources policy formulation and implementation and other human resources functions.

RW2's testimony was mainly a repeat of the evidence already before Court. However, it was RW2's testimony that the Complainant was accorded an opportunity to be heard. The disciplinary committee that had convened to hear the matter found him guilty of the offence as charged and he was summarily dismissed as provided by the Disciplinary Code. After the dismissal, the Complainant appealed against the decision, which appeal was also dismissed. Thereafter he reported the matter to the Labour Office in Ndola but due to short notice, RW2 was unable to attend the said meeting and delegated her assistant in Kitwe to attend the meeting. The name of the assistant is Ms. Clarice Kaunda. According to RW2 Ms. Kaunda mishandled the meeting with the Labour Officer, as a consequence of which she requested for another meeting with the officer at which a decision was made that the Complainant's appeal be re-heard.

According to RW2, during the said appeal re-hearing the Complainant was again found guilty of the said offence, based on the fact that he confirmed having been privy to all transactions in the said sales depot on alternate basis, that is, taking part in the daily sales transactions, having to open and close the stock, stock reconciliation process and handling the daily banking.

RW2 said she was present at the appeal re-hearing and it was evident that both of the accused were fully aware of what was happening in their assigned sales depot.

RW2 also testified that after the hearing, the Complainant was paid his applicable separation package which comprised the encashment of his accrued leave days and days worked prior to effecting the termination less any money owed to the corporation including half of the K39, 748.50 incurred loss.

During cross-examination RW2 stated that she was fully aware of the Company's Disciplinary Code and explained the disciplinary procedure in some detail. She also said that the Complainant submitted an exculpatory letter in which he denied knowledge of the missing money. She admitted that Doris Sibale acknowledged knowing about the missing money in her written submission.

- During further cross-examination RW2 confirmed that Doris Sibale was prosecuted for the same offence, convicted and sentenced to two years imprisonment. She averred that the main reason for CW's dismissal was that he should have known about the missing money because he was privy to the transactions. She said that the Complainant was aware of the standard procedures which he signed for. She testified that he would perform his supervisor's functions when she was not around.

It was RW2's further testimony that both the Complainant and his supervisor had access to the safe and both had pin codes to the same. She said she did not know at what point Doris Sibale admitted that she knew about the missing money.

RW2 further stated under further cross-examination that she disputed the letter from the Labour Officer.

In re-examination RW2 testified that there was no appeal hearing for Doris Sibale and that she was just called in as a witness. According to RW2, Doris Sibale was prosecuted while the Complainant was not because she was a repeat offender.

This marked the close of the Respondent's case.

At the close of the case both parties undertook to file written submissions and did so. We are grateful to learned Counsel on both sides for the same.

• The undisputed facts as they emerge from the record before Court are as follows:

1. The Complainant was employed by the Respondent on 1st July, 2014 as Depot Assistant.
2. On 13th February, 2015 the Complainant was suspended from duty without pay on allegations that he, together with his supervisor Mrs. Doris Sibale, had misappropriate company funds.
3. On 26 February, 2015 whilst on suspension the Complainant received a charge sheet charging him with theft.
4. The Complainant was afforded a disciplinary case hearing and summarily dismissed after the said hearing.
5. On 23rd March, 2015 he wrote a letter of appeal to the Head - Human Resources and Corporate Affairs. The appeal was turned down vide a letter dated 25th March, 2015.
6. An appeal re-hearing was held on 1st June, 2015 following a meeting of the parties with the Labour Officer in Ndola.
7. The Complainant's dismissal was confirmed by the appeal committee

In our view the question for determination by this Court is whether or not the summary dismissal of the Complainant was wrongful or unlawful as he claims in his Notice of Complaint. We believe that the answer to this question will help us determine whether the Complainant is entitled to the relief he is seeking or not.

- We have carefully analysed the viva voce and documentary evidence before the Court. We are cognisant of our mandate as a Court, which is to do substantial justice to both parties.

In addition, we are alive to the fact that the burden of proof is on the Complainant to prove his case against the Respondent on a balance of probabilities.

Learned Counsel for the Complainant has referred the Court to the case of **Agholor v Cheeseborough Ponds (Z) Limited (1)** and has stated that it is trite law that a contract of employment can be terminated by either party to it but only in accordance with the terms provided in the contract of employment. She has argued that what is clear from this case is that in order for an employer to terminate an employee's contract he must follow procedure as well as the law of natural justice. If the employer fails to follow the laid down procedure or the rules of natural justice, the purported dismissal would be wrongful and unlawful.

It is our considered opinion that in the case in *casu*, the laid down procedure was followed to a large extent with a few lapses. The rules of natural justice were observed in that the Complainant was afforded an opportunity to be heard by the disciplinary committee constituted to hear the case. The Complainant also had the opportunity to write an appeal letter which was considered by the Respondent and an appeal re-hearing held, albeit after the intervention of the Labour Officer.

- Counsel for the Complainant has further argued that the Complainant's dismissal was wrongful and unlawful because under cross-examination RW1 admitted that Doris Sibale had informed him that the Complainant was not aware of the shortage at the depot and that she had tried to cover up the losses by trying to borrow from money lenders. According to Counsel, this was proof enough that she was responsible for misappropriating the money at the depot.

Counsel for the Complainant has argued further that the only allegation against the Complainant that came out of RW1 and RW2's testimonies was that the Complainant must have been aware of the theft and was therefore dismissed for being negligent. It is Counsel's submission that the Respondent failed to show to Court how the Complainant had misappropriated any money and whether such negligence could result in summary dismissal.

According to Counsel, the Complainant's dismissal was procedurally wrong. She argues that Christopher Chikonde (RW1) was both the charging officer and a witness to the audit or shortage at the depot. This in Counsel's view is tantamount to RW1 wearing two hats at the same time.

Counsel for the Complainant has referred the Court to exhibit "DNS5" in the Complainant's Affidavit in Support of Complaint which is captioned: "Letter of response on your appeal against the termination of your employment by way of summary dismissal" and is dated 25th March, 2015.

In the said letter, in paragraph 4 the Respondent wrote as follows:

Further, note that you are also on record of having failed to provide proof of non involvement in daily sales transactions on your assigned sales depot.

Counsel for the Complainant has also drawn the Court's attention to the case of **Wilson Masauso Zulu v Avondale Housing Project (2)** which stated the principle that he who alleges must prove. She submits that since it was alleged by the Respondent that the Complainant had misappropriated company money jointly with his supervisor Doris Sibale, it was incumbent on the Respondent to prove to the committee sitting to hear the charges against the Complainant that he had done so and not for the Complainant to prove that he had not.

According to Counsel, the Respondent charged the Complainant with a dismissible offence when Doris Sibale his supervisor, admitted from the onset that she misappropriated the money and that is why she was charged and eventually convicted of theft of K39,748.50.

The Respondent has referred the Court to the case of **Zambia Electricity Supply Corporation Limited vs Muyambango (3)** where the Supreme Court held 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 been done. The duty of the Court is to examine if there was necessary disciplinary power and if it was exercised properly.

- Learned Counsel for the Respondent has further quoted the following statement by the Supreme Court in the same case:-

where it is not in dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity.

In the case in *casu* it is evident that there is a dispute as to whether the Complainant had committed an offence for which the appropriate punishment was dismissal.

Counsel for the Respondent referred the Court to several other cases in support of her submission. These are **British Home Stores v Burchell (4)** in which the Court gave guidelines for the exercise of disciplinary power, **Stockdale v Woodpecker Inn Limited and Another (5)** where the Court stated that:

If a servant does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.

Another authority referred to is the Supreme Court holding in the case of **Mulungushi Investment Limited v Gradwell Mafumba (6)** in which it was held thus:

Once a Court finds that a dismissal is on facts justified, the Respondent is not entitled to damages.

- We are in agreement with the holdings in the authorities cited by learned Counsel for the Respondent. However, we are of the view that in the case in *casu* whereas the Respondent had the necessary disciplinary power, it did not exercise it properly in that it shifted the burden of proof on the Complainant. As the allegor, the Respondent should have provided proof of the Complainant's guilt of the offence of theft. We find that the Respondent did not do so for reasons we shall give below.

The Respondent has alleged that the Complainant was bound by the Depot Procedures and that due to the nature of his job it was not possible for him not to have a hand in the missing funds at the depot. The Respondent further alleged that both the Complainant and his supervisor had keys to the safe at the depot and that the safe held money made from sales at the depot before it was banked. We are of the view that these facts do not prove that the Complainant stole or participated in the theft of the money. Further, the Respondent has not adduced any evidence to show how the Complainant allegedly contravened the Depot Procedures leading to the theft of the money. The Complainant has at all times denied any knowledge of the misappropriated money and Doris Sibale, the Complainant's supervisor, absolved him of any knowledge or participation in the misappropriation of the subject money. We note that even RW1 admitted in cross-examination that Doris Sibale had told them that the Complainant was not aware of the missing money. It is clear from the evidence that Doris Sibale acted alone in misappropriating the K39, 748.50.

- It is evident that the Complainant was dismissed for the alleged negligence in not detecting the misappropriation of the money and not for theft. Regrettably the Respondent has failed or neglected to produce its Disciplinary Code from which we could have determined whether negligence is a dismissible offence under the Respondent's conditions of service or not. In any case, we have not seen any tangible evidence of negligence on the part of the Complainant to justify any disciplinary action, let alone dismissal. It is therefore, our view that there is no evidence before this Court to show that the Complainant was guilty of an offence for which the appropriate punishment was dismissal and for this reason we find that his dismissal was wrongful.

In coming to our decision we are alive to the guidance given by the Supreme Court in the case of **Zambezi Ranching and Cropping Limited vs Lloyd Chewes (7)** for the Court to be wary of misdirecting itself by glossing over the wrong doings by a complainant and coming to a conclusion on a view of the facts and evidence which cannot reasonably be entertained.

We are also mindful of this Court's ruling in the case of **Mary Musole v Borassus Estates Limited (8)** in which we stated as follows:-

We have not been requested to decide the Complainant's guilt or otherwise regarding the alleged theft from the Respondent. Our sole function is to determine whether or not the Complainant was unlawfully dismissed as claimed.

- In the case in *casu* we are not by any means glossing over any alleged wrong doing by the Complainant and neither are we called upon to decide the Complainant's guilt or otherwise regarding the alleged theft from the Respondent. However, the review of the evidence before us which we have done above, leads us to the inescapable conclusion that the Complainant was wrongfully dismissed.

Gwyneth Pitt, the author of *Employment Law (sixth Edition)* at page 216 has stated that there are two conditions to be fulfilled for a successful action for wrongful dismissal: Firstly, that the employer terminated the contract without notice or with inadequate notices and secondly that the employer was not justified in doing so. We are satisfied that the two conditions have been met in the case in *casu*.

It is our finding that the Complainant has discharged his burden of proving his case of wrongful dismissal on a balance of probabilities. On the facts and evidence before us and going by the authorities cited herein, we find and hold that the Complainant was wrongfully dismissed.

Consequently, judgment is entered in favour of the Complainant. He is therefore entitled to damages for wrongful dismissal. We however, dismiss the claims for damages for loss of expectation of income, embarrassment, pain and anguish as the Complainant has not proved these.

We are alive to the fact that the Complainant has mitigated the damages he may have suffered due to the loss of his employment by finding an alternative job. However, taking into account the circumstances of this case, we are of the view that fair compensation for the Complainant for the

wrongful dismissal would be damages equivalent to three months' salary and perquisites. We award him accordingly.

We further order that the K19, 874.25 deducted from his terminal benefits be paid back to him.

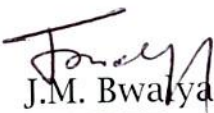
We also award the Complainant interest at short term bank deposit rate from the date of filing the Notice of Complaint to the date of Judgment, thereafter at the current bank lending rate as determined by the Bank of Zambia until date of payment.

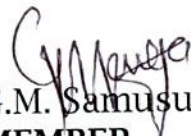
Costs are awarded to the Complainant, the same to be agreed and in default, to be taxed.

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

Delivered at Ndola the **25th** day of **July, 2016**


W.S. Mwenda (Dr.)
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER


G.M. Samusungwa
MEMBER