

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRD/ND/77/2017

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(LABOUR JURISDICTION)

BETWEEN:

CLEMENT MACHAYI

COMPLAINANT

AND

**NORTH WESTERN WATER AND SEWERAGE
COMPANY**

RESPONDENT

**Before: The Honourable Mr. Justice D. Mulenga this 22nd day of
September, 2017.**

For the Applicant : In Person
For the Respondent : Mr. F. Chalenga of Messrs Freddie &
Company

JUDGMENT

Case referred to:

1. Wilson Masautso Zulu v Avondale House Project (1982) Z R 172
2. Zambia Electricity Supply Corporation Limited v Lubasi Muyambango (2002) Z R 22
3. The Attorney-General v Richard Jackson Phiri (1988-1989) Z R 121

The Complainant herein filed a Notice of Complaint with an affidavit in support on 11th July, 2017, upon an Order granting the Complainant leave to file a Complaint Out of Time given on the same date.

The Complainant's ground of complaint is that his dismissal from employment is unfair, wrongful and illegal as he was not the custodian of funds and that the action taken by the Respondent to dismiss him was illegal, a violation of human rights and not in the interest of justice.

For reasons aforesaid the Complainant claims the following relief:-

- (a) A declaration that his dismissal from employment is null and void
- (b) Payment of three (3) months salary in lieu of Notice
- (c) Damages for defamation of name, anguish and torture.
- (d) Damages for loss of employment
- (e) Order from the Court for his retirement
- (f) Interest and Costs
- (g) Any other emoluments the Court may deem fit.

To sum up, the Complainant's case as deposed through his affidavit and viva voce evidence is that he was employed by the Respondent on 29th October, 2007, on permanent and pensionable basis as Plant Operator, stationed at Zambezi.

In the year 2009, the Complainant was transferred to Solwezi in the same capacity as Plant Operator and in 2010 he rose to the position of Acting Operations Supervisor.

In the year 2014, the Complainant was elevated to the Position of District Supervisor and transferred to Mufumbwe District. The Complainant was transferred from Mufumbwe to Solwezi on 29th October, 2015, in a new position of Customer Supervisor Services Assistant/Operations Supervisor. The New appointment aforesaid was effective 21st November, 2015 and per Respondent's practice on transfer, the same was pending the District audit before the Complainant could leave the station.

The Respondent Company Auditors conducted an audit at Mufumbwe District from 19th to 20th November, 2015. Complainant averred that, the Auditors audited stock dealing, log dealing, daily revenue collections and payments made to casual workers. Subsequently the Auditors prepared and issued an Audit Analysis Report. According to Complainant the Audit Analysis Report highlighted some findings and concerns which he as outgoing District Supervisor and the incoming District Supervisor acknowledged.

The Complainant's contention is that the Audit Analysis Report dated 20th November, 2015, which was conducted in his presence at Mufumbwe District, had cleared him. The Audit Analysis Report dated 20th November, 2015 is exhibit "*CM20*" in Complainant's affidavit.

The Complainant drew this Court's attention to item "2" in the Audit Analysis Report which states;

4. *Daily Collections and deposits are tallying though need to pay attention during posting to avoid misposting which dents district records.*

The Complainant averred that upon conclusion of the audit of Mufumbwe District, he handed over to the new District Supervisor on 20th November, 2015 and reported at Solwezi District.

In February, 2016, the Respondent sent another team of Company Auditors to Mufumbwe District, the same proceeded to conduct yet another audit but in the absence of the Complainant. The second team of Auditors then proceeded to render an Audit Analysis Report dated 29th February, 2016. The said Audit Report made recommendation that disciplinary action be taken against the members of staff involved in order to curb thefts at the District office. Further, that the 350 metres of NDPE pipe, valued at K10,500.00 which was still buried in the ground leading to Complainant's plot should be uprooted immediately and taken back to Head Office. The cost of recovery and transportation of the pipe to be lumped on the Complainant.

Following the second Audit Report dated 29th February, 2016, the Respondent charged the Complainant with two offences namely, "Dishonesty Conduct and Gross Negligency of duty resulting in loss of Company funds (Charge sheet- exhibit ("*MMS 3*").

From the Complainant's point of view it was wrong and unfair for the Respondent to direct a second audit at Mufumbwe in his absence. The Complainant, therefore vehemently argues that he was not given an

opportunity to answer to whatever audit queries that may have been discovered and presented in the Audit Analysis Report.

The Complainant, further argues that it is wrong and unfair for the Respondent's Auditors to recommend to Management for disciplinary action against him, based on audit queries which he had not been given an opportunity to respond to or answer.

The Complainant contends that it is common practice in the audit fraternity that auditors should give to the person being audited an opportunity to answer to audit queries and only when the auditors are not satisfied with the responses, should they recommend disciplinary action.

The Complainant also argues that having been cleared by the first audit which was conducted in his presence, the second audit was premeditated and or calculated to hound him out of employment.

This Court has noted further, that whereas the Complainant has not pleaded victimisation, he has done so indirectly, when he averred in his testimony that he was forced to vacate in a hurry the Mufumbwe Company house, which he occupied prior to his transfer to Solwezi.

The Respondent on the other hand avers that the Complainant was charged with two offences of Gross Negligency resulting in Loss of Company funds and Dishonesty conduct. The said offences are provided for under Clause 14 and 45 respectively, of the Respondent's Code of Discipline and Grievance Procedures.

The Respondent further avers that the Complainant was not only charged with dismissible offences but also that he was given an opportunity to exculpate himself and he did so through a Written Statement (Exhibit "*MMS5*").

The Respondent also contends that the Complainant was notified of the Disciplinary Case Hearing and was accorded an opportunity to be heard. The Complainant was in fact heard by the Disciplinary Case Hearing Committee and was found to have committed the offences charged therefore, guilty of the charges and was summarily dismissed from employment. Further, that the Respondent informed the Complainant of his Right of Appeal against the dismissal and did in fact appeal. However, the Respondent contends that the Complainant's appeal was nothing but merely full admission of his wrong doing and request for forgiveness as per exhibit "*MMS 9*".

The Respondent through the Affidavit in support of its Answer sworn by one Maxon Masauso Sichali the Respondent's Human Resources and Administration manager, deposed among other things that the Complainant's employment as District Supervisor is outlined in the North-Western Water Supply and Sewerage Company Limited job description Manual Procedure (exhibit "*MMS1*")

It is the contention of the Respondent that the Audit Analysis Report revealed that the Complainant had neglected his duty as a District Supervisor, which resulted into loss of Respondent's Company funds and property. Further that the Complainant had been conducting his duties with dishonesty. The said misconduct had been clearly elaborated in the Charge Sheet (Exhibit "*MMS 3*").

At trial, the Complainant, as the record would show took the Court through each and every issue which was raised against him in the particulars of the offences he was charged with by the Respondent, thereby making explanations in his defence against the accusations made against him.

The facts and evidence adduced before this Court, clearly shows that this Court is called upon to determine whether or not the termination of Complainant's employment by way of summary dismissal was wrongful/unfair and or unlawful.

It must be pointed out at the outset in accordance with the guidance given by the Supreme Court in the case of *Wilson Masautso Zulu v Avondale House Project*¹ 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 a judgment whatever may be said of the opponent's case.

As alluded to herein above, the Complainant took this Court through each and every particular of the allegations of Gross Negligence and dishonest conduct levelled against him by the Respondent. The Complainant therefore, vigorously attacked the Respondents charges. However, it must be understood that, it is not the function of this Court to review the employer's disciplinary process like an appellate tribunal. The function of this Court is properly defined in the case of **Zambia Electricity Supply Corporation Limited v Lubasi Muyambango**², the Supreme Court held:

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 was necessary disciplinary powers and if it was exercised properly.

The import of the holding of the Supreme Court in the **Zesco v Lubasi Muyambango** case, referred to herein above is that the charged employee should fight his case during the Disciplinary hearing process presented by the employer in accordance with its Disciplinary Procedure Code. The duty of this Court however, is to examine the said disciplinary process to ascertain whether or not it was done in accordance with the established disciplinary procedure of the organisation. Further, to observe whether or not the disciplinary power in the employer was exercised properly by observing among other things the rules of natural justice.

This Court is also mindful that the exercise of disciplinary powers by the employer against the employee is only justified when there is substratum of facts to support the same. This position was emphasised in the case

of *The Attorney-General v Richard Jackson Phiri*³, the Supreme Court held that:

We agree once the correct procedures have been followed, the only question which can arise for consideration of the Court, based on the facts of the case, would be whether there were in fact, facts established to support disciplinary measures since it is obvious that any exercise of power will be regarded as bad if there is no substratum of facts to support the same.

This Court has observed and it is not in dispute that the Respondent charged the Complainant with offences which are provided for in the Code of Discipline and Grievance Procedures. The Respondent also accorded the Complainant an opportunity to exculpate himself and he did so, by way of written exculpatory statements. The Complainant was also heard by a disciplinary hearing committee which subsequently found him guilty of the dismissible offences.

This Court further observes that whereas the Complainant argues that he could not be held liable for the loss of company funds as he was not a custodian of the same. The Complainant's own appeal to the Managing Director of the Respondent Company made serious admissions of wrong doing on his part which in the opinion of this court do not help his case.

The Complainant's Appeal Letter dated 4th May, 2016 (exhibit "MMS9") reads in part:-

The Managing Director

Solwezi

Dear Sir,

RE: APOLOGY LETTER/APPEAL

. . . I write to apologise to you and Management for all the wrong things I did while charged with the responsibility to preside over district operation.

I have carefully reflected on my conduct and behaviour in the past weeks as unacceptable and it is not part of my DNA thus, I wish to correct the impression.

It is hard to correct the wrongs done already but I pledge not to indulge myself in such illegal activities again.

In addition, I wish to request to avail to me the total amount which the Company lost with all the supporting documents to enable me plan how to pay back.

Once again I am so sorry for the betrayal of trust

Yours faithfully,

Clement Machayi

The Complainant told the Court that he was made to write the appeal letter alluded to herein above in that tenor as he was advised by his supervisor. However, there is no further evidence from the Complainant to show that he was coerced by a person in authority to write such a damaging letter to his case. The Complainant in my opinion is a person who was in a senior position and could not reasonably be expected to be coerced like a junior staff.

Having heard the parties herein and in view of the facts and evidence before this Court, and considering the Supreme Court authorities herein cited, I find and hold that the Complainant's claim has no merit. The Complainant has failed to prove his case against the Respondent, on the balance of probabilities. , the Complaint is accordingly dismissed. I make no order for costs.

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

Delivered at Solwezi this **22nd** day of **September, 2017.**


...../
Hon. Justice D. Mulenga
JUDGE