

SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

FOR THE APPELLANT, IN PERSON.
FOR THE RESPONDENT, MR. M.L. MUKANDE, LEGAL
COUNSEL.

The facts of the case are that, the complainant was employed by the respondent on 1st March, 1982 as a Sub-accountant in charge of the foreign exchange department. He was based at the centre branch in Lusaka until his dismissal on 6th May, 1985. As a Sub-accountant and while stationed at the centre branch, he was a custodian of the foreign exchange and traveller's cheques. During 1994 the respondent lost 82,850 sterling and US\$ 12,000 in foreign exchange through fraudulent issue of traveller's cheques to people who did not have clearance from the Ministry of Health for medical treatment abroad. These travellers cheques were later found to have been sold on the black market on Katondo street of Lusaka. The applications for

the foreign exchange were intialed by the complainant's witness by name of Mr. Mukuwa who was a sub-accountant in the foreign exchange department based at the head office of the respondent. It was discovered that after completion the forms were sent to Bank of Zambia for approval without proof of authority on form MF 44. At the Bank of Zambia the forms were received by a Mr. Mwinama, who subsequently conveyed the approval of the Bank of Zambia. On receipt of the application forms from Mr. Mwinama the complainant witness, Mr. Mukuba, handed them over to the complainant for the issuance of the travellers cheques to the purportedly successful applicants. Following the discovery of the racket Mr. Mwinama was dismissed by the Bank of Zambia his employer. Similarly the complainant and his witness Mr. Mukuba were also dismissed by the respondent. The complainant petitioned the Industrial Relations Court complaining that he was dismissed from his employment on the ground of discrimination based on social status. The Industrial Relations Court noted that the complaint was based on the ground that the complainant had been singled out even though similar mistakes of transactions had occurred in other branches and that he did not conduct the transactions alone.

On behalf of the appellant it was contended by his then advocates in the court below that the respondent's supervisor of the foreign exchange control at the centre branch neglected his duties when he failed to ensure that Form T had been properly completed by the applicant for foreign exchange. It was further contended that instead of punishing the supervisor for the errors and omissions on form T, the respondent chose to dismiss the complainant. The Industrial Relations Court reviewed the evidence and considered the submissions by both learned counsel and dismissed the complaint. We take note that this judgment of ^{the} Industrial Relations Court was delivered on 6th August, 1993 before this court's much criticised judgment in Ngwira Vs Zambia National Insurance Brokers Ltd, SCZ No 9 of 1994 which still stands as law on discrimination based on social status. Thus in dealing with the question of whether the complainant had proved discrimination based on social status the Industrial Relations Court had this to say:-

"The burden of proof squarely lies on the shoulders of of the Complainant; he has the task of proving, on a balance of probabilities, that the treatment he was

given was different from the treatment another employee in similar circumstances received all because of his social status. What this means is that the Complainant should, in his evidence, give names of other employees who were guilty of the same or similar offence but who were not dismissed so that the Court can compare the treatment given to the complainant with that given to these other employees to establish whether or not the respondent discriminated against the complainant. Because social discrimination has been alleged it is incumbent upon the Complainant to state the position or ranks the other employees held in the Respondent."

In our view discrimination based on social status is not established by evidence of different treatment of employees in an organisation. We have said before that unfair treatment of an employee is not evidence of discrimination based on social status. In Ngwira case, we pointed out that failure to dismiss other employees equally guilty of similar offence is not proof of discrimination based on social status. We also said social status does not depend on the position or rank an employee holds in a company. Since the court adopted a wrong approach in determining the issue of discrimination based on social status, we have to determine whether the complainant established a case of discrimination based on social status.

The appellant appeared in person before us although the record of appeal seemed to have been prepared by a firm of advocates. The detailed memorandum of appeal contains more of the evidence and submissions than setting out the grounds of appeal. In addition the heads of argument generally recite the evidence in detail. In his argument before us the appellant repeated the argument that he was discriminated because he was in conflict with a Mr. Satama who according to him manufactured evidence against him which led to the letter of dismissal. The appellant further argued that the officers who were charged to investigate the loss of the foreign exchange and travellers cheques had differences with him and took advantage of the investigations. He contended that he had been treated unfairly for following procedures. He further contended that the investigations were carried out secretly without involving him until upon receipt of the letter of termination. He contended that the rules of disciplinary

and grievances code had not been followed and that he had not been given an opportunity to be heard, submitting that he was unfairly treated and wrongfully dismissed.

On behalf of the respondent Mr. Mukande pointed out that the Industrial Relations Court fully considered the appellant's complaint.

We have carefully examined the evidence on record, the judgment of the Industrial Relations Court and the submissions before us. In passing, we wish to observe that although this record purports to have been prepared by a firm of advocates it comes to us with surprise that the record of appeal should contain documents written long after the judgment was delivered. The Industrial Relations Court noted that the appellant was dismissed for facilitating the issuance of travellers cheques to persons who did not qualify for medical treatment abroad. The court accepted the evidence of the complainant's witness relating to the proper procedure in applying for foreign exchange for medical treatment. The court also accepted the evidence that an application not accompanied by the Ministry of Health approval on Form MF 44 was automatically disqualified by the Bank of Zambia. The court further accepted the evidence of the respondent that the applications scrutinised during investigations did not have approval from the Ministry of Health. The court also accepted that the other persons involved in the racket had also been dismissed.

The appellant's letter of termination of employment dated 6th May, 1985 reads as follows:-

"Dear Mr. Mutale,

Re-Termination of Employment

Following your suspension from work on 21st August, 1985 to allow investigations to be carried out into the loss of 82,850 sterling and US\$ 12,000 and subsequent findings by both SITET and our own Management at its meeting held on 26th April, 1985, decided to terminate your contract with the Bank with effect from 29th April, 1985. The following case led to your dismissal:-

At the time you were sub-accountant at Lusaka Centre Branch, in charge of Foreign Exchange Operations, your colleague S. Mukuma, used to make applications to Bank of Zambia giving details that the applicants had been recommended for medical treatment abroad by the Ministry of Health, when this was false. Thereafter, Mukuma handed these applications to you who provided foreign exchange in form of travellers cheques which were subsequently sold on the black market.

By copy of this letter, the Financial Controller is requested to recover from you any outstanding staff loans that you may have.

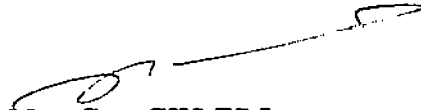
Yours sincerely,

F.Z. SIMENDA
CHIEF PERSONNEL & TRAINING MANAGER.

The allegations contained in the letter appear to us to have been common cause. The complaint as we understand it from the appellant's evidence was that his supervisor who did not discover the fraud should also have been dismissed. In our view the failure of the respondent to have taken any action against the appellant's supervisor was not evidence establishing discrimination based on social status. Although the court below adopted a wrong approach it arrived at a correct finding that the appellant had not proved that he was discriminated on ground of social status. The appeal is therefore dismissed. We make no order as to costs.

E. L. SAKALA
SUPREME COURT JUDGE

J6

A handwritten signature in black ink, appearing to read 'M. S. Chaila', written in a cursive style with a long horizontal stroke extending to the right.

M. S. CHAILA
SUPREME COURT JUDGE

D. K. CHIRWA
SUPREME COURT JUDGE