IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N :

DUNLOP ZAMBIA LIMITED — APPELLANT

and

GRIFFITHS KATENGA — RESPONDENT

CORAM: Bweupe, DCJ., Chaila, Lewanika, JJS.

On 6th December, 1996 and 4th May, 1997

For the Appellant: L.M. Matibini of Lloyd, Jones & Collins

For the Respondent: I.C.T. Chali of Chali, Chama & Co.

JUDGMENT

Lewanika, JS. delivered the judgment of the court.

CASES REFERRED TO:

1. WARD -V- BRADFORD CORPORATION, 1971, 70 LGR 27.
2. PAMODZI HOTEL -V- GODWIN Y MBEWE, SCZ JUDGMENT NO. 4 OF 1987.
3. SUBRAMANIAN -V- PUBLIC PROSECUTOR, 1965 1 W.L.R. 965.
4. ZAMBIA AIRWAYS CORPORATION LTD. -V- GERSHOM MUBANGA, SCZ JUDGMENT NO. 5 OF 1995.

This is an appeal from a judgment of a commissioner of the High Court in which a declaration was made to the effect that a purported dismissal of the respondent's employment by the appellant was null and void.

The respondent was employed as a departmental manager in charge of production by the appellant which inter alia makes tyres and tubes.

The facts of the case were that on 24th June, 1989 the respondent reported on duty at the appellant's factory and summoned a security officer so that they could count the tyres that were kept in a locked cage. The cage had two locks, the appellant kept the key for one lock whilst the security officers kept the key for the other lock. This arrangement was to ensure that the cage could not be opened by only one person. They counted the tyres and found that they were 54. There was no discrepancy and they locked the cage. On the following day the respondent reported on duty and he again went to the cage with the same security officer to take stock of the tyres. They discovered that 28 tyres were missing, the cage was intact and had not been tampered with. The respondent reported the matter to the head of the security department and to his immediate supervisor and investigations were carried out by the head of the security department and on 30th June, 1989 the respondent was charged with having removed the 28 tyres from the appellant's premises without authority and was asked to exculpate himself. The respondent wrote an exculpatory letter on 5th July, 1989 in which he denied having removed the tyres without authority.

On 6th July, 1989 a disciplinary hearing was held. During the hearing, two casual workers stated that it was the respondent who had removed the tyres on 24th June, 1989 in collusion with the security officer and loaded them on a tipper as they were scrap. On 10th July, 1989 the respondent received a letter dismissing him from employment with effect from 6th July, 1989. His appeal to the managing director was unsuccessful.

The respondent instituted an action against the appellant claiming a declaration that his dismissal was null and void. The learned trial commissioner made such a declaration and it is against that declaration that this appeal is made.

Counsel for the appellant has advanced two grounds of appeal the first one being that the learned trial Judge misdirected himself in finding that the respondent was unlawfully dismissed. That the Judge in particular erred on the aspect of disregarding the fair procedures taken by the appellant in arriving at the decision to terminate the services and for treating the evidence implicating the respondent in the theft of tyres as hearsay evidence. In arguing this ground counsel submitted that it is trite law that there is no need for the employers to prove that an offence has been committed beyond reasonable doubt for this would impose on them a higher commitment than would be possible to fulfil and impose on them a duty which rightly belongs to a court of trial. All that is required is for the employers to genuinely believe that the employee has been guilty of the misconduct in question, they must have reasonable grounds for that belief and they must have carried out such investigation into the matter as is reasonable in the circumstances. He then referred us to the decision in WARD -V- BRADFORD CORPORATION (1) where Lord Denning said, "We must not force these disciplinary bodies to become entramelled in the nets of legal procedure. So long as they act fairly and justly their decision should be supported."

He said that in this case the evidence on record is that D.W.1 testified to the circumstances leading to the charge being preferred against the respondent. The investigations undertaken and the conduct of the disciplinary hearing. At the hearing two casual workers implicated the respondent in the unlawful removal of the tyres and he had an opportunity to exculpate himself. In the circumstances the management had to decide whether to accept the story of the casuals or the respondent. They chose the former and in his view in the absence of any evidence of malafidet the decision of the appellant should not have been reversed. He then referred us to the decision of this court in the case of PAMODZI HOTEL -V- GODWIN Y MBEWE (2). He said that in this case there was a disciplinary procedure in place and that the only question the learned Judge ought to have considered was whether the appellant had carried out properly and fairly the procedure in the disciplinary code. He submitted that the matter was determined fairly and in accordance with the terms of the code and that in fact the respondent had conceded in cross-examination that the proper procedure was followed in terminating this employment.

The second ground advanced by counsel for the appellant is that the learned Judge erred in treating the evidence implicating the respondent in the theft of tyres as hearsay. The learned Judge ought to have considered the context under which it was tendered. He said that d.w.1 gave the evidence for the sole purpose of showing that in arriving at the decision to terminate the respondent's employment the appellant took into account the statements

made by the two witnesses. The evidence was tendered only to show that it was made. He referred us to the case of SUBRAMANIAM -V- PUBLIC PROSECUTOR (3) where it was held that, "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made."

Counsel submitted that the evidence of D.w.1 in this regard should not have been treated as hearsay evidence particularly that the respondent conceded that it was made.

The third ground of appeal canvassed by counsel for the appellant was that the learned trial Judge erred in granting an excessive award of and in ordering that the damages be the loss of salary from 6th July, 1989 to the date that he got employment on 13th JUne, 1991. He submitted that no evidence was called to the effect that the respondent had actually suffered damages to the extent of his former salary. If he did, it was his duty to mitigate the loss by obtaining employment within a reasonable time. He referred us to the judgment of this court in the case of ZAMBIA AIRWAYS CORPORATION -V- GERSHOM MUBANGA (4) on the point.

In reply counsel for the respondent conceded that the procedural aspects as laid out in the conditions of service were followed but he contends that, that is not enough it

has to go further than that. He said that the respondent's argument was that the allegations from the two casual workers were not credible. That the court below was entitled to satisfy itself that there was a reasonable basis on which the employer acted, and the court found that the allegations were not reasonably proved. He said that what ought to have been found was that the allegations did not meet a reasonable standard of proof. He conceded that the award of damages ought to have been based on wrongful dismissal and that the damages awarded were beyond the guide lines of this court.

We have considered the arguments advanced by counsel for the appellant and for the reaspondent. It is common cause that the respondent's conditions of service were contained in a collective agreement which enshrined a disciplinary code and that the proper procedures set out in the code were followed in terminating the respondent's employment. In the case of PAMODZI HOTEL -V- MBEWE, we said, "had it been necessary for us in that case to decide whether there had been a breach in the procedure for the termination of the contract as laid down in the Disciplinary Code of that contract, we should have taken into account sections 84 (3) of the Industrial Relations Act, (Cap. 517) which provides that upon registration of a collective agreement by the Registrar it shall have statutory effect but it shall come into force only after publication is duly gazetted. It follows therefore, that, where there is a collective agreement which has been properly published in the Gazette and which contains a disciplinary code providing for a certain procedure to be

followed before dismissal, there is statutory support for such procedure and a breach thereof might well result in a declaration that a dismissal was null and void....." However, in the instant case the evidence on record is that the proper procedures were followed the only function of the trial court was to determine whether or not the appellant acted fairly and justly in arriving at its decision. It was not part of its function to rehear the proceedings of the disciplinary body set up in the code or to act as an appellate court from those proceedings. The learned trial Judge fell into further error when he found that the evidence of the casual workers before the disciplinary committee was hearsay as the purpose for which the evidence was adduced was merely to show that the statements were made and taken into account by the appellant in arriving at its decision and not that the statement were true.

For the reasons we have given, we allow this appeal and set aside the judgment and declaration of the High Court. Costs in this court and in the court below to the appellant to be taxed in default of agreement.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

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M.S. CHAILA
SUPREME COURT JUDGE

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D.M. LEWANIKA
SUPREME COURT JUDGE