**SCZ JUDGMENT NO. 19 OF 2004**

**IN THE SUPREME COURT FOR ZAMBIA**
**HOLDEN AT NDOLA** **APPEAL NO. 94/2003**

**(Civil Jurisdiction)**

**B E T W E E N:**

**LISWANISO SITALI AND 18 OTHERS** **Appellants**

**And**

**MOPANI COPPERMINES PLC** **Respondent**

Coram: Chirwa, JS, Silomba, JS and Munthali, Ag. JS, on 2nd December 2003 and 3rd June 2004.

For the Appellants: Mr. E. D. Ndhlovu of Messrs Luso Chambers

For the Respondent: Mrs. M. N. Mulenga, In-house Counsel

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**J U D G M E N T**

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**Munthali, Ag. JS delivered the judgment of the court**

**CASES AND WORKS REFERRED TO:**

1. KURUMA, SON OF KANIU V. THE QUEEN [ 1955] A.C. 197
2. CALLS V. GUNN [ 1963] 3 ALL E.R 677 at 680
3. MURPHY ON EVIDENCE 6TH EDITION page 83

This is an appeal from the judgment of the High Court dismissing the appellants' claim for a declaration that their dismissal was null and void.

The evidence for appellants was given by PW1 SITALI LISWANISO an Assayer, PW2 MARTHA MUMBA a security officer and PW3 a scale man and crane driver.

PW1 testified that on 21st March 2001 he reported for work at the Assay laboratory in the plant area. He was summoned to the mine C.I.D section where he found DW1 and DW2 in company of Zambia Police Officers. He was asked to identify an object which was in plastic. He identified it as cobalt.

PW1 narrated that he was implicated in cobalt deals after MARK PHIRI mentioned him. He was threatened that if he did not admit involvement he would not be released from custody. He made a statement while being filmed on video tape. He also made statements at mine police and Industrial Relations office in which he admitted involvement in theft of cobalt. At the time he made the statements he had already been charged. On 25th April 2001 he was

PW2 testified that as a security officer her duties entailed protection of company property. On 26th March 2001 while on leave she was summoned by DW1 and DW2. She was told that she was implicated in cobalt thefts. She denied all the accusations. She made a statement at the Industrial Relations office after being forced to.

PW2 narrated that there was nothing, she could do if the cobalt weight differed. She escorted cobalt weighing more that 5Kg on 3 occasions. All she did was to sign for what had transpired. She did not report the discrepancies to her supervisors. She was later dismissed after a case hearing.

PW3 testified that as a driver it was his duty to take cobalt samples from the cobalt plant to Analytical section. Before doing so he would weigh the cobalt. Thereafter the mine police escorted him to the laboratory. On 25th April 2001 he was called to the C.I.D office where he was told to go home. On 7th May, 2001 he gave a statement in which he denied involvement in cobalt deals. He later

admitted because he was forced. What he said was recorded on video tape. Later he was dismissed and he unsuccessfully appealed against dismissal to the manager.

The evidence from the respondent came from 5 witnesses. DW1 FREDERICK DE BEEN testified that when he started working for the respondent he received information that several employees including security people were involved in the theft of cobalt. From December 2000 a project to catch the people involved was launched. An agent by the name of MARK PHIRI revealed all those who were involved. Cobalt weighing more than 4Kg would be taken to the laboratory and the excess of 4Kg would be stolen. He referred to pages 28 and 29 of the plaintiffs' bundle of documents as being the register for cobalt samples which did not show excess cobalt.

It was DW1's evidence that those who were involved were questioned. They made written statements and oral statements which were recorded on video tapes. Neither him nor DW2 used duress or inducement of any kind. He said video tapes showed that the appellants were even smoking and drinking coffee. The plaintiffs

implicated themselves and each other in their statements.

DW2 JURGENS VAN SCHALKWYK told the lower court that he was part of the team that made video recording and he was involved in charging all the plaintiffs. The thefts were observed through shortages from the laboratory.

DW3 JONATHAN MWANZA, a senior security officer told the lower court that he got a statement from PW1 which appears on pages 2 and 3 of the defendant's bundle. He never used any duress on PW1.

DW4 BARNABAS MWALE also a security officer told the lower court that he had information that MARK PHIRI and LISWANISO SITALI were actively involved in the theft of cobalt. The informant bought 1Kg of cobalt from MARK PHIRI for K60,000. PHIRI then mentioned LISWANISO SITALI, driver FRANCIS MUTALE, SYLVESTER MUSONDA, MARY MUMBA, STEVEN LOMBE, ASIA MWALE, LOTTI CHULU and MALIMANDE among others.

DW5 DARIUS CHALWE a senior Employee Relations Advisor told the court that in April 2001 all those who were involved in the

cobalt scam were charged by the security. A Mr KRUGER heard the appeals as he was not involved in the initial investigations.

It was from this evidence that the learned trial Judge found that all the appellants worked as a syndicate to steal from the respondent.

The appellants have filed six substantive grounds of appeal. These are:-

1. The learned Judge misdirected himself in law and in fact when he held that the respondent could charge and dismiss for offences committed against a previous employer;
2. The learned Judge misdirected himself in law and in fact when he held that the standard of proof in criminal allegations made to support civil proceedings should be on the balance of probabilities.
3. The learned Judge misdirected himself in law and in fact when he admitted in evidence confessions without testing their voluntariness through trial within a trial.
4. The learned Judge misdirected himself in law and fact when he admitted in evidence and relied on video tapes which had

not been produced by any of the witnesses.

5. The learned Judge failed to pronounce a verdict on one of the plaintiffs, namely FRANCIS MUTALE.

6. The learned Judge failed to pay adequate attention to the contents of the record of the proceedings and to the prejudice of the plaintiffs never referred to the plaintiffs' advocates in his judgment but introduced into the judgment a Mr. Zulu who was unknown in these proceedings.

At the hearing of the appeal Mr Ndhlovu learned counsel for the appellants amplified on the heads of argument in his oral submissions.

On the issue of confessions in the third ground of appeal Mr Ndhlovu submitted that the confessions were not free and fair. He referred to the evidence of PW1 at pages 26 and 27 of the record where the witness said he was forced to admit after being detained and threatened. Mr. Ndhlovu also referred to the evidence of PW2 at pages 33, 34 and 35 of the record where the witness told the court that she was threatened and detained by police. Mr. Ndhlovu did not

categorically state whether a trial within a trial in a civil matter could be held.

On the fourth ground of appeal Mr. Ndhlovu indicated to court that video recording can be part of evidence provided that they are produced. He submitted that the video recordings were not produced.

On the fifth ground of appeal Mr. Ndhlovu submitted that there was no verdict in respect of one of the appellants, namely, Francis Mutale. He suggested that his case be referred to the High Court for rehearing.

Mrs. Mulenga, for the respondent, who had earlier on successfully applied for leave to file heads of argument intimated to court that she would rely on the heads of argument.

In the appellants' filed heads of argument grounds 1, 2, 3, 4 and 5 were argued together and some of these were highlighted in the oral submissions.

The respondent has addressed the appellants' grounds of appeal seriatim. On the first ground of appeal the respondent has

argued that the offences were committed between January 2000 and February 2001 and that the issue of **locus standi** was adequately dealt with by the learned trial judge.

On the second ground of appeal the respondent has argued that in a civil case the standard of proof is proof on a preponderance of probabilities. It is not the same standard as in a criminal case.

As regards the third ground of appeal it is argued that the witnesses called to support the appellants' claim admitted making the statements and the process of a trial within a trial does not apply in civil cases. It is further argued that the appellants did not object to the production of the disputed statements on production or viewing of the video tapes.

On the fourth ground of appeal the respondent has argued that video tape recordings are admissible in court proceedings and are treated as real evidence. The respondent argues that on 18th March 2002 an application was made to court to admit the video tapes. The tapes were viewed without objection.

On the fifth ground of appeal the respondent has argued that

FRANCIS MUTALE (Plaintiff No. II) was included in the pleadings and the judgment affected him.

Lastly on the sixth ground of appeal the respondent has argued that whatever a Mr Zulu may have been credited to have said, were submissions of the appellants' advocates in the lower court.

We have read the heads of argument filed by the appellants and the respondent. We have also heard the oral submissions made by the learned counsel for the appellants.

It is common cause that the appellants were dismissed primarily on their admissions and confessions both orally (video recording) and in writing.

Most of the grounds of appeal have raised issues which lie in the domain of criminal law. The charges the appellants faced may have been criminal in nature but the proceedings were civil in nature. In both civil and criminal cases relevant evidence is admissible regardless of the manner in which it is obtained. Somewhere there is a point of departure as will be demonstrated shortly.

Mr. Murphy, the learned author of the book titled MURPHY ON

EVIDENCE, 6th Edition, at page 83 (3.10.2) under the rubric " CIVIL CASES" has this to say:

" **The rule governing the admissibility of illegally or unfairly obtained evidence in civil cases is the same as that in criminal cases, namely that relevant evidence is admissible regardless of the manner in which it is obtained. The court is concerned with the relevance, not the source of evidence and will leave the parties to other remedies for any wrongful acts indulged in to obtain evidence. And just as no general exclusionary discretion can be demonstrated in civil cases corresponding to that which exists in criminal cases, so the judge in a civil case has no discretion to exclude evidence illegally or unfairly obtained."**

In criminal cases a judge has a discretion to disallow a relevant piece of evidence as was shown in KURUMA, SON OF KANIU V. THE QUEEN (2). In this case the appellant was found in unlawful possession of two rounds of ammunition during the state of Emergency in Kenya. The evidence proving that the appellant was in possession of the ammunition had been illegally obtained.

Lord Goddard, C.J., had occasion to discuss the admissibility of evidence in civil and criminal cases. He had this to say at page 204:

" **There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."**

In the English case of CALLS V. GUNN (2) Lord Parker, C.J., echoed the dictum of Lord Goddard. At page 680 lines C– D he had this to say:

" " **That in dealing with admissibility in law, and as Lord Goddard points out, and indeed as is well known, in every criminal case a judge has a discretion to disallow evidence, even if in law relevant and, therefore admissible, if admissibility would operate unfairly gainst an accused. I would add that in considering whether admissibility would operate unfairly against an accused one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of the accused."**

These appellants commenced the action in the court below as a civil action and it has come to us as such. The remedies they were

seeking and are still seeking before us are civil remedies. The procedures adopted are civil procedures. We agree with the respondent that in a civil case the standard of proof is proof on a preponderance of probabilities. It matters not that there is a criminal element involved such as fraud or theft.

Mr. Ndhlovu in his oral submissions did not go so far as to suggest that in a civil case a trial within a trial can be conducted to determine voluntariness. From the authorities cited above, a judge in a civil case has no discretion to delve into how evidence was obtained. In this case the learned trial judge found that the statements and the video tapes were relevant to the fact in issue, namely, the way the syndicate operated to steal cobalt from the respondent. This syndicate involved personnel from the cobal plant, laboratory and security departments. PW2 admitted in open court that she escorted cobalt weighing more than 5Kg and never reported the discrepancies. The 5Kg weight is not reflected in the cobalt register. What she told the court is what is in her statement which she and other appellants claim were not obtained freely and

voluntarily.

In criminal law, the rule is that a confession can only be admitted if it is voluntary, and therefore one obtained by threats or promise held out by a person in authority is not to be admitted. A trial within a trial is the means by which voluntariness is established.

Both grounds two and three of the appeal have no merits.

On the issue of video tapes not being produced, the evidence on record shows that on 18th March 2002 the respondent filed a notice to produce and play video recordings. There was no objection to the playing and production of the tapes. Learned counsel for the appellants was present when the tapes were viewed and the respondent closed its case. At the beginning of the proceedings in Chambers counsel for the appellants intimated he wanted to raise a preliminary issue. The learned trial judge asked him to raise the issue in open court. The nature of the issue was not indicated and it was never raised in open court. This fourth ground of appeal cannot succeed.

The fifth ground of appeal alleges failure by the learned trial

judge to pronounce a verdict on FRANCIS MUTALE. We agree with the respondent's submissions that the pleadings are inclusive of MUTALE and that he implicated himself and others in the theft of cobalt in his statement. It was for this reason that the learned trial judge found that all the plaintiffs worked as a syndicate. There are no merits in this ground of appeal.

On the sixth ground of appeal we agree with the appellants' learned counsel that the learned trial judge referred to a Mr. Zulu instead of counsel who dealt with the matter. But whatever is attributed to Mr. Zulu is what was said by the appellants' advocate. It was a typographic error on the part of the learned trial Judge. There is no indication how the appellants were prejudiced. This ground of appeal has no merits.

We shall lastly deal with the first ground of appeal which challenges the trial judge's holding that the respondent could not charge and dismiss for offences committed against a previous employer. This relates to 4 appellants who admitted being involved in the cobalt deals between January and March 2000. The learned

trial judge dealt with the issue of LOCUS STANDI. He correctly held that MOPANI PLC had a vested interest in all mine assets and any minerals underground prior to 1st April 2001.

Here MOPANI PLC succeeded Z.C.C.M Ltd. Succession entails the transmission of rights or obligations from an entity which has altered or lost its identity to another entity. Only those employees who did not cross over from Z.C.C.M Ltd to MOPANI PLC can claim immunity. No employer can be expected to keep a dishonest employee in his employment. This ground of appeal also fails.

The appeal is dismissed with costs

**D. K. CHIRWA**
**SUPREME COURT JUDGE**

**S. S. SILOMBA**
**SUPREME COURT JUDGE**

**S. S. K. MUNTHALI**
**AG. SUPREME COURT JUDGE**