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SCZ Judgment No.7 OF 2006

64

IN THE SUPREME COURT FOR ZAMBIA APPEAL 150/2004
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

B E T W E E N:

ZESCO LIMITED

APPELLANT

AND

DAVID LUBASI MUYAMBANGO

RESPONDENT

CORAM: LEWANIKA, DCJ., CHIBESAKUNDA, CHITENGI, JJS
On 2nd November, 2004 and 14th March, 2006.

For the Appellant: Ms K. MWANSA, Principal Legal Counsel
For the Respondent: N. SIPALO of Ngenda Chambers

JUDGMENT

LEWANIKA DCJ, delivered the judgment of the court.

AUTHORITIES REFERRED TO:

1. ATTORNEY GENERAL VS RICHARD JACKSON PHIRI, 1988/89 Z.R. 121
2. FRANCIS VS MUNICIPAL COUNCIL OF KUALA LUMPUR, 1962, 3 A.E.R. 633
3. HUGHES VS METROPOLITAN RAILWAY, 1932, A.C. 161
4. JAMES MUTALE VS ZAMBIA PRIVISATION AGENCY, 1995/97 Z.R. 157
5. JOSEPH DANIEL CHITOMFWA VS NDOLA LIME, SCZ NO. 28 OF 1999
6. MERSEY DOCKS & HARBOUR BOARD VS GOGGINS & GRIFFITH, 1947 A.C.1
7. MUKUPA MWILA VS ZESCO LTD, APPEAL NO. 14 OF 2002
8. PAUL KAMBATIKA VS ZESCO LTD, APPEAL NO. 86 OF 2000
9. MULUNGUSHI INVESTMENTS LTD VS GRADWELL MAFUMBA, SCZ NO. 141 OF 1997
10. WORKERS COMPENSATION FUND VS DAVEY MUSANA, 2000/HN/444
11. ZAMBIA NATIONAL PROVIDENT FUND VS YEKWENIYA M. CHIRWA, 1986, Z.R. 70

In this appeal, which arises from a decision of the Industrial Relations Court, we shall refer to the Appellant as the Respondent and the Respondent as the Complainant, which is what they were in the court below.

The evidence on record is that the Complainant was employed by the Respondent as Manager, Human Resource Development in August, 1994. By letter dated 1st August, 1995 the Complainant was redesignated Training Center Manager for the Kafue Gorge Regional Training Center to be based at Namalundu in the Kafue Gorge. The Complainant was informed that he would act in this position until further notice. By letter dated 30th August, 1995 the Respondent informed the Complainant that his transfer to the training center was permanent. Subsequently the Complainant entered into contracts with the Kafue Gorge Regional Training Center as Director whose duration was for two years and these contracts were being renewed from time to time. One of the contracts appears on pages 99 to 101 of the record of appeal. By letter dated 30th May, 2002 the Respondent transferred the Complainant from the Directorate of Corporate Services to that of Generation and Transmission as Human Resources Manager to be based in Lusaka answerable to the Director of Generation and Transmission. By another letter dated 20th August, 2002 the Respondent re-appointed the

Complainant as Director of Kafue Gorge Regional Training Center answerable to the Director of Human Resources and Administration who was also chair person for the Kafue Gorge Regional Training Center Board of Trustees. By letter dated 29th August 2002 the Respondent wrote a letter to the complainant suspending him from employment to facilitate investigations into certain allegations that were made against him. The details of the allegations are contained in the letter of suspension which appears on page 110 of the record. By another letter dated 12th September, 2002 the Chairman of the Board of Trustees of the Kafue Gorge Regional Training Center wrote to the complainant informing him that following the meeting of the Disciplinary Committee that met on 10th September, 2002 he had been found guilty of all the charges that were set out against him in the letter of suspension and that he would not continue as Director of the Training Center but would go back to the Respondent with immediate effect. This letter appears on page 112 of the record.

On 26th September, 2002, the Respondent wrote to the complainant dismissing him from employment for the reasons set out in that letter. The letter appears on pages 113 and 114 of the record. The Complainant appealed against his dismissal to the Managing Director of the Respondent

but the appeal was unsuccessful. The Complainant then instituted these proceedings in the Industrial Relations Court.

In his notice of complaint, the Complainant was claiming the following reliefs:-

- (a) Reinstatement in his position as Manager, management development or payment of his pension benefits until age 55 on retirement;
- (b) Damages or compensation for breach of contract;
- (c) Payment of all monies due to him from the time his contract at Kafue Gorge Regional Training Center expires on 30th March, 2004
 - i) Salary
 - ii) Services allowance
 - iii) Leave days entitlements
 - iv) Fuel allowance
 - v) Accommodation allowance
 - vi) Bonus allowances
- (d) Costs
- (e) Any other relief that the court may deem appropriate.

At the conclusion of the trial, the Industrial relations Court found in favour of the Complainant and made the following orders:-

1. That the purported dismissal of the Complainant at ZESCO is null and void

2. That the Complainant be considered to have been serving in his position in ZESCO as if he had reached the age of 55 years. He should be paid all his benefits he has accrued in ZESCO;
3. That the Complainant be paid interest on all the monies due to him at Bank of Zambia lending rate from the date he filed the complaint, which is 27th March, 2003 to date of payment.

The Respondent has appealed against these findings and/or orders and has filed seven grounds of appeal, namely: -

1. That the court below misdirected itself in both law and fact in holding that the Complainant had been wrongfully and unfairly dismissed despite overwhelming evidence to the contrary;
2. That the court below misdirected itself in law and fact in failing to take into account the fact that a disciplinary case hearing had been held to hear the Complainant's case during which he had repeatedly admitted the allegations leveled against him;
3. That the court misdirected itself in law and fact in failing to take into account that the Complainant was merely on secondment to Kafue Gorge Regional Training Center and remained an employee of the Respondent company throughout his secondment;
4. That the court below misdirected itself in law and fact in holding that the Training Center was a separate and autonomous entity completely separate from the Respondent company despite evidence to the contrary;
5. That the court below misdirected itself in law and fact when it refused to consider the compelling evidence in the form of a letter written by the Director, Human Resource of the Respondent Company renewing the complainant's contract with the Training Center in which it was clearly stated that the complainant was answerable to the Respondent company;

6. That the court below misdirected itself in law and fact in its adamant refusal to take into account the contents of the minutes of the disciplinary hearing which clearly indicated the Complainant's repeated admissions of the allegations leveled against him;
7. That the court below erred in law and fact when it ordered that the Complainant be paid his benefits as though he had worked until he attained the age of 55, contrary to the laid down principles regarding damages in the event of a finding for wrongful and unlawful dismissal.

At the hearing of the appeal, Counsel for the Respondent said that she would rely on her heads of argument save that she wished to add two more authorities in support of ground 7, and these were BANK OF ZAMBIA VS KASONDE, SCZ NO. 14 of 1997 and BARCLAYS BANK VS CHOLA & MUBANGA, SCZ NO. 8 OF 1997. She said that the award given to the Complainant was excessive and not supported by law.

In arguing the first ground of appeal, Counsel for the Respondent submitted that there is evidence on record that Mr. Morecome MUMBA a Trustee and Mr. Albert MWILA an auditor went to the Kafue Gorge Regional Training Center to investigate the allegations made against the Complainant and compiled a report of their findings. She said that the report is self explanatory and tabulates the Complainant's misdeeds at the Training Center. She said that the Complainant was suspended and asked to show cause why disciplinary action should not be taken against him. The

suspension letter is on page 110 of the record. She said that the Complainant was given a chance to exculpate himself and at the hearing he was found to be guilty.

She said that we have repeatedly stated in the past that it is not the duty of the court to sit as an Appellate forum from an internal Tribunal. She referred us to the cases of PAUL KAMBATIKA VS ZESCO (8) and ATTORNEY-GENERAL VS RICHARD JACKSON PHIRI (1) where we said: *"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 the necessary disciplinary power and if it is exercised in due form."*

She said that on the facts of this case the dismissal was justified and the Complainant was not entitled to any relief. She said that what the Complainant did amount to the offence of misconduct and that according to the Respondent's Disciplinary Code, the penalty for such misconduct was dismissal. She also referred us to the case of ZAMBIA NATIONAL PROVIDENT FUND VS YEKWENIYA CHIRWA (II) where we held that 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.

Counsel for the Respondent also pointed out that after finding in favour of the Complainant, the court below granted him all his benefits as if he had worked for the Respondent until his retirement. She said that this was a contradiction because the same court refused to grant the Complainant the remedy of reinstatement and yet the relief granted entitled the Complainant to a salary until his retirement as if he was working, yet he was not working. She said that this order is a disguised reinstatement.

Counsel pointed out that by the time this matter was being heard, the complainant was 48 years old and hence deeming him to have worked from the date of dismissal to the date of retirement at the age of 55 years gives him a salary for 8 years. She said that this court has never granted such a relief and that this position is not supported by law.

As to the second ground of appeal, Counsel submitted that a disciplinary hearing was convened on 10th September 2002 and that the Secretary of the Committee gave evidence in the court below and produced the minutes of the meeting. She pointed out that at page 222 of the record,

the court noted that the minutes were not minutes. She said that the court did not state why the "*minutes were not minutes.*" She said that the court ignored the minutes and did not make any reference to them in the judgment. She said that the minutes clearly show that the meeting was called to hear the case of the Complainant. The hearing found the Complainant guilty and the court below should have considered this piece of evidence.

As to the third ground of appeal, Counsel for the Respondent submitted that the Complainant had admitted that he was seconded to the Kafue Gorge Regional Training Center. She said that the Complainant was transferred to the Center in August, 1995 and that his letter of transfer which is on page 88 of the record is headed "**REDESIGNATION AND TRANSFER.**" That the evidence on record shows that as a result of the transfer the Complainant was paid hardship and upset allowances. She said that the following points go to show that the Complainant continued to be governed by the Respondent's rules and conditions of service:-

- (i) His salary reviews and complaints were redressed by the Respondent;
- (ii) He maintained the same man number at the Respondent company and Training Center;
- (iii) He continued being paid his salary by the Respondent

- (iv) The transfers were redesignations paid for by the Respondent following the Respondent's conditions of service.

She said that the Complainant never ceased to be an employee of the Respondent and therefore could be disciplined by the Respondent.

As to ground 4, Counsel for the Respondent submitted that it is not in dispute that the Respondent Company provides staff, free use of the campus, electricity, water and fuel, staff accommodation and the power house for practical training. She drew our attention to the fact that the memorandum of understanding appearing on page 169 of the record was drawn up by the legal department of the Respondent Company. She said that the memorandum of understanding extended only to the day-to-day running of the center and did not affect the contracts of employment of persons who were not party or privy to it. That disciplinary action could be exercised against the employees of the Respondent who were at the center because their contracts of employment with the Respondent had not been amended. She further said that the issue of autonomy should not have been looked at independently as the memorandum of understanding provided for the arrangement between the center and the Respondent and did not extend to personal contracts of employment.

Ground 5 is essentially a repeat of ground 3 and ground 6 is also in essence a repeat of ground 2. Ground 7 was argued together with ground 1.

In reply Counsel for the Complainant submitted that he would also rely on his heads of argument except that with regard to the additional ground of appeal he would also rely on the cases of **KAMOYO MWALE VS THE ATTORNEY GENERAL, APPEAL NO. 79 OF 1996** and **JOSEPH DANIEL CHITOMFWA VS NDOLA LIME COMPANY LIMITED, SCZ NO. 28 of 1999.**

With regard to the first ground of appeal, Counsel for the Complainant said that the Complainant was dismissed from the Respondent by a letter dated 26th September 2002 which is at page 161 of the record. That prior to this letter the Complainant was not charged for any offence in the Respondent company. That the letter in question refers to offences allegedly committed when he was an employee of Kafue Gorge Regional Training Center which is currently a subject matter pending before the Industrial Relations Court in complaint No. 16 of 2003. He said that the court below was on firm ground when it found that the Training Center where the Complainant was working as Director was de-linked from the Respondent and later became a corporate body with its own rights and obligations and

could sue or be sued in its own name. He referred us to the memorandum of understanding which is on page 37 of the record. He referred us to paragraphs 1(a), 1(b) and 1(c) which provides as follows:-

1.(a) that the Kafue Gorge Regional Training Center be de-linked from ZESCO and be handed over to the Board of Trustees;

(b) that the management of the center be vested in the board of Trustees of the Kafue Gorge Regional Training Center Registered Trustees;

© that the Training Center manager shall from now on be accountable to the Board of Trustees and not to ZESCO.

He also pointed out that at page 186 of the record there is the certificate of incorporation of the Kafue Gorge Regional Training Center which gives it its corporate status. He also referred us to the contract of the employment appearing on page 99 of the record dated 2nd November, 1998 made between the Kafue Gorge Regional Training Center and the Complainant which governed the relationship between the Complainant and the Center. He said that the Respondent is nowhere mentioned in the contract and is not a party to it. That the case for the Complainant is that the only document he received from the Respondent concerning any disciplinary action against him is the letter of dismissal at page 179 of the record. That there is no evidence on record to show that the Complainant was ever charged for the alleged offences enumerated in that letter. He referred us to the case of

JAMES MATALE VS ZAMBIA PRIVATISATION AGENCY (4) that *“whatever humane considerations parties may have, to us cannot oust the requirement of natural justice.”* He reiterated that an employee should always be given an opportunity to state his case no matter what the circumstances. He said that this position is reinforced by Section 26A of the Employment Act which provides that:-

“an employer shall not terminate the services of an employee on grounds related to conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him.”

He said that there is therefore no doubt that the termination was done contrary to law and was therefore unlawful.

As to grounds 2 and 6, Counsel said that the issue regarding the document at page 147 of the record being the minutes of the meeting held on 10th September, 2002 was resolved by the Court at page 222 as the document in question was held to be inadmissible and is therefore not part of this record.

As to ground 3 Counsel said that he would rely on his arguments in ground 1.

As to ground 4, Counsel said that the Kafue Gorge Regional Training Center was a separate and autonomous entity completely separate from the

Respondent Company. That the fact that the Respondent provided facilities and paid salaries for the employees of the Center did not make the Center a department of the Respondent Company.

As to ground 5, Counsel said that this has already been covered in the other arguments.

We have considered the submissions of Counsel for the Respondent and for the Complainant as well as the evidence on record. We shall consider grounds 1, 2 and 3 of the Respondent's ground of appeal together as they are interrelated. It is common cause that the Complainant was employed by the Respondent as Manager, Human Resource Development in August, 1994. On 1st August 1995 the Complainant was redesignated Training Center Manager for the Kafue Gorge Regional Training Center. Initially the Complainant was informed that he would act in this position until further notice but by letter dated 30th August, 1995 he was informed that his transfer was permanent. Subsequently the Complainant entered into contracts with the Kafue Gorge Regional Training Centre as Director, whose duration was for two years and these contracts were being renewed from time to time. The evidence on record is that the Complainant's salary whilst he served as Director of the Training Center was being paid by the

Respondent together with the other employees at the Center. There is also evidence on record that the Complainant's annual appraisals, salary increments and other conditions of service were being determined by the Respondent. There was also evidence on record that when the Complainant had any grievance relating to his conditions of service he would approach the Respondent for redress. By letter dated 30th May, 2002 the Respondent transferred the Complainant from the Directorate of Corporate Services to that of Generation and Transmission as Human Resources Manager to be based in Lusaka and answerable to the Director of Generation and Transmission. This letter is on page 156 of the record. By another letter dated 20th August, 2002 the Respondent re-appointed the Complainant as Director of the Kafue Gorge Regional Training Center answerable to the Respondent's Director of Human Resources who was also Chairperson of the Kafue Gorge Regional Training Center Board of Trustees. This letter is on page 158 of the record. By letter dated 29th August 2002 the Respondent wrote a letter to the Complainant suspending him from employment to facilitate investigations into certain allegations that were made against him. On 10th September 2002 a meeting was held by a Disciplinary Committee consisting of Zambian based members of the Board of Trustees to consider

the allegations made against the Complainant. The Complainant was present at this meeting and the minutes of this meeting appear on pages 147 to 153 of the record. The meeting found the Complainant guilty of the charges leveled against him and resolved inter alia that, *'it would not be in the interest of the Center for Mr. Muyambango to continue as Director of KGRTC and that he should go back to ZESCO, his employers for redeployment.'* The Complainant was informed of the decisions of the Disciplinary Committee by letter dated 12th September, 2002. By letter dated 26th September 2002, the Respondent dismissed the Complainant from employment for the reasons set out in that letter.

It is clear to us that, notwithstanding the provisions of the memorandum of understanding, the Complainant from the evidence, was an employee of the Respondent and was merely on secondment to the Kafue Gorge Regional Training Center. As an employee of the Respondent, it was open to the Respondent to discipline the complainant for any offences that he committed whilst on secondment to the Training Center. The court below was being naïve in the extreme by holding that the Respondent could not discipline the Complainant for offences committed by him whilst on secondment to the Training Center. From the evidence on record we are

also satisfied that the Complainant was made aware of the charges that were leveled against him and that he was given the opportunity to exculpate himself as evidenced by the minutes of the meeting of the Disciplinary Committee. As we have already pointed out, these minutes appear on pages 147 to 153 of the record and we fail to see on what basis the court below made the comment on page 222 of the record that, *"we take note of the fact that what is referred to as minutes, do not seem to be minutes to me, court."* These minutes as pointed out by Counsel for the Respondent, formed part of the record and were not expunged from the record yet the court below made no reference to them in its judgment. As we said in the case of **THE ATTORNEY GENERAL VS RICHARD JACKSON PHIRI** (1) 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 done. The duty of the court is to examine if there was the necessary disciplinary power and it if is exercised in due form."*

In this case from the evidence on record we are satisfied that the necessary disciplinary power existed and that it was exercised in due form as all the procedures were followed.

We find merit in grounds 1, 2 and 3 of the grounds of appeal and would allow the appeal on those grounds and set aside the judgment of the court below. In the circumstances, it would be otiose for use to consider the other grounds of appeal. We also award costs to the Respondent. The costs are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE

P. Chitengi
SUPREME COURT JUDGE