IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 198/2005**

HOLDEN AT LUSAKA **SCZ Judgment No. 21/2007**

(Civil Jurisdiction)

Appellant

BETWEEN:

UNDI PHIRI

AND

BANK OF ZAMBIA **Respondent**

Coram: Sakala, CJ. Chibesakunda and Chitengi, JJS
on *7th* November, 2006 and 21st August, 2007

For the Appellant : **Mr. N. Okware**
Messrs Okware and Associates

For the Respondent: **Mr. G. C. Mulenga**
Legal Counsel

JUDGMENT

Chitengi, JS, **delivered the judgment of the court.**

Cases referred to: -

1. ***West Midlands Cooperative Society V Tipton (1986) 1 RLR 112.***

2. ***Hamilton V Argyll (1993) 1 RLR 99.***

3. ***National Breweries Limited V Philip Mwenya SCZ Judgment No. 28 of 2002 (unreported).***

4. ***Zambia National Provident Fund V Yekweniya Mbiniwa Chirwa (1986) ZR 70.***

5. ***Anderson Kambela Mazoka & Others V Levy Patrick Mwanawasa* & Others *SCZ/EP/01/02/03/2002 (Unreported)***

In this judgment, we shall refer to the Appellant as the Plaintiff and the Respondent as the Defendant, which is what they were in the court below.

The facts of this case are that the Plaintiff was at the material time employed by the Defendant in its Financial Systems Supervision Department as an Inspector with the responsibility of inspecting Commercial Banks to ensure compliance with Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, the Bank of Zambia Act and the Regulations. The Plaintiff worked in this capacity from 1st December, 1994, when he was employed, to 7th February, 2000 when his services were terminated.

The events leading to the termination of the Plaintiff's services are that on 9th June, 1999, the Plaintiff was charged with the disciplinary offence of issuing cheques on an insufficiently funded account contrary to Section 6.3(c) of the Defendant's Disciplinary code. The Plaintiff bounced some of these cheques even after being warned previously in 1996 and 1997. The Plaintiff bounced in excess of twenty cheques. The Plaintiffs reply to this charge was that the cheques were subsequently met by either funding the account or substituting them with cash paid directly to the payee and that no one complained. On 17th August, 1999 the Plaintiff was indefinitely suspended pending investigations. On 20th August 1999, the Plaintiff surrendered his cheque book to the Defendant and informed the appropriate official that he had closed his account. However, the account was allowed to run up to the end of August, 1999, as there were post dated cheques still to be presented by the traders from who the Plaintiff got goods on credit. During the suspension, the Plaintiff issued two dud cheques on his closed account. On 29th November, 1999, the Plaintiff and twenty five others facing similar charges appeared before the Disciplinary Committee. However, the Plaintiff's case was not heard because the Plaintiff was told that he had not been charged with any offence and that he should go home to wait for the charges. Some two days later, the Plaintiff received a letter in which he was charged with financial embarrassment in the conduct of his financial affairs with the public and other institutions, contrary to Section

6.3(f)(iii) of the Defendant's Disciplinary Code. According to the Plaintiff, the charge was vague and he sought clarification which was later given to him. The Plaintiff's reply to the new charge was that the matters contained in the allegations were private affairs. Some of the allegations were that the Plaintiff had got money from commercial banks.

Investigations by the Defendant's Chief Security officer, Mr. Paul Luo, who was the Defendant's first witness, confirmed the allegations and revealed misrepresentation made by the Plaintiff to the commercial banks where he was getting money. But the Plaintiffs position was that at the time he was charged, he had already paid back the money to the banks except Commerce Bank and Indo Bank whom he owed K4.5 Million and K3 Million respectively.

According to Mr. Mwamba Chokolo, the Defendant's second witness and its Assistant Director, Human Resource and Administration, the Plaintiff, prior to disciplinary action being taken against him, had been counselled on several occasions about the conduct leading to his dismissal and warned verbally of disciplinary action. The Plaintiff gave an undertaking that he would stop his financial misconduct. In order to assist the Plaintiff to stay on the right side of the disciplinary code, the Defendant gave the Plaintiff a soft loan to enable him clear his indebtedness to the various commercial banks and other creditors he owed money. However, despite this assistance, the Plaintiff's bad conduct did not abate. The Plaintiff also swindled a widow out of her husband's terminal benefits but the Disciplinary Committee found this allegation irrelevant because the subject matter was outside the Plaintiff's scope of employment.

On 4th February, 2000, the Plaintiff appeared before the Disciplinary Committee, which after deliberations summarily dismissed him. The Plaintiff then appealed to the Appeals Committee, which substituted the summary

dismissal punishment with one of discharge. A further appeal to the Governor was unsuccessful.

After the Plaintiff's services were terminated the Plaintiff sought employment with NAPSA who asked for reference from the Defendant. Mr. Chokolo (DW2) gave the reference, which according to the Plaintiff was actuated by malice or bad faith but according to Mr. Chokolo, was based on the true facts that led to the Plaintiff's separation with the Defendant.

On these facts, the Plaintiff commenced an action seeking the nullification of his termination, reinstatement, damages for wrongful and unfair dismissal, full terminal benefits, arrears of salary, damages for mental anguish and distress and interest and costs.

The Defendant counter claimed for K64,605,921.15 in respect of various loans advanced to the Plaintiff while in the employ of the Defendant and which loans remain unpaid and for an order of foreclosure in respect of Plot 8819, Lake Road, Woodlands, Lusaka. In his Defence to the counter claim, the Plaintiff denied owing the Defendant the sum of money claimed by the Defendant and opposed the claim for foreclosure.

In a somewhat lengthy judgment, the learned trial Judge dismissed the Plaintiff's entire claim and found for the Defendant on the counter claim.

The learned trial Judge found that the Plaintiffs services were properly terminated because the Plaintiff was charged with the disciplinary offences and contrary to what the Plaintiff pleaded, given an opportunity to be heard. The learned trial Judge based this finding on the correspondence that took place between the Plaintiff and the Defendant's officials from the commencement of

the disciplinary proceedings through to the Defendant's Governor. The learned trial Judge found that the Plaintiff wrote exculpatory statement and attended the Disciplinary committee hearing. Further, the learned trial Judge found that in the correspondence the Plaintiff in fact admitted the Disciplinary offences and that in his appeals to the Appeals Committee and the Governor, the Plaintiff only pleaded for leniency and was successful in that the summary dismissal punishment was substituted with a discharge enabling the Plaintiff to get his terminal benefits. In the event, the learned trial Judge rejected the complaint by the Plaintiff that the Defendant did not observe its own Disciplinary Code.

On discrimination, an issue that was not pleaded, but on which evidence was led and not objected to, the learned trial Judge held that discrimination was not pleaded for him to consider it. However, the learned trial Judge said that even if the issue of discrimination were pleaded it would not hold because the Plaintiff had failed to prove that the other persons charged with similar offences were similarly circumstanced like the Plaintiff in terms of number of bounced cheques and gravity of the offence.

About the Plaintiffs complaint that the Defendant wrote a malicious letter to the NAPSA when the latter asked for information on the Plaintiff, the learned trial Judge held that the Defendant was duty bound to tell NAPSA the true reasons for the Plaintiffs termination. The learned trial Judge observed that the Plaintiff admitted bouncing cheques. In the event, the learned trial Judge found that there was no malice or bad faith on the part of the Defendant.

On the Plaintiffs complaint that the investigations officer (DW1), Mr. Chokolo (DW2), who ordered the investigation and Mr. Kapaya who was an interested party sat on the Disciplinary Committee, thereby breaching the rules of natural

justice, the learned trial Judge said that the Plaintiff never objected to these three people being part of the Disciplinary Committee. Rather, the Plaintiff praised the investigations officer (DW1) for his professionalism and the Disciplinary Committee for its valuable advice which he took to heart as a further source of guidance in his life. Further, the Plaintiff commended the Appeals Committee for reducing his punishment. Furthermore, the Plaintiff did not even make the composition of the Disciplinary Committee and the Appeals Committee a ground of appeal during the internal appeals he made in the Bank. For these reasons, the learned trial Judge rejected the Plaintiffs complaint that the rules of natural justice were breached.

The Plaintiff now appeals to this Court against the judgment of the court below.

The Plaintiff advanced seven grounds of appeal.

The first and second grounds of appeal relate to failure on the part of the Defendant to observe the rules of natural justice. However, on account of the view we take of these two grounds, we do not find it necessary to recite these grounds and go into the details of the submissions on these grounds. Suffice it to say that we have given the grounds of appeal, submissions and the authorities cited therein our careful consideration. We are also of the view that these grounds of appeal can be dealt with and disposed of even without considering the arguments on behalf of the Defendant.

As the learned trial Judge quite properly observed in his judgment, the oral and documentary evidence that was before the learned trial Judge put it beyond any doubt that the Plaintiff was given an opportunity to be heard. The Plaintiff did not only appear in person at the Disciplinary hearing but also wrote exculpatory letters explaining his side of the case and pleading for leniency. Further and more importantly, the Plaintiff in fact admitted committing the

disciplinary offences with which he was charged. In these circumstances, we are bound to say that we do not understand the basis for the Plaintiffs complaint that the Defendant did not observe the rules of natural justice when it dealt with the Plaintiffs disciplinary case. The first and second grounds of appeal are completely devoid of any merit and we dismiss them.

We now deal with the remaining grounds of appeal.

The third ground of appeal is that the trial Judge erred in law and fact in holding that the Appellant was properly charged and adequately informed of all the charges he was facing before the Disciplinary Committee prior to his discharge from employment.

The fourth ground of appeal is that the trial Judge erred in fact and in law in holding that the Respondent followed their disciplinary code and that they warned the Appellant as a first offender before discharging him from employment.

The fifth ground of appeal is that the trial Judge erred in law and in fact in ignoring the evidence of discrimination against the Appellant by the Respondent on the grounds that the same was not pleaded and that no evidence was led to prove discrimination.

The sixth ground of appeal is that the trial Judge erred in law and fact in holding that it was not necessary for the Appellant to appear before the Appeals Committee when evidence was led which confirmed that such had been the practice in other cases before.

The seventh ground of appeal is that the trial Judge erred in law an in fact in

holding that the Respondent was right to write a negative reference to NAPSA where the Appellant had found alternative employment following dismissal by the Respondent and which reference led him to losing his new job.

Counsel filed written heads of argument which they augmented with brief oral submissions.

Mr. Okware, learned counsel for the Plaintiff, argued the third and fourth grounds of appeal together. Mr. Okware's written argument on these grounds is that the Plaintiff was not warned as a first offender; that the Plaintiff was only charged and after he had sought clarification of the charge, he was made to appear before a tribunal which later dismissed him summarily. It was Mr. Okware's submission that there was no warning letter as required by the Disciplinary Code. He said that the Defendant imposed a penalty of discharge, a penalty meant for third time breaches.

The argument on ground five is that the Plaintiff was discriminated against by the Defendant because the Plaintiff was dismissed on a charge over which other employees were only warned. It was Mr. Okware's submission that the learned trial Judge fell into error by ignoring the evidence of discrimination.

The argument on ground six is that the Defendant should have called the Plaintiff to attend the Appeals Committee hearing as this was an established practice. According to Mr. Okware, this would have given the Plaintiff an opportunity to be heard on the new charge and cross-examine his accusers before the Appeals Committee. In this respect, Mr. Okware cited the case of ***West Midlands Cooperative Society V Tipton ([1])*** in which Lord Bridge quoting from a judgment by Viscount Dillard in ***W. Davis & Sons V Atkins*** said: -

> "*.....Failure to follow a procedure prescribed in the*

code may lead to the conclusion that a dismissal was unfair.[9]

On ground seven Mr. Okware submitted that it was wrong for the trial Judge to hold that once one is discharged on grounds of misconduct, then the employers have the right to give negative references which render an employee unable to get another job somewhere else. In this regard, Mr. Okware cited the case of ***Hamilton V Argyll***[(2)]***)*** where it was stated that: -

> *"There is no necessary inference that because an employee is guilty of gross misconduct in relation to his or her actual employment they must necessarily be considered unsuitable for any employment elsewhere."*

It was Mr. Okware's argument that to permit the conduct of the Defendant to stand is to consign the Plaintiff into permanent destitution; it means that the Plaintiff will not work again as every prospective employer will seek reference from the Plaintiffs last employer, who in this case is the Defendant.

Mr. Okware's brief oral submissions are a repeat of the written submissions.

For the reasons we have already stated above and having disposed of grounds one and two in the manner we have done, it is not necessary for us to consider the arguments by Mr. Mulenga, learned counsel for the Defendant, on grounds one and two. We shall only deal with Mr. Mulenga's submissions on grounds three to seven.

Mr. Mulenga's submissions on grounds three and four are that the Plaintiff was properly charged in line with the Disciplinary Code; that the Plaintiff had been warned several times; that two of these warnings appear on pages 255 and 256 of the record of appeal and that the Plaintiff was verbally warned by PW2. It was Mr. Mulenga's submission that the Disciplinary Code is clear that on the first breach the offending employee must be warned. He contended that in this

case, however, each bounced cheque amounted to a breach and by the third breach the punishment was dismissal but in this case the Defendant was lenient and only discharged the Plaintiff despite the Plaintiff having committed thirty four or more breaches. Mr. Mulenga urged us to dismiss these grounds of appeal.

On ground five Mr. Mulenga submitted that unless a claim is pleaded and evidence led to support it, it might not be upheld. It was Mr. Mulenga's submission that discrimination was not pleaded and no evidence was led to substantiate it and, therefore, the court below quite properly dismissed the claim for discrimination. Finally on this ground, Mr. Mulenga submitted that, even if there were other people charged with similar offence, such other people did not bounce as many cheques as the Plaintiff did for the other people to be said to be persons similarly circumstanced for the purpose of grounding a claim based on discrimination. On ground six Mr. Mulenga submitted that the case of ***West Midlands Cooperative Society V Tipton***[(1)] cited to support the proposition that failure to follow procedure might lead to a conclusion that a dismissal was unfair is irrelevant. Mr. Mulenga pointed out that the law in point on this issue in Zambia is found in ***National Breweries Limited V Philip*** *Mwenyaf* [(3)] where the Supreme Court held that failure to follow the procedure in the contract does not render a dismissal wrongful.

The substance of Mr. Mulenga's submission on ground seven is that in giving reference on the Plaintiff, the Defendant was bound to tell the new employer the truth about the Plaintiff.

Like Mr. Okware did, in his short oral submissions, Mr. Mulenga also repeated his written submissions.

We have carefully considered the oral and documentary evidence that was before the learned trial Judge, the submissions of counsel and the judgment appealed against.

We have already disposed of grounds one and two, so we start with grounds three and four which were argued together. The complaint in grounds three and four like ground six is basically that the Defendant did not adequately comply with its own Disciplinary Code.
But in his submissions Mr. Okware also said that the Plaintiff was not adequately informed of the charges. This submission is against the evidence. The totality of the evidence leaves us in no doubt that the Plaintiff knew what charges were leveled against him. Hence, the Plaintiff admitted these charges, pleaded for leniency and got it from the Appeals Committee and the Governor who reduced the harsh punishment of summary dismissal to one of discharge. In the result, we agree with Mr. Mulenga's submissions that the Plaintiff was properly charged.

We are satisfied that the critical issue in grounds three and four like in ground six is the effect of alleged failure by the Defendant to comply with its own Disciplinary Code and not failure by the Defendant to adequately inform the Plaintiff of the charges. We shall deal with these grounds together.

Mr. Okware advanced the proposition and the case cited in support of it that failure to follow a procedure prescribed in the code may lead to the conclusion that a dismissal was unfair. For this proposition, Mr. Okware cited the case of ***West Midlands Cooperative Society V Tipton IRLR112***[(1)] **as** authority. As Mr. Mulenga quite rightly submitted, the proposition and the case cited in support of it are irrelevant and they are in conflict with our own decisions, which hold to the contrary. In the case of ***Zambia National Provident*** *Fund* ***V Yekwenya***

Mbinuwa Chirwaf [4]**,** which was cited in ***National Breweries V Philip*** *Mwenyal* [3], which Mr. Mulenga cited. We held that procedure rules are part of conditions of service and not statutory and that where it is not in dispute that an employee committed an offence for which the appropriate sentence is dismissal and he is dismissed, no injustice arises from failure to comply with the laid down procedure in the contract of service and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.

In this case, what the Defendant is alleged to have breached is the Plaintiffs contract of service relating to discipline and not statutory. The breach does not vitiate the discharge because on the evidence we are satisfied that the Plaintiff had committed dismissible offences. A more serious and despicable misconduct by a senior Central Bank official charged with the responsibility of supervising commercial banks and other financial institutions is difficult to imagine. We find no merit in grounds three, four and six.

In ground five, the Plaintiff complains of discrimination. He says that while others who committed similar offences were only warned, he was discharged. Mr. Okware, on behalf of the Plaintiff, argued that what matters is the fact that the Plaintiff was discriminated against and that in this case the learned trial Judge erred when he ignored the evidence of discrimination. In reply, Mr. Mulenga submitted that discrimination was not pleaded and that the evidence did not prove that the other employees who were not discharged were similarly circumstanced as the Plaintiff. Mr. Mulenga pointed out that the other persons did not bounce as many cheques as the Plaintiff did.

We have considered these submissions. It is trite that matters that a party wishes to rely upon in proving or resisting a claim must be pleaded. However,

as we said in the recent case of ***Anderson Kambela Mazoka & Others V Levy Patrick Mwanawasa & Others*** [5] where a party does not object to evidence on unpleaded matter immediately it is adduced, the court is not precluded from considering that evidence. In this case, the evidence of discrimination was adduced but not objected to. The learned trial Judge was therefore entitled to consider it. However, although the learned trial Judge said discrimination had not been pleaded, he actually dealt with the issue of discrimination in his judgment and made a finding that there was no discrimination. So contrary to the argument by Mr. Okware, there was no misdirection on the part of the learned trial Judge. What we have to decide is whether on the evidence discrimination was not proved as the learned trial Judge held. We have carefully considered the evidence on this issue. We accept Mr. Mulenga's submissions and the learned trial Judge's finding that there was no discrimination proved. As Mr. Mulenga rightly submitted, there is no evidence that the other persons who were not discharged also bounced numerous cheques like the Plaintiff did. We add, there is no evidence that the other persons were also in a position of bank inspectors like the Plaintiff. The Plaintiff was in a crucial position. The Plaintiff had the responsibility of ensuring that commercial institutions were complying with the banking law. For the Plaintiff to routinely borrow money from these institutions and issue to them dud cheques was a serious matter. In the position the Plaintiff was, his conduct did not only compromise his integrity but also made him a liability to the Defendant. The Plaintiff put himself in a position where he could easily be made to ignore any irregularities he may find during the inspection of commercial banks and other financial institutions. As the learned trial Judge quite rightly pointed out, there is no evidence that the breaches by the other persons here were as those committed by the Plaintiff for one to say that the Plaintiff and those others who were not dismissed were similarly circumstanced. The learned trial Judge was on firm ground when he found that

the Plaintiff was not discriminated against. This ground of appeal fails.

We now deal with ground seven. We must say that we are extremely startled by this ground of appeal. It is a ground of appeal which should not even have been advanced. We do not even find it necessary to discuss the submissions on this ground. What we are being asked to say is to rule that the Defendant should have told lies to NAPSA that the Plaintiff was an honest man with impeccable record with the Defendant. That would have been a grave offence on the part of the Defendant. It is common cause that the Plaintiff, who appears to have an insatiable love for money, on numerous occasions borrowed money from commercial banks and other persons and issued dud cheques. There was, therefore, as the learned trial Judge found, no malice or bad faith on the part of the Defendant by telling NAPSA the true reasons why the Plaintiffs services with the Defendant were terminated. We are not prepared, by our judgment, to promote and protect the interests of people who indulge themselves in illegal and crooked activities. This ground of appeal also fails.

All the grounds of appeal having failed, this appeal must be dismissed and we dismiss it. There is completely no merit in this appeal. We make no order as to costs.

E. L. SAKALA CHIEF JUSTICE

L. P. CHIBESAKUNDA
SUPREME COURT JUDGE

PETER CHITENGI
SUPREME COURT JUDGE