

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA

APPEAL NO. 81 OF 2010

(Civil Jurisdiction)

B E T W E E N:

**KONKOLA COPPER MINES PLC**  
AND  
**MAINDA MWIINGA NCHIMUNYA**

APPELLANT

RESPONDENT

CORAM: **SAKALA, CJ., CHIBESAKUNDA AND WANKI, JJS**  
On 1<sup>st</sup> March, 2011 and 8<sup>th</sup> June, 2011

For the Appellant: Mr. N. Nchito, and T. Mzumara, of  
Messrs. MNB

✓ For the Respondent: Mr. W.K. Cheelo, of Messrs.  
Wilson and Cornhill

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

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**WANKI, JS, delivered the judgment of the Court.**

Cases referred to:

1. **Wilson Masauso Zulu -Vs- Avondale Housing Project Limited, (1982) ZR 172.**
2. **Attorney General -Vs- Marcus Kampumba Achiume, (1983) ZR 1.**
3. **Felix Sinjela -Vs- Konkola Copper Mines Plc, 2004/HK/535.**
4. **Tolani Zulu and Musa Hamwala -Vs- Barclays Bank of Zambia Limited, (2003) ZR 172.**
5. **Rhesa Shipping Company Limited SS -V- Edmunds [1985] 2 ALLER 712.**
6. **Konkola Copper Mines PLC -Vs- Kakenenwa Muyangwa, Appeal No. 31 of 2008.**

Other Materials Referred To:

**7. Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**

**8. Evidence Materials, Sweet and Maxwell [1997] 83.**

The Appellant, Konkola Copper Mines PLC, being dissatisfied with the judgment of the Industrial Relations Court given at Ndola on the 23<sup>rd</sup> day of September, 2009 in favour of the Respondent, Mainda Mwiinga Nchimunya, appealed to the Supreme Court against the said judgment.

The facts leading to the appeal are that Mainda Mwiinga Nchimunya, the Respondent, then Complainant, filed a Notice of Complaint against Konkola Copper Mines PLC, the Appellant, then Respondent, in the Industrial Relations Court at Ndola.

The grounds on which the complaint was presented were that the dismissal of the Complainant by the Respondent on the 23<sup>rd</sup> day of January, 2009 was unfair, wrongful, discriminatory, unlawful, irregular and done in bad faith and with malice.

The Complainant was seeking a declaration or order that his dismissal from employment on the 23<sup>rd</sup> day of January, 2009 was unfair, wrongful, irregular and done in bad faith and with malice; an order of reinstatement or in the alternative payment of compensation or damages; an order of payment of accrued leave days; an order for payment of pension benefit from Konkola Copper Mines PLC Pension Fund; Interest on such monies as are found due; any other relief the Court shall deem fit and equitable; and costs.

The Notice of Complaint was supported by an Affidavit in Support that was sworn by the Complainant.

The Respondent/Appellant filed an Answer in which they stated that the dismissal of the Complainant/Respondent was in accordance with the Respondent/Appellant's Disciplinary Code and Grievance Procedure. They denied that the Complainant was entitled to any of the reliefs he sought.

The Respondent's Answer was supported by an Affidavit which was sworn by Ernest Kasanda Kapula, the Respondent's Manager, Human Resources.

At the hearing of the complaint, the Complainant gave evidence and did not call any other witness.

He stated that his employment history commenced in 1996, when he was employed as a Trainee Chartered Accountant by Zambia Consolidated Copper Mines. In 2000, he converted to the Respondent.

In the 2005/2006 appraisals, he was rated as a star of business which translated into more perks, salary increments and higher grades of conditions of service.

He further stated that in December, 2008, he was called by the General Manager, Mr. Keith Kapui, who handed him a letter. As he did not understand the contents of the letter, which was titled 'alleged abuse of office'; he sought clarification as to the allegation of abuse of office and what property was being referred to in the letter as being beyond the Complainant's emoluments.

The response was that all the General Manager knew that the Complainant had a lot of money in the Bank, a house and cars and he was asked to put his response in writing. Following this, he responded in writing to the letter. Thereafter, there was a case hearing convened on a charge of abuse of office. Later, he was informed that he had not filled in a KCM form for declaration of interest. The Complainant further stated that he was dismissed following the case hearing. He told the Court that the charge leveled against him of abuse of office was not contained in the Disciplinary Code. He unsuccessfully appealed to the General Manager and the Chief Executive Officer against his dismissal.

He finally stated that he had been unfairly treated and was professionally injured as an Accountant.

Under cross-examination, he stated that there had been a case hearing on a charge of abuse of office. His employment included conditions of service. He was aware of the requirements to declare interest in shares and patents; but that he had no interest in shares and patents. The only interest he had was of a personal nature.

He further said that the property he owned was not commensurate with his emoluments at KCM; but acquired it through his businesses. He contended that he used his accounting skills to run his businesses, however, he did not keep any accounting records or ledgers as he was recording in his head or pieces of paper.

In re-examination, he reiterated that he was merely told by the General Manager that he was in possession of privileged information which; indicated that he had property in his ownership, which was beyond his emoluments; but was not given a catalogue of property referred to. He provided a list of properties that he owned to the company; but the Respondent did not provide a list.

In rebuttal, the Respondent called the Manager, Human Resources, Ernest Kapula. He testified that the Complainant's employment was terminated by the Respondent on grounds of being in possession of property in excess of his emoluments and that the charge was within the spirit of the Disciplinary Code, Clause 1.3.

He contended that his interpretation of the Code was that it was not exhaustive, it was a guide. It was his evidence that at various stages, the Complainant was informed of his rights and he exercised them.

In cross-examination, he testified that it was felt by the Respondent that the property the Complainant owned was in excess of his emoluments and it probably could have been obtained as a result of abuse of office. He was not aware as to whether there was a document or catalogue of the said property. He, however, stated that the author of the letter to the Complainant on abuse of office had privileged information; whereas his role was merely the facilitation of the Disciplinary Code. He conceded that there was no specific clause that talked about abuse of office; but that under the broad headings and subjects of the Code, the Respondent could

arrive at a charge that is appropriate and the offence be captured under Clause 1.3.

Under re-examination, RW1 repeated his earlier evidence that he was only facilitating the process of the case and the Respondent never disclosed the property; but insisted that the Complainant made the disclosure.

Following the close of the evidence, the Parties filed submissions.

The Trial Court, after considering the evidence before it and the submissions, found in favour of the Complainant, and accordingly held that the dismissal was unlawful and unjust and ordered the Respondent to compensate the Complainant as follows:

- 1. Payment of Zambia Consolidated Copper Mines (ZCCM) accrued terminal benefits calculated on the basis of 28 months pay plus one month's basic pay for each complete year of service.**
- 2. Accrued leave pay.**
- 3. Payment of salaries and all monthly benefits from the date of dismissal to the date of judgment.**
- 4. Interest from the date the complaint was lodged into Court to date of judgment at 15% thereafter at 6% to date of payment.**
- 5. Costs to the Complainant.**

The Appellant, being dissatisfied with the whole judgment, appealed to the Supreme Court.

The Appellant advanced 4 grounds of appeal as follows:-

- 1. The Court below erred and misdirected itself in law and fact in narrowing the scope of the offence the Respondent was facing to abuse of office by being in possession of property which was not commensurate with his earnings.**

2. Further, notwithstanding the evidence on record to the effect that the Respondent understood and admitted the charge, the Court below erred and misdirected itself in law and fact, in holding that the offence in issue lacked particularity to enable the Respondent reply to it.
3. The Court below erred and misdirected itself in law and fact when it failed to properly evaluate the evidence on record and held that the Respondent was not obliged to declare his business interest to the Appellant.
4. The Court below erred and misdirected itself in law and fact when it disregarded the evidence on record and proceeded to hold that it failed to see how wealth created by an honest worker for himself and finally can be translated as 'abuse of office,' which finding was not supported by the evidence on record.

The Appellant filed Heads of Argument based on the four grounds of appeal, which were argued as one.

The gist of all the four grounds of appeal is that the evidence on record did not support the findings of the Court below; and that the Court's findings were perverse.

It was pointed out that this Court has had occasion to address its mind to questions relating to findings of fact in the case of **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED**, <sup>(1)</sup> in which it was held that the Appellate Court will only reverse findings of fact made by a Trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.

Similarly, in the case of **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**, <sup>(2)</sup> this Court held *inter alia*, that an appeal Court will not reverse findings of fact made by a trial Judge unless

it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no Trial Court acting correctly can reasonably make and that an unbalanced evaluation of the evidence, where only flaws of one side but not of the other are considered, is a misdirection which no Trial Court should reasonably make and entitles the appeal Court to interfere.

It was pointed out that the conclusion, drawn from the above cases, is that the appeal Court will generally not reverse findings of fact by a trial Judge and that this is trite law.

It was contended that the above cited authorities squarely accord with, and are fortified by **Section 97 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia** which provides that (a) any person aggrieved by any award, declaration, decision or judgment of the (Industrial Relations Court) may appeal to the Supreme Court on any point of law or any point of mixed law and fact.

It was argued that the present case fits the profile of the **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME** <sup>(2)</sup> decisions in that the findings of the Court below are not supported by the evidence on record; and that the findings seem to be premised on evidence which is not on record. It was submitted that this was a proper case where this Court could

properly exercise its discretion and disturb or interfere with the findings of the Trial Court.

It was pointed out that in its judgment, at J12, lines 16 and 17, page 18 of the Record of Appeal, the Court below observed, *inter alia*, that (c) he (Appellant) charged the (Respondent) with abuse of office and having property not commensurate with (The Respondent's) earnings. The Court a **quo** then proceeded to deal with the charge as if it was one of abuse of office, a course that created the impression that the charge as proffered by the Appellant lacked particularity. It was submitted that this was a misapprehension of the facts, bringing this case in line with the decisions of this Court in **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**. <sup>(2)</sup> The Court was urged to reverse this finding.

It was further submitted that it is clear that the treatment of the charge by the Court was misleading for implying two distinct offences, namely; 'abuse of office and having property not commensurate with (the Respondent's) earnings.' The Court was referred to page 79 of the Record of Appeal, where the offence the Respondent was facing was stated as being 'abuse of office by having property under his ownership which was beyond his emoluments;' that in respect of this charge, and as will be noted from page 80 of the Record of Appeal, the Respondent sought clarification on the charge **vide** his letter dated 9<sup>th</sup> December, 2008.

It was pointed out that page 81 is the Appellant's response to the effect that the Respondent was required to state the property under his ownership and how he acquired it; and that in relation to this clarification, the Respondent, as is evidenced at page 82 of the Record of Appeal stated *inter alia*, as follows:

**"- I wish to state that the property in my possession will never be commensurate with my earnings from KCM PLC. This is for the simple reason that I don't just work for KCM PLC, but for myself and the family as well. I would like to state that I have farming background-"**

It was contended that the Record of Proceedings, lines 21 to 25, page 150 of the Record of Appeal reiterates the evidence relating to the Respondent's response that the property he had would never match his emoluments.

In relation to the charge, the Court was referred to the Record of Proceedings, lines 6 to 20, page 149 of the Record of Appeal. It was contended that the charge in issue was within the ambit of the Appellant's Disciplinary Code and Grievance Procedure, particularly Clause 1.3 of the said Code; which is a mere guide and not an exhaustive list of offences; and that the High Court has had occasion to consider the question of Clause 1.3 of the Code in **FELIX SINJELA -VS- KONKOLA COPPER MINES PLC**, <sup>(3)</sup> in which the Court had the following to say:

**"Section 1.3 of the Disciplinary Code and Grievance Procedure which appears at page 5 of the Plaintiff's Bundle of Documents specifies that since the Code cannot cover every specific case that may occur, officials must use their discretion within the frame work of and in accordance with the spirit of the Code. It is clear that the Code is an expression of the Company's policy on discipline and a guide to line officials and their advisors."**

It was submitted that they could not put it any better than that, otherwise to construe the clause otherwise would be tantamount to placing the Appellant in unattractive position where its Code (and therefore the expression of its Company policy on discipline), becomes an instrument for evading justice at the expense of the Appellant in relation to offences that may not necessarily be provided for in a Code in express language; but nonetheless culpable. It was argued that in the light of Clause 1.3 of the Code, what was important was that the offence was made clear to the person charged. It was submitted that in the context of the present case, the Appellant ensured that the charge was clearly and properly explained to the Respondent during the entire disciplinary process; that most importantly, the Respondent was given an opportunity to be heard within the dictates of the rules of natural justice.

In relation to declaration of interest, it was submitted that from the Record of Appeal, the Respondent was aware of the requirement to declare interest and that he had not in fact done so in relation to his interests in shares, patents and business; that the Respondent was required to declare not only shares and patents, but also business interests, and that this was intended to keep employees out of any possible conflict of interest in relation to their employment. It was submitted that the failure or neglect by the Respondent to declare his business interests flew in the teeth of his obligation as an employee of the Appellant; that the evidence referred to squarely placed the obligation to declare interest in

relation to patent rights, shareholding, and declaration of interest 'generally' on the Respondent as a requirement by the Appellant.

It was pointed out that the Court below chose to disregard that evidence to the detriment of the Appellant and in defeasance of the cause of justice.

It was submitted that the position taken by the Respondent, and as confirmed by the evidence on record, did not accord with that of a person who did not understand the charge he was facing; and that the Respondent understood the charge and acted upon what it required him to do; but for reasons best known to him, he opted to be economical with the truth and 'political' about his responses to the charge. It was further submitted that the Respondent's conduct and attitude towards the charge raised more questions than answers as one who genuinely acquired property for himself, would have no issues providing an inventory of his property and how he acquired same.

It was further submitted that the Appellant's evaluation of the evidence submitted by the Respondent in response to the charge was that, it was insufficient for purposes of absolving the Respondent from the allegations he was facing and that in consequence, the dismissal was upheld, and rightly so.

It was further argued that the Trial Court's finding based on a narrow scope given to the offence (that is, abuse of office) the Respondent was facing, flies in the teeth of the evidence on record, on a proper view of which, no Trial Court, acting correctly, could reasonably make such a finding. It was submitted that this was

inconsistent with the decision in **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME** <sup>(2)</sup> and brought this case under the ambit of cases where this Court has discretion to interfere with the findings of fact by the Trial Court.

It was argued that the Appellants, **vide** their letter dated 16<sup>th</sup> January, 2009, contained at page 98 of the Record of Appeal, clearly communicated to the Respondent that he had furnished no new evidence warranting reversal of the dismissal and that he was accordingly dismissed from employment; that through the letter in question, the Appellant informed the Respondent of his right of appeal; and that at this stage, the Appellant made it abundantly clear to the Respondent, and the Respondent knew exactly what was required of him.

It was pointed out that even in anticipation of the last and final appeal, the Appellant put the Respondent on notice as to the inadequacy of his evidence at first hearing and first appeal stages; but the Respondent opted not to take the situation seriously, thereby failing to provide the required explanation.

It was submitted that the evidence on record demonstrated that there was no doubt as to the ample opportunity the Respondent was given during the disciplinary process; that the Respondent had been notified of his questionable conduct; and that adequate opportunity had been given to him to meet the charge. Thereupon, it lay with the Appellant to decide the outcome. In aid of this submission, the case of **TOLANI ZULU AND MUSA HAMWALA -VS- BARCLAYS BANK OF ZAMBIA LIMITED**, <sup>(4)</sup> was

cited wherein this Court held *inter alia*, (albeit in relation to Section 26A of the Employment Act and Article 7 of the International Labour Organization Convention No. 58) that, 'the gist of the provisions is that the conduct or performance of the employee which is questionable must arise or related to his work and he must be given an opportunity to be heard.'

It was argued that, that notwithstanding, the Court would observe that the Court below went to a great length to temper with the real charge that the Respondent was facing in the present case; thus at J13, lines 2 to 8, page 19 of the Record of Appeal, the Court below observed:

**"Unsubstantiated allegations concerning Complainant's properties drawn from so called privileged information are of very serious criminal wrongdoing and (it took) the view that the (Appellant) should have taken great care to ensure that (the allegations) were properly investigated, not malicious and were not of a type likely to have been made by people seeking to discredit and injure the character of the (Respondent) for ulterior but undisclosed motives.'**

It was pointed out that it was clear from the foregoing, that the Court below proceeded on a path of conjecture as there was no evidence led to suggest that there were persons with motives to discredit and injure the Respondent for any reason; that this finding was made in the absence of relevant evidence. On account of the principles laid down by this Court, in **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED**, <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME** <sup>(2)</sup> it was submitted that the appeal Court is entitled to exercise its discretion and reverse the said finding.

It was further submitted that, secondly, and most importantly, the Court below clearly substituted the charge for one of a very serious criminal wrongdoing; but that the Respondent was facing a specific charge, which was proffered pursuant to the Appellant's Disciplinary Code and Grievance Procedure; and that the Respondent was not facing a criminal charge per se, which in any event is a preserve of the State. For this argument, the case of **FELIX SINJELA -VS- KONKOLA COPPER MINES PLC** <sup>(3)</sup> was cited, wherein the High Court, in relation to the argument that the defendant therein could not dismiss the Plaintiff for causing death because that offence was not in the Code or because only the State could charge and prosecute him, the Court observed and held that the Plaintiff had committed an offence, a dismissible offence falling within the ambit of Clause 1.3 of the Code so that his claim for wrongful dismissal could not succeed.

It was argued that to construe the charge in the manner the Court below did is tantamount to substituting the material charge for another different from the one the Appellant proffered against the Respondent (and for which he was heard and found wanting).

It was submitted that substitution of the charge, was not the province of the Court as a specific charge was proffered against the Respondent and an opportunity was equally given to the Respondent to meet the charge.

It was contended that it was a fundamental departure from the interest of justice for the Court below to have tempered with the charge, in total disregard for the Appellant's Disciplinary Code and

Grievance Procedure. The Court was urged to disturb the findings by the Court below to the effect that Clause 1.3 did not cover the charge in question as such a finding was a serious misdirection on the part of the Court.

In relation to the question of profits, it was pointed out that the Respondent told the hearing panel that he broke even in 2006, made an annual profit of K29 million in 2007 (which he invested in business), and made a loss in 2008 as he lost 4000 out of the 7000 chickens he had kept; that on account of what he termed stiff competition in the chicken business, the Respondent did not earn much from his business. It was submitted that on the foregoing evidence, it was shocking that the Respondent could claim that 'because of his business, his property could not be commensurate with his emoluments; that the Respondent, having been caught up in his own web of abusing his position as Business Controller and untruthfulness, could not face the music; but attempted to desperately explain his situation away using the alleged business which was nonetheless far from being viable and that he did not run his business as an Accountant, and in accordance with accounting principles; that he did not keep any record, that is, accounting records or ledgers; but that he was recording in his head; that he failed to produce, and had no accounting trail either before the Court or otherwise indicating how he acquired the property in his possession, and that he had not given the Appellant an accounting or any satisfactory explanation.

It was submitted that the evidence on record revealed glaring inconsistencies in the Respondent's testimony in so far as the affairs of his business are at issue. First, in response to the charge, he stated:

**".... I wish to state that the property in my possession will never be commensurate with my earnings from KCM PLC. This is for the simple reason that I don't just work for KCM PLC but for myself and the family as well. I would like to state that I have a farming background ....."**

These words were repeated at the various stages of the disciplinary process; and that paradoxically, when it came to matters of Zambia Revenue Authority returns, and accounting records, he opted to excuse himself from such requirements. It was submitted that the Respondent (owing to his professional qualification and standing) knew and knows, and yet he opted to mislead the Court below into believing that he would be exempted from filing returns by merely making a wish.

Secondly, it was pointed out that the Respondent testified that he did not make much from his business, and yet he claimed that the business is responsible for the property in his possession.

It was contended that it was surprising that the Court below disregarded or opted to proceed in the absence of any relevant evidence and held that it failed to see how wealth created by an honest worker for himself and his family can be translated as 'abuse of office' which finding was not supported by the evidence on record. The evidence on record seems to suggest and suggests the contrary position. It was submitted that the said finding by the Trial Court was flawed as it was not supported by the evidence on

record (albeit it purports to do so) and, was perverse and premised on misapprehension of the facts; inconsistent with the well established principles of law laid down in **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**. <sup>(2)</sup>

It was further contended that essentially, in the absence of any relevant evidence, the Court somehow saw hard work and honesty in the Respondent and made a finding to that effect (that is, the Court held, at J14, lines 12 to 14, page 20 of the Record of Appeal, that it clearly agreed with the submission that the whole episode was a fishing expedition, and it failed to see how wealth created by an honest worker for himself and family can be translated as an “abuse of office.”)

It was submitted that this finding was made notwithstanding that the evidence on record shows that the Respondent’s employer, the Appellant, had raised concerns about the questionable nature of the Respondent’s conduct with the charge subject of this matter being sufficient testimony in that regard. It was also pointed out that the evidence further showed that the Respondent conducted business without keeping accounts and filing tax returns and that the finding of the Trial Court flies in the teeth of the evidence on record.

In response to ground one, it was submitted that the Court below did not err or misdirect itself in law or fact and did not narrow the scope of the offence the Respondent was facing and that the Respondent did not admit abusing his office.

It was further submitted that the Court below did not err or misdirect itself when it upheld the Respondent's claim and dismissed the Appellant's defence. It was contended that the matter before this Court was civil in nature; and that it is an established principle of civil law that for a claim to be upheld in a civil matter, the claimant and or Plaintiff must prove the case on a balance of probabilities.

It was pointed out that there was undisputable evidence from both the Appellant and the Respondent that the Respondent was in the employment of the Appellant and earning a salary of not less than US \$4000 monthly, and that the Respondent clearly explained how he acquired the property although the Appellant contended that it was not commensurate to his earnings. The Court was referred to the learned author, STEVE V GLOW, in the book EVIDENCE MATERIALS SWEET AND MAXWELL (1997) 83 where it is stated thus:

**"It is settled law that in civil matters the burden of proof is discharged on the preponderance of probabilities. This is not a matter of relative quantity of evidence adduced by the parties but whether the party bearing the burden has shown in absolute terms that his or her proposition is more likely than not. The burden is not successfully discharged by merely showing that your account of events is more likely than that of your opponent."**

It was submitted that the Court below found as a fact that the Respondent did not substantiate their claim; that the Appellant had no reasonable justification whatever to dismiss the Respondent from its employment; that there was no evidence led by the Appellant to justify its action whatsoever; that Respondent's

evidence was that the Appellant wanted to know from him how he acquired his property; and that the information was provided to the Appellant; and that there was no evidence on record to show that the Respondent abused his office.

It was contended that the Court below was on firm ground to uphold the Respondent's claims as the Appellant failed to show that the Respondent abused his office whilst in the employment of the Appellant. That while the Appellant alleged abuse of office, an offence which led to the Respondent's dismissal; the Appellant did not lead any evidence to show and or prove how the Respondent abused his office to acquire the property that he had at the time of his dismissal.

It was further submitted that the Appellant did not prove any of its allegations against the Respondent and as such the Court below was on firm ground to uphold the Respondent's claim as the Appellant instead asked the Respondent to provide evidence of the property he owned.

It was contended that it was the Appellant's duty and responsibility to adduce evidence to explicitly show that the Respondent abused his office to acquire the wealth he had at the time of his dismissal; and that it was not the duty of the Respondent to prove his innocence on the alleged abuse of office the Appellant alleged.

It was the submission on behalf of the Respondent that the Appellant lamentably failed to support and justify its action as the Disciplinary Code did not contain such an offence he was charged

with as the Respondent, in his exculpatory letter, did write at page 14 of the Respondent's bundle of documents and stated:

**"I am in receipt of your letter dated 12<sup>th</sup> December, 2008. I wish to state that the property in my possession will never be commensurate to my emoluments from ZCCM PLC. This is for the simple reason that I don't just work for KCM PLC but for myself and the family as well. I would like to state that I have a farming background."**

It was submitted that the Respondent did explain how he came to acquire property not commensurate to his emoluments; and that the long and short of the Respondent's story was that he was also involved in other business activities which supplemented his income.

It was further submitted that the Respondent further showed the Appellant proof of ownership of the property he had; and that it was the Appellant who was supposed to show the Respondent how the Respondent had abused his office and own property that he had acquired beyond his emoluments.

It was contended that the Appellant did not show the Lower Court and or adduce evidence to prove that the Respondent owned property beyond his means. In the case of **RHESA SHIPPING COMPANY LIMITED SS -VS- EDMUNDS** <sup>(5)</sup> stated:

**"The legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a Judge of first instance before he finds that a particular event occurred to be satisfied on the evidence that it is more likely to have occurred than not. If such a Judge concludes that the occurrence of an event is impossible, a finding by him that it is nevertheless more likely to have occurred than not accord with common sense. This is especially so when it is open to the Judge to say simply that the evidence leaves him no doubt whether the event occurred or not and that the party on whom**

**the burden of proving that the event occurred lies has therefore failed to discharge such burden.”**

In response to ground two, it was submitted that the Court below did not err or misdirect itself in law and fact in holding that the offence in issue lacked particularity to enable the Respondent reply to it. It was argued that the Appellant in a nutshell had charged the Respondent with the offence of being in possession of property not commensurate to his earnings and that this was a result of abusing his office; and the charge did not give further and better particulars.

It was contended that there was no miscarriage of justice by the Lower Court. In any case, the Respondent exonerated himself on how he acquired the property. He clearly stated that apart from his monthly salary he was also involved in other money making ventures.

It was further submitted that the Court below did not err to make a finding of fact on which the Appellant is appealing against, as the Industrial Relations Court is a Court that has been mandated by law to do substantial justice and not to follow rules of procedure in a pendent way.

It was pointed out that this Court has held that a matter from the Industrial and Labour Relations Court cannot be appealed against on a point of facts pursuant to Section 97 of the Industrial and Labour Relations Act. Thus, it was held in the case of **KONKOLA COPPER MINES PLC -VS- KAKENENWA MUYANGWA** <sup>(6)</sup>

that:-

**“We hold that the appeal before this Court is against the findings of fact by the Lower Court. Section 94 of the Industrial Relations Act proscribes against Appeals lying to this Court on findings of fact by the Industrial Relations Court. Therefore the appeal in this Court is incompetent. We therefore dismiss the appeal.”**

It was contended that the Court below had an opportunity to take down the evidence of the witnesses and evaluated their demeanour and made findings of fact; and that this Court has no jurisdiction to reverse findings of fact unless in very exceptional circumstances.

It was finally submitted that the crucial issue in this appeal is whether the Court below made findings of fact on the crucial issues which were unwarranted and unsupportable; and that in this case, there was abundant evidence and if so, there was at the very least sufficient substratum of evidence to justify the findings that were made; and that the Court below had correctly observed that the dismissal was wrongful and that there was no wrongdoing on the part of the Respondent herein.

In response to ground three, it was submitted that the Court below properly evaluated the evidence on record and there was no obligation on the Respondent's part to declare his business interests; that the Respondent clearly stated why he did not declare interest; that the reason was because his activities had nothing whatsoever to do with his employer; and that there was no conflict of interest and there was no evidence to show, indicate or prove that the Respondent's business activities had any transactions or dealings with the Appellant.

With regard to ground four, it was submitted that the arguments raised in ground two of the Respondent's submissions sufficed to counter the Appellant's arguments.

It was prayed that the whole appeal be dismissed with costs as it lacked merit.

Appeals from the Industrial Relations Court to this Court are founded on the provisions of **Section 97 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia**. The said section provides:-

**“97. Any person aggrieved by any award, declaration or judgment of the Court may appeal to the Supreme Court on any point of law or any point of mixed law and fact.”**

It follows that this Court will not entertain any appeal from the Industrial Relations Court unless it is satisfied that it is based on any point of law or mixed point of law and fact.

In ground one, the Appellant is challenging the Industrial Relations Court for narrowing the scope of the offence the Respondent was facing to abuse of office, when the specific offence which the Respondent admitted was that of abuse of office by being in possession of property which was not commensurate with his earnings.

It was submitted that the evidence on record did not support the decision of the Court; that the Court's dealing with the charge, as if it was one of abuse of office, created an impression that the charge as proffered by the Appellant, lacked particularity, and that this was a misapprehension of the facts bringing the case in line with the decisions in **WILSON MASAUSO ZULU -VS- AVONDALE**

**HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA**. <sup>(2)</sup> It is for this reason that, they argued the Court to reverse the findings.

On behalf of the Respondent, the submission was that the Court below did not err or misdirect itself in law and fact and did not narrow the scope of the offence the Respondent was facing.

We have considered ground one of appeal, the arguments in support and against and we have examined the judgment of the Trial Court.

We have found that the Court below did not narrow the scope of the offence the Respondent was facing; that the evidence that was adduced before the Court, both verbal and documentary, referred to the abuse of office and having property not commensurate with the Respondent's earnings. The Court below, at page J12 (or 18 of the Record) stated:-

**“The Respondent charged the Complainant with abuse of office and having property not commensurate with his earnings.”**

We do not, therefore, understand how the Court below can be said to have narrowed the scope of the offence. In any case, we do not see how the said narrowing of the scope of the offence the Respondent was facing prejudiced the Appellant's case.

The Lower Court properly analysed the evidence before it before arriving at its decision and finding. Further, its findings were supported by the evidence. In the circumstances, we have found no justification to interfere with the Lower Court's findings.

We, therefore, find no merit in ground one of the appeal. It is, accordingly, refused.

In ground two of the appeal, the Appellant is challenging the Lower Court's holding that the offence in issue lacked particularity to enable the Respondent reply notwithstanding the evidence on record to the effect that the Respondent understood and admitted the charge.

In support to the foregoing ground, it was argued that the offence that the Respondent was facing is stated at page 79 of the Record of Appeal in the nature of abuse of office by having property under his ownership which was beyond his emoluments. In respect of this charge, the Respondent sought clarification on the charge vide his letter dated 9<sup>th</sup> December, 2008.

His said letter was responded. In relation to this clarification, the Respondent responded. Thereafter, the Respondent was formally charged by the Appellant. In relation to the charge, the Court's attention was drawn to page 149 of the Record of Appeal. The charge was within the ambit of the Appellant's Disciplinary Code and Grievance Procedure, Clause 1.3. It was finally submitted that what is important is that the offence is made clear to the person being charged.

The Appellant ensured that the charge was clearly and properly explained to the Respondent during the entire disciplinary process. Most importantly, the Respondent was given an opportunity to be heard consistent with the dictates of the rules of natural justice.

In response it was submitted on behalf of the Respondent that the Court below did not err or misdirect itself in law and fact in holding that the offence in issue lacked particularity to enable the Respondent reply to it.

The Respondent was charged with the offence of being in possession of property not commensurate to his earnings and that this was as a result of abusing his office does not give further and better particulars. The Appellant must have clearly indicated which property was acquired as a result of abuse of office.

We have considered ground two, the submissions in favour and against and we have examined the judgment complained of.

From the evidence on Record, the Respondent was not told which property in his possession was the subject of suspicion to enable him give an account as to how he acquired it. Further, the General Manager was not called to give evidence as to which property was suspected to have been acquired as a result of abuse of office.

The Appellants left it to the Respondent to tell them.

We, therefore, agree with the Trial Court that the charge lacked particularity and that the burden of proof was shifted.

In the circumstances, we find no merit in ground two. It is, accordingly, dismissed.

In ground three, the Appellant attacked the Trial Court for failing to properly evaluate the evidence on record and holding that the Respondent was not obliged to declare his business interest to the Appellant.

In support of ground three of appeal, it was submitted that in relation to declaration of interest, the Record of Proceedings, lines 19 and 22, page 146 of the Record of Appeal confirms that the Respondent was aware of the requirement to declare interest and that he had in fact not done so in relation to his interest in shares, patents and business.

It was further submitted that the Respondent was required to declare not only shares, and patents, but also business interests. This was intended to keep employees out of any possible conflict of interest in relation to their employment. The failure or neglect by the Respondent to declare his business interests flew in the teeth of his obligation as an employee of the Appellant.

The evidence referred to above squarely placing the obligation to declare interest in relation to patent rights, shareholding and declaration of interest 'generally' on the Respondent as a requirement by the Appellant formed very much a part of the Record. Yet, the Court below chose to disregard that evidence to the detriment of the Appellant and in defeasance of the cause of justice. In support, the Court was referred to the principle established in the case of **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**, <sup>(2)</sup> that unbalanced evaluation of the evidence, where only the flaws of one side; but not of the other are considered, is a misdirection which no Trial Court should reasonably make and entitles the appeal Court to interfere with the findings of the Trial Court was fundamentally flouted by the Trial Court. This Court is, therefore, properly called upon to reverse the findings in question.

In response on behalf of the Respondent, it was submitted that the Court below properly evaluated the evidence on record and there was no obligation on the Respondent's part to declare his business interests.

It was further submitted that the Respondent clearly stated why he did not declare interest. He stated that the reason was because his business activities had nothing whatsoever to do with his employer.

We have considered ground three, the submissions in support and against ground three and we have examined the judgment of the Court below.

We have found that the only evidence relating to the requirement to declare interest in shares and patents which was given by the Respondent at J6 (page 12 of the Record) was not rebutted by the Appellants.

R.W.1 did not in his evidence refer to the requirement to declare interest.

The Lower Court at J15 (page 21 of the Record of Appeal) properly considered the question as to whether or not the Complainant was obliged to declare his business interest. The Court then found after combing the Disciplinary Code and Grievance Procedure that it had not seen anything to support the contention that the Complainant was compelled to disclose any business interest he was involved in.

There was, therefore, no evidence that the Court failed to evaluate. In the circumstances, we find no merits in ground three. It is, accordingly, dismissed.

In ground four, the Appellant has attacked the Court below when it disregarded the evidence on record and proceeded to hold that it failed to see how wealth created by an honest worker for himself and his family can be translated as 'abuse of office' which finding was not supported by the evidence on record.

In support of ground four of appeal, it was submitted that the said finding is not supported by the evidence on record. The evidence on record seems to suggest and suggests the contrary position. It was also submitted that the said finding by the Trial Court was flawed as it was not supported by the evidence on record and was perverse and premised on misapprehension of the facts.

This again, was inconsistent with well established principles of law laid down by this Court in the **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**. <sup>(2)</sup>

On behalf of the Respondent it was submitted that the arguments raised in ground two of the Respondent's submissions suffice to counter the Appellant's arguments.

We have considered ground four, the submissions in support and against and we have examined the judgment of the Court below.

We find that the holding by the Court below, that, it failed to see how wealth created by an honest worker for himself and his family can be translated as 'abuse of office,' did not form one of the main issues.

In any case, there being no evidence that the Respondent created his wealth dishonestly; and that the Respondent was not an honest worker, we do not see, how the Court below can be said to have disregarded the evidence on record.

In the circumstances, we have found no merit in ground four. It is, accordingly, refused.

Last and not the least most of the arguments in all the four grounds of appeal attacked the findings of fact by the Trial Court. As stated in the cases of **WILSON MASAUSO ZULU -VS- AVONDALE HOUSING PROJECT LIMITED** <sup>(1)</sup> and **ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME**, <sup>(2)</sup> this Court will not reverse the findings of fact made by the Trial Court, unless it is shown that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the fact or were findings which on a proper view of the evidence, no tribunal acting correctly could reasonably make.

In the current case, the Appellant has not satisfied this requirement in order for us to depart from this well settled principle of law.

For the reasons given above, this appeal fails as the same has no merit. It is dismissed with costs to the Respondent to be taxed in default of agreement.



.....  
E. L. Sakala,  
**CHIEF JUSTICE**



.....  
L. P. Chibesakunda,  
**SUPREME COURT JUDGE**



.....  
M. E. Wanki,  
**SUPREME COURT JUDGE**