IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 128A/2011**
HOLDEN AT LUSAKA **SCZ/8/198/2011**
(Civil Jurisdiction)

BETWEEN:
AMOS MWANSA **APPELLANT**

AND

B.P ZAMBIA PLC **RESPONDENT**

Coram: Chibesakunda, Ag. CJ, Mwanamwambwa and Muyovwe, JJS.

On 5th June, 2012 and 7th October, 2013

For the Appellant : Mr. L. Kasuba of Leonard Lane & Partners
For the Respondents : Mr. S. Lungu of Shamwana and Company

J U D G M E N T

Chibesakunda, Acting CJ., delivered the Judgment of the Court.

Cases Referred to-

1. ***Attorney-General v. Richard Jackson Phiri, (1988/1989) ZR 121;***
2. ***Annard Chibuye v. Zambia Airways Corporation Ltd, (1981) ZR 4;***
3. ***Nkhata and Four Others v. Attorney-General, (1966) ZR 124; and***
4. ***Khalid Mohamed v. Attorney-General, (1982) ZR 49.***

This is an appeal against the judgment of the High Court dated 18th April, 2011, in a matter instituted by the Appellant against the Respondent alleging unfair and/or wrongful dismissal. The matter was commenced by way of a writ of summons, accompanied by a statement of claim.

According to the statement of claim, and the Appellant's own testimony in the court below, the Appellant was employed by the Respondent, as a Dispatcher, on 4th June, 2007. His case against the Respondent was that on 2nd March, 2009, he was suspended from performing his duties pending investigations into allegations that he was involved in the theft of the Respondent's fuel from one of its tankers. The said theft occurred on 15th February, 2009. That the Respondent subsequently charged him with dishonest conduct and conspiracy to defraud the company, while the state police also arrested and instituted criminal proceedings against him on similar charges.

The Appellant's main defence to the disciplinary charges was that he was not on duty at the time of the alleged theft as he was attending a workshop in Lusaka to which the Respondent had sent him. He, therefore, claimed that he was unfairly and/or wrongfully dismissed.

In response to the Appellant's action, the Respondent denied the allegation that it unfairly and/or wrongfully dismissed him. It called two witnesses whose evidence was essentially that the Appellant was dismissed after a disciplinary hearing in which he was found guilty of "conspiracy to defraud or remove company property without authority" and "dishonest conduct (as evidenced)", contrary to clause 10.12 (11) and 10.12 (24), respectively, of the Respondent's Human Resource Policy and Administration Manual.

That all the necessary disciplinary procedures, contained in the Respondent's Disciplinary Code, were followed before the Appellant's employment was terminated.

On the evidence before him, the learned trial Judge found that the Respondent complied with all the relevant clauses of the disciplinary code before dismissing the Appellant. That, therefore, there was no unfairness or wrongdoing on the part of the Respondent. He refused to review the facts relating to the charges that the Appellant faced before the disciplinary committee or to substitute his own opinion as to whether the said Committee was right or wrong in dismissing the Appellant. In his view, he had no powers to do that. Consequently, he dismissed the Appellant's case with costs to the Respondent.

Dissatisfied with the learned trial Judge's judgment, the Appellant has appealed to this Court on the following grounds:

1. **the learned trial Judge erred in law and in fact when he held that there was no unfairness or wrongdoing on the part of the Respondent and that all procedures were followed without putting into consideration the fact that:**

i) **the Appellant was not accorded a chance to cross-examine the Respondent's sole witness at the disciplinary hearing;**

ii) the Appellant was not represented by a representative of his choice at the disciplinary hearing; and

iii) the charges leveled against the Appellant were so grave in nature and as such the Respondent ought to have strictly followed the provisions under clause 10.08 and 10.10 of the Respondent's Disciplinary and Grievance Code, which provisions were not strictly abided by;

2. the learned trial Judge erred in law and in fact when he declined to review the facts relating to the charges leveled against the Appellant or to adjudicate as to whether the Respondent's decision was right or wrong notwithstanding the fact that there was no evidence whatsoever in support of the charges leveled against the Appellant by the Respondent as the only basis for the charges was that the Appellant was facing criminal charges in the subordinate court; and

3. the learned trial Judge erred in law and in fact when he awarded costs of the action to the Respondent against the Appellant without putting into consideration the impecunious standing of the Appellant who is unemployed.

In support of the foregoing grounds of appeal, Counsel for the Appellant, Mr. Kasuba, filed written heads of argument. On ground one, he submitted that the learned trial Judge misdirected himself by not taking into consideration the procedure laid down in the Respondent's letter of notice of disciplinary hearing, which is at page 69 of the record of appeal. That, therefore, the trial court erred when it held that there was no unfairness and/or wrongdoing on the part of the Respondent when it terminated the Appellant's employment.

Mr. Kasuba further contended that considering the fact that the charges against the Appellant were serious, it was mandatory for the Respondent to comply with clauses 10.08 and 10.10 of the Disciplinary Code. That, in addition, since the charges against the Appellant were solely hinged on the fact that the Appellant had been arrested by the state police, the Respondent should have waited for the outcome of the Appellant's criminal trial before deciding whether or not to dismiss him.

With regard to ground two, Counsel argued that the learned trial Judge misdirected himself when he declined to review the facts relating to the charges leveled against the Appellant or to adjudicate as to whether the Respondent's decision was right or wrong. That the fact that the Appellant was later acquitted by the subordinate court showed that there was no evidence to support the

Respondent's decision to dismiss him. Counsel cited our decision in the ***Richard Jackson Phiri Case***[1], to buttress his arguments.

On ground three, Mr. Kasuba submitted that the learned trial Judge misdirected himself when he awarded costs against the Appellant without taking into account the fact that he was impecunious. Although Counsel conceded that the award of costs was in the discretion of the court, he argued that the discretion was required to be exercised judiciously.

In response to submissions advanced on behalf of the Appellant, Counsel for the Respondent, Mr. Lungu, filed written heads of argument. On ground one, Mr. Lungu argued that this ground should fail for two reasons. Firstly, that it was premised on findings of fact alone and not law. Secondly, and in the alternative, he submitted that should we find that ground one is properly before us, we should still dismiss that ground because the trial court was on firm ground when it found that the Respondent complied with its disciplinary procedures before dismissing the Appellant.

With regard to ground two, Mr. Lungu argued that the learned trial Judge properly directed himself when he refused to review the facts relating to the charges leveled against the Appellant. That the trial Judge's role was limited to determining whether the Respondent's disciplinary proceedings complied with its disciplinary code and whether the disciplinary committee exercised its powers

properly. To buttress these arguments, Counsel relied on this Court's decision in the ***Richard Jackson Phiri Case***[1].

On the Appellant's argument that the learned trial Judge should have held his dismissal wrongful since it was founded on the criminal case for which he was subsequently acquitted, Mr. Lungu submitted that the acquittal of the Appellant in the criminal case had no bearing on the civil matter before the learned trial Judge. To reinforce this argument, Counsel referred us to the case of ***Annard Chibuye v. Zambia Airways Corporation Ltd***[2].

Coming to ground three, Counsel was of the view that the trial court was correct when it awarded costs to the Respondent. That it is trite law that a successful litigant is always entitled to costs unless it is shown that he is guilty of improper conduct in the manner he prosecuted his claim.

We have considered the evidence on record, the judgment appealed against and the submissions by Counsel for both parties. In this judgment, we will deal with the three grounds of appeal seriatim.

On ground one, we accept Mr. Lungu's submission that this ground attacks the learned trial Judge's findings of fact. We do not agree with Mr. Kasuba's contention that, in finding that there was no unfairness or wrongdoing on the part of the Respondent, the

learned trial Judge did not take into account the three issues, which Counsel has outlined in ground one. A study of the learned trial Judge's judgment shows that he found, as a fact, that there was no evidence from the Appellant that he had asked to cross-examine his accusers and that such request had been turned down by DW2's panel that heard the disciplinary matter. That there was no suggestion by the Appellant that he had been denied an opportunity for his representative to attend the disciplinary hearing.

On the argument that clauses 10.08 and 10.10 of the Respondent's code of conduct were contravened by the Respondent, the learned trial Judge found that the Respondent complied with the two clauses. That, in his testimony, the Appellant conceded that clause 10.08.3 did not require him to be informed about investigations being carried out by his supervisor against him. That it was not in every case that a panel should be set up as provided under clause 10.08.6. In relation to clause 10.10, that it was not mandatory for the Respondent to only take disciplinary action against him after the criminal case he was facing before the subordinate court had been concluded.

Clearly, the trial court adequately decided on the issues, which the Appellant claims were not taken into consideration. In our considered view, the learned trial Judge's findings of fact were properly grounded on the evidence on record. We do not, therefore, see any valid legal basis for reversing the said findings. In so

holding, we affirm our decision in ***Nkhata and Four Others v. Attorney General***[3], where we said that:

> ***"a trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:***
>
> ***(a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept;***
>
> ***(b) in assessing and evaluating the evidence the Judge had taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account;***
>
> ***(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or***
>
> ***(d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted was not credible, as for instance, where those***

witnesses have on some collateral matter deliberately given an untrue answer.

In our view, the Appellant has not demonstrated to us any of the grounds we established in the ***Nkhata Case***[3]. We, therefore, hold that we cannot interfere with the learned trial Judge's findings of fact.

Accordingly, ground one must fail.

Coming to ground two, we are of the considered opinion that the resolution of this ground depends on the application of the principles we settled in the ***Richard Jackson Phiri Case***[1]. In that case, we laid down two elements that must be proved before a decision of a disciplinary committee can be considered to have been validly made. These are (a) whether the disciplinary committee had power to intervene, that is, whether the Committee had valid disciplinary powers; and (b) if those powers existed, whether they were validly exercised.

In the instant case, it is common ground that the Respondent had valid disciplinary powers over the Appellant. The only question, therefore, is whether the said powers were validly exercised by the Respondent. The burden of proving that the disciplinary powers were not validly exercised, rested entirely on the Appellant since, as per ***Khalid Mohamed v. Attorney-General Case***[4], it is trite law

that "**a plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.**"

We concur with the learned trial Judge that in accordance with this Court's decision in the ***Richard Jackson Phiri Case***[1], he had no jurisdiction to sit as a court of appeal, from the decision of the disciplinary committee, to review its proceedings or to inquire into whether its decision was fair or unfair. We do not, however, agree with his holding that he had no power to review the facts relating to the charges that were leveled against the Appellant. In our view, while the learned trial Judge had no power to review the merits of the decision of the disciplinary committee, he had jurisdiction to ascertain whether facts existed to justify the disciplinary measure taken by the Respondent against the Appellant. We said in the ***Richard Jackson Phiri Case***[1], that-

> **"We agree that once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges leveled in disciplinary proceedings, injustice would be visited upon**

the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures."

Applying our decision in the ***Richard Jackson Phiri Case***[1], we hold that the learned trial Judge was required to satisfy himself that a bedrock of facts existed, before the disciplinary committee, to justify the Committee's decision to dismiss the Appellant.

Notwithstanding the fact that the learned trial Judge did not decide on the factual basis for the Respondent's disciplinary action, our study of the evidence on record reveals that there was, in fact, evidence before him to establish that a substratum of facts existed to support the disciplinary committee's decision to dismiss the Appellant. This can be seen from the testimonies of DW1 and DW2, which establish that the Respondent received a report that some people had been caught stealing fuel from one of its tankers. That although the Appellant was not physically present at the scene of the theft, he was ascertained to have been the mastermind of the offence. That he was established to have connived with the person who was controlling the GEOTAB, in order to facilitate the diversion of the tanker truck. That the Appellant knew some of the people that were caught decanting fuel from the Respondent's tanker and he had met them before the date of the theft. That in addition to the

police report, which implicated the Appellant, the Respondent carried out its own investigations.

As for Mr. Kasuba's submission that the Respondent's decision to dismiss the Appellant was not valid because he was in Lusaka at the time the fuel was stolen, it is our view that this contention is misplaced. This is so because the Respondent's disciplinary charges did not allege that the Appellant was physically present at the scene where the fuel was allegedly stolen but that he was the mastermind of the theft.

With regard to Mr. Kasuba's argument that since the Appellant was acquitted of the criminal matter, by the subordinate court, he should have *ipso facto* been found innocent by the disciplinary committee, we are of the firm opinion that this contention goes against well settled principles of law. In ***Annard Chibuye v. Zambia Airways Corporation Ltd***[2], we held that **"a judgment passed in a criminal trial cannot be referred to and taken note of in a civil trial regardless of whether the criminal trial resulted in a conviction or in an acquittal."**

For the foregoing reasons, we hold that the Respondent's disciplinary committee validly exercised its powers when it dismissed the Appellant.

Ground two, therefore, must equally fail.

Coming to ground three which relates to the award of costs, we agree with Counsel for the Appellant that the award of costs is in the discretion of the court. In the instant case, taking into account the fact that the Appellant is unemployed, we are of the view that this is a proper case for us to order each party to bear their own costs.

Accordingly, ground three succeeds. We order each party to bear their own costs both in this Court and in the court below.

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L. P. Chibesakunda
ACTING CHIEF JUSTICE

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M. S. Mwanamwambwa
SUPREME COURT JUDGE

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E. N. C. Muyovwe
SUPREME COURT JUDGE