IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 132/2007**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHARLES KANGWA **APPELLANT**

AND

SHADE CONTROL **RESPONDENT**

CORAM: Chibesakunda, Chitengi, Mwanamwambwa, J.J.S.

On the 13th of October, 2009 and 18th October, 2013

For the Appellant: In person

For the Respondent: No appearance

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Barclays Bank Zambia Ltd V. Zambia Union of Financial and Allied Workers Union (2007) ZR 106**
2. **Roland Leon Norton V. Nicholas Lostrom (2010) ZR, 358,**

Legislation referred to:

1. **The Industrial Relations Act, Cap 269 of the laws of Zambia, Sections 85(5), 97.**
2. **The Employment Act, Cap 268 of the laws of Zambia, Sections 25 and 26A.**
3. **The Industrial Relations Court Rules, Rule 42.**

When we heard this appeal, Hon. Mr Justice Peter Chitengi, was part of the Court. He retired and later passed away. Therefore, this Judgment is by the majority.

This is an appeal against the Judgment of the Industrial Relations Court, dated the 27th of July, 2007. By that Judgment, the lower Court dismissed the Appellant's Complaint against the Respondent on grounds that the Appellant had failed to establish his case on a balance of probabilities.

The brief facts of the matter are that the Appellant was employed verbally by the Respondent Company on the 14th of May, 1997, as a Security Guard. The Appellant's duties were to secure the Respondents premises, located along Lusaka's Cairo Road and included securing the Respondent's motor vehicles which usually parked outside the said premises. On the 21st of September, 2006, there was a riot in the town centre of Lusaka. The rioters started approaching the Respondent's premises and upon seeing this, the Appellant ran away from his work position and hid at a place, about

10 metres away from the Respondent's premises. Afterwards, he went back to the Respondents premises and he was served with a suspension letter and charged with gross negligence of duty. The Appellant explained that he ran away from work because he was afraid of the rioters. He had been given four written warnings before this incident. He was dismissed from employment for gross negligence of duty. He was paid terminal benefits and leave days in accordance with the collective agreement signed by the Union that represented him and the Respondent.

On the 5th of October, 2006, the Appellant took out an action in the Industrial Relations Court against the Respondent, for;

1. **Reinstatement;**
2. **Terminal benefits;**
3. **Leave days;**
4. **Compensation for loss of employment;**
5. **Costs;**
6. **Interest on the amount found due; and**
7. **Any other relief the Court may deem fit.**

After evaluating the evidence on both sides, the trial Court made the following findings of fact:

1. **That the Complainant was employed by the Respondent as a Security Guard on 14th May, 1997;**
2. **That the Complainant's duties were to secure the Respondent's property which included motor vehicles which were usually parked outside the Respondent's premises;**

3. That on the 21st September, 2006, there were riots in the town centre which spread towards the Respondent's premises;
4. That arising out of riots, the Complaint left his work position unguarded;
5. That on the same day the Complaint was suspended from duty for leaving his work position unguarded and that he orally exculpated himself; and
6. That on 27th September, 2006, the Complainant was dismissed from employment and paid his terminal benefits in accordance with the Collective Agreement in force.

Dissatisfied with the decision, the Appellant has appealed to this Court. There are three (3) grounds of appeal. These read as follows:

1. The Learned Judge erred by dismissing the overwhelming evidence presented before the Court by the Complainants, which is filed in the record of appeal and preferred to take sides with the respondent who never appeared at the Court during the hearing of the case.
2. The Learned Judge erred by also overlooking the law as demanded by the Complainant in the statement which the Respondent violated i.e. Section 26A of the Employment Act and also Section 25(1) of the Employment Act Cap 268 of the Laws of Zambia.
3. The Learned Judge erred in his Judgment by not passing Judgment in default as the Respondents did not attend the Court hearing at any time.

No written submissions where filed in this matter. When the matter came up for hearing, the Appellant relied on the documents on the Record of Appeal. There was no appearance on behalf of the Respondents.

We have looked at Ground one. The learned trial Judge found as a fact that there were riots on the 21st of September, 2006, and that as a result of the riot; the Appellant left his work place unguarded. He was charged with gross negligence of duty and the explanation he gave was that he ran away from the rioters. This evidence was not disputed by the Appellant. In fact, this evidence came from the Appellant as he was the only witness in the lower Court. We are satisfied that the lower Court considered this evidence and found that the Respondent was justified for the action it took. The above evidence is the same as the evidence given by the Respondent in its answer in the lower Court. Nothing was in contention on the facts. However, the lower Court found that the Appellant was negligent in carrying out his duties. Further, the Appellant was given an opportunity to be heard and he gave his reasons. He ran away from his station of work for fear of a riot. The Respondent employed him for purposes of guarding the premises but instead of guarding the premises, he decided to ran away and hide some 10 metres away from the Respondents premises.

The evidence on record shows that some of the Respondent's motor vehicles used to park outside the gate. We would have expected the Appellant to ensure that all the Respondents property is secured inside the premises, the gate locked, with everybody, including the Appellant, inside the Respondent's premises.

However, the Appellant decided to abandon his work station and the Respondents premises to hide some 10 metres away from the premises. We agree with the lower Court that this was negligence on the part of the Appellant. Further, the findings of fact by the lower Court are supported by the evidence on record. The Appellant was given an opportunity to be heard and was paid his leave and terminal benefits. We find no merit on this ground of appeal and dismiss it.

Coming to ground two, we have looked at section **26A and section 25(1) of the Employment Act, Cap 268 of the laws of Zambia.** Section 26A provides that:

> **"An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."**

The evidence on record shows that the Appellant was given an opportunity to be heard. After he was given his letter of suspension, he was asked to explain why he left the Respondent's premises unguarded. He explained that he ran away from the premises as he was scared of the rioters. This evidence came from the Appellant himself. The fact that he was asked to explain why he ran away amounts to being given an opportunity to be heard. We therefore, do not fault the Learned trial Judge for the finding he made. In fact,

this part of ground two is an appeal against points of fact. The law is well settled that a party to proceedings in the Industrial Relations Court can only appeal on points of law or on points of mixed law and fact. **See: Section 97 of the Industrial Relations Act, Cap 269 of the laws of Zambia.**

As we have already said above, the lower Court's finding that the Appellant was given an opportunity to be heard, is supported by the evidence on record.

We now come to the second issue under this ground. Section 25(1) of the Employment Act provides that:

> **"(1) Wherever an employer shall dismiss an employee summarily and without due notice or payment of wages in lieu of notice, such employer shall, within four days of such dismissal, deliver to a labour officer in the District in which the employee was working, a written report of the circumstances leading to, and the reasons for, such dismissal.**
>
> **Provided that a report delivered through the post shall be deemed to have been delivered to a labour officer within four days of such dismissal if the envelope within which it is contained bears a postmark dated not later than three days following such dismissal.**
>
> **(2) A labour officer shall cause to be entered in a register maintained for the purpose, details of every report delivered to him for the purposes of subsection (1)".**

We note from the record that the issues raised under Section 25(1) of the Employment Act were not raised in the Court below. It is a well settled principle of law that a party to an action cannot

bring new evidence in the appellate Court. This Court held in the case of **Barclays Bank Zambia Ltd V. Zambia Union of Financial and Allied Workers Union (1),** that:

> **"Where an issue was not raised in the court below it is not competent for any party to raise it in the appellate court."**

In another case of **Roland Leon Norton V. Nicholas Lostrom (2),** this Court held that:

> **"matters which are neither pleaded nor raised in the Court below, cannot be raised on appeal because doing so would be ambushing the other side."**

This Court can only consider an appeal based on the evidence from the lower Court. Matters that where not brought up or pleaded in the lower Court cannot be brought on appeal. In any case, this Court has no evidence on the new issues which the Appellant wants to bring up. We dismiss this ground of appeal for the above reasons.

Ground three relates to the lower Court's failure to enter Judgment in default. The Industrial Relations Act has no provision for Judgment in default. **Rule 42 of the Industrial Relations Court Rules** provides that:

> **"If a respondent to any proceedings fails to deliver an answer within the time appointed under these Rules, or if any party to proceedings fails to comply with an order or direction of the Court, the Court may order that he be debarred from taking any further part in those proceedings (except for the purpose of being heard on any application for discovery or recovery of documents, or the answering of interrogatories or a statement of facts, or the payment of costs or expenses by him), or may make such other order as the court thinks just."**

The above rule shows that there is provision for debarring a Respondent from taking any further part in the proceedings. The evidence on record shows that the Appellant had made an application under this Rule on the 15th of November, 2006. He however withdrew the application on the 5th of December, 2006. We are surprised that the Appellant has brought up this issue in this Court when he withdrew the application on his own. Further, the Industrial relations Court is a Court of substantial justice. This is provided for under **Section 85(5) of the Industrial Relations Act**. This section provides that:

> **"The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."**

Allowing the strict rules of procedure would take away the whole purpose of the Industrial Relations Court being a Court of substantial justice. We dismiss this ground of appeal as well.

Looking at all these issues, we find no merit in this appeal and dismiss it. We order that each party bears its own costs.

.....

L. P. Chibesakunda

AG./CHIEF JUSTICE

.....

M. S. Mwanamwambwa

SUPREME COURT JUDGE