IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 40/2008**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

CAROLYNE MAPHENDUKA **RESPONDENT**

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

On the 1st of December, 2009 and 19th November, 2013

For the Appellant: Mr. Chilundu Principal Legal Officer, ZESCO.

For the Respondent: Mr J. Kabuka of Messrs J Kabuka and Co.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Zambia Revenue Authority V. Hitech Trading Company Limited (2001) Z.R 17.**
2. **The Attorney-General V. Marcus Kampumba Achiume (1983) Z.R. 1 (SC).**
3. **Zulu V. Avondale Housing Project (1982) Z.R. 172.**

4. **Bank of Zambia V. Kasonde (1995-97) Z.R. 238.**

Legislation referred to:

1. **The Supreme Court Act, Cap 25 of the laws of Zambia, Section 25 and Rule 72.**
2. **The Supreme Court Practice Rules, 1999, Order 59/10/11.**
3. **The Industrial Relations Act, Cap 269 of the laws of Zambia, Section 97.**
4. **The Law Reform (Miscellaneous Provisions Act) Cap 74 of the Laws of Zambia, Section 4.**

When we heard this appeal, Hon. Mr Justice D. K. Chirwa was part of the Court. He has since retired. Therefore, this Judgment is by the majority.

This is an appeal against the Judgment of the Industrial Relations Court, dated the 28th of November, 2007. By that Judgment, the trial Court awarded the Respondent compensation to the extent of 12 months salaries at the current rate of a Chief Accountant in the Appellant's employment. The lower Court also awarded the Respondent interest at the commercial lending rate approved by the Bank of Zambia with effect from the date of dismissal until Judgment and thereafter at 8% until final payment.

The brief facts of the case are that the Respondent was working for the Appellant company as Chief Accountant for the Copperbelt Region. On the 6th of May, 2003, the Respondent was charged with the following offences:

1. **Dishonest conduct in breach of clause 20 of the Disciplinary and Grievance Procedure Code for Management staff;**
2. **Refusal to obey instructions in breach of clause 18 of the Disciplinary and Grievance Procedure Code for management staff;**
3. **Gross Negligence in breach of clause 13 of the Disciplinary and Grievance Procedure Code for management staff; and**
4. **Incompetence in breach of clause 7 of the Disciplinary and Grievance Procedure Code for management staff.**

The particulars of offences were that the Respondent, between April, 2002 and March, 2003, was involved in mal-practices. The mal-practices were stated as follows:

1. **Splitting purchase orders in order for you to manipulate your authorization limits to your advantage;**
2. **Purchasing of excess stock (thereby tying cash in stock) in the division stores when you were fully aware that materials where already in excess;**
3. **Allowing a situation where you were passing payments to purchase materials for use in the Copperbelt Division from companies owned by the following officers Charles Matomola Mboma, Jennipher N. Simbaya, Bernadette Nthalasha, Abraham Phiri, Harris Sipanje, Godwin Chilufya, Green Siwale and yourself.**

The Appellant set up a Disciplinary Committee and a Disciplinary hearing was held. The Respondent was found guilty of the charge involving 'dishonest conduct' contrary to clause 20 of the Disciplinary and Grievance Procedure code for management staff. She was dismissed from employment on the 26th of June, 2003. She appealed to the Managing Director of the Appellant Company but her appeal was unsuccessful.

On the 23rd of January, 2004, the Respondent commenced an action in the Industrial Relations Court against the Appellant, for;

1. **Reinstatement with full benefits or alternatively she be treated as having been declared redundant;**
2. **Damages for loss of employment, mental anguish and torture;**
3. **Interest on any award made and costs; and**
4. **Any other additional relief which the Court may deem fit.**

The evidence on record, in relation to the Respondent in the Court below was that she was charged for the above offences after working for the Appellant for 20 years. That the Respondent stated, in relation to the charge of failure to obey instructions, that the instructions referred to relate to the Memorandum dated 13th June, 2002 faxed to the Copperbelt Region on the 29th of April, 2003 which was 20 days after her suspension. She stated that the Memorandum came from the office of the Director- Finance, appealing to all officers to discontinue the practice of splitting of

orders. The evidence on record shows that the Respondent was not aware of the Memorandum because it was faxed to the Copperbelt region after she had left employment. There is evidence that the practice of splitting orders was common in the Appellant Company.

In relation to the charge of incompetence, the record indicates that at no time did the Respondent's employer bring it to her attention that she was incompetent. All appraisals relating to the Respondents show that her supervisor was satisfied with her work. The evidence on record shows that the Respondent had never been charged for any offence prior to 2003. The evidence on record also shows that there were no purchasing procedures in the Appellant Company. There is evidence that the Respondent never owned a company that was doing business with the Appellant. The Respondent sometimes collected cheques to deliver to creditors because of the critical nature of the business like Hotels and fuel supplies with BP.

The evidence on record from the Appellant is that the controlling officer for the Copperbelt Division is the Division Manager whose authority must be obtained for any purchase. That the Chief Accountant's role is to confirm budget provision for items to be purchased while the Division Manager is the overall authority.

That the circular dated 13th June, 2002, on split orders was faxed to the Copperbelt in April, 2003.

After evaluating the evidence and considering the submissions on both sides, the learned trial Court made the following finding:

> **"it is therefore our view that to a large extent, the vice was able to thrive due to lack of diligence on the part of the Complainant and other key players in the process. We however, do not think that this position qualifies the Complainant to come within the definition of dishonest as we do not see any of the elements of the offence in her conduct in this regard. This element is accordingly not proved.**
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> **The second limb of the offence is that of exceeding the authorisation limits and wish to note that this element has not been specifically alleged against the Complainant save as it flows from the first limb of splitting orders. What has been said is that by splitting orders, the Complainant was in fact effectively circumventing her authorization limit which was limited to amounts not exceeding five million kwacha. This assertion is however, interesting because RW1 said that the controlling officer at the Division is the Division Manager meaning that any such limits were placed on the controlling officer and not the Complainant. However, assuming that the limit was actually imposed on the Complainant as Chief Accountant, we still find that in the absence of evidence to prove that the splitting of orders was instigated by the Complainant in order to avoid the limit, we are unable to accept this limb of the offence as well.**
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> **The third and final limb is about allowing companies owned by the Respondent's employees to supply materials to the Respondent. There is ample evidence that some named employees of the Respondent had interest in some companies that are doing business with the Respondent but none to show that the Respondent had interest in any of the companies. We further find no evidence to show that the complainant was aware of the interest some of the employees had in some of the companies that did business with the Respondent. We further find no express exclusion of such companies from**

doing business with the Respondent. Other than the fact that the Complainant used to personally deliver cheques to some suppliers as conceded by her, there is no evidence to suggest that she did so because she knew that some employees had interest in those companies. It is further not been shown to us how the Complainant allowed any company to supply materials to the Respondent because she knew that some employees had interest in those companies...."

Dissatisfied with the decision, the Appellant has appealed to this Court. There are two (2) grounds of appeal. These read as follows:

Ground one:

That the Learned trial Judge erred in law and fact when he held that there was no evidence to show that the Respondent was not aware of Companies owned by employees dealing with the Appellant contrary to evidence on record.

Ground two:

That the Learned trial Judge having found that the Complainant lacked diligence in her performance of her work, should not have exonerated her from the offence of dishonest conduct.

On behalf of the Appellant, Mr Chilundu submitted in Ground one that there is statement on page 4 of the supplementary bundle of documents, given by one Jennipher Simbaya on 17th September, 2003, where she stated as follows:

> **"I remember very well on 3 occasions my husband offering to assist the Chief Accountant. On 2 occasions materials were bought from Johannesburg and supplied to ZESCO using my husband's Company, Ziola Enterprises and the money, together with the profit, was given to her though I cannot recall the items which were supplied."**

He argued that the trial Court failed to consider the above evidence which is clear that the Respondent was aware that some employees had some connections with certain suppliers of the Appellant. He stated that this evidence was not challenged at trial. That therefore, the finding by the lower Court that the Respondent had no interest in the companies that were doing business with the Appellant is contrary to the evidence on record.

He submitted further that the finding by the lower Court that:

"it has further not been shown to us how the Complainant allowed any company to supply materials to the Respondent because she knew that some employees had interest in those companies," was also contrary to the evidence of Jennipher Simbaya referred to above.

On behalf of the Respondent, Mr Kabuka submitted that the Appellant's arguments seek to impeach the findings of fact of the trial Court based on an extra judicial statement attributed to Jennipher Simbaya. He stated that Jennipher Simbaya was not

called as a witness and her statement was not tendered in evidence during the trial on the merits in the Court below. He submitted that the attempt by the Appellant to introduce such evidence on appeal offends against **Section 25 and Rule 72 of the Supreme Court Act, Cap 25 of the laws of Zambia**, as read with **Order 59/10/11, of the Rules of the Supreme Court of England, 1999.** He added that arguments at the Bar, however spirited, cannot be a substitute for evidence on record. He cited **Zambia Revenue Authority V. Hitech Trading Company Limited** [1] in support of his argument.

We have looked at the submissions by both Counsel and the evidence on record. The evidence relied upon by the Learned Counsel for the Appellant is alleged to have been given by one Jennipher Simbaya. However, upon an examination of the record, we note that Jennipher Simbaya was not called as a witness in the Court below. Her statement was not produced in Court. Therefore, her evidence was not considered in the Court below because it was not available to Court for consideration. We do not see why evidence that has not been tested should be taken into account in an Appellate Court like this one. It is trite law that fresh evidence cannot be introduced in an Appellate Court, except in instances provided for under **section 25 of the Supreme Court, Cap 25 of the Laws of Zambia**, because the other side will not have had an opportunity to test the evidence through cross examination. Appellate Courts are reluctant to allow the admission of fresh

evidence in order to bring some certainty in litigation. When we look at the totality of the evidence, we do not blame the Learned trial Judge for coming up with the findings that he did.

The other issue argued by the Appellant's Counsel relates to findings of fact. The principle on reversing findings of fact is 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. **See**: **The Attorney-General v. Marcus Kampumba Achiume** [2].

findings he made are not perverse; they are consistent with the evidence on record.

Further, we note that this Ground of Appeal is challenging the lower Court's findings 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.**

On the reasons we have given above, we dismiss this Ground of Appeal.

In Ground two, the Learned Counsel for the Appellant submitted that there is evidence on page 29 of the supplementary record of Appeal containing a Memorandum to all managers and the Chief Accountant, dated 13th June, 2002 stating the following:

> **"it has been observed by Management that there is a tendancy of splitting orders when procuring materials or services... Please be advised that this practice defeats the whole purpose of putting in place authorization limits which were done in order to control and monitor costs..."**

He argued that the above evidence does not seem to have been considered by the Learned trial Judge when he stated that:

> **"from the evidence on record, there is no dispute that incidences of order splitting were recorded at the Copperbelt Division of the Respondent where the Complainant was the Chief Accountant. There is also no dispute that the Complainant had a crucial role in all purchases made by the Division which role..."**

He submitted that one of the key responsibilities of the Respondent was to enforce expenditure limits and regulations. That the Respondent did not enforce expenditure limits in order to allow employees of the Appellant to benefit. That this falls clearly in the ambit of dishonest conduct. He stated that the lower Court failed to take the evidence that it was not only the responsibilities of the Divisional Manager to control limits but also the Respondent as submitted on her principal accountabilities on her job description.

He submitted that in light of the above, the Learned trial Court, properly directing itself, could not have arrived at the finding it did.

On behalf of the Respondent, Mr Kabuka submitted that the Appellant in the Court below called one witness. This witness testified as RW1. He argued that RW1's evidence did not implicate the Respondent. He stated that the evidence of RW1 showed that the Complainant was showing responsibility in her work. He argued

that the finding by the trial Court that the Respondent may have lacked alertness and diligence but was not dishonest was not perverse as would entitle an appellate Court to interfere. He cited **Zulu V. Avondale Housing Project (3).** He argued that the Appellant being a public institution should strictly adhere to the principles of fair play and this Court has disapproved dismissals based on unproven or unsubstantiated allegations of dishonesty. He cited **Bank of Zambia V. Kasonde (4)** in support of his argument.

We have considered the submissions and the evidence on record regarding this ground. The evidence on record shows that the Memorandum on splitting of orders was faxed to the Copperbelt Division way after the Respondent had been suspended from work. This evidence is not in dispute and was confirmed by the Appellant witness, RW1, in the Court below. Further, RW1, told the lower Court that the Controlling officer at the Copperbelt Division was the Division Manager. That the Chief Accountant was only responsible for ensuring that there is a budget provision for the item to be purchased. The evidence also shows that the Respondent was aware of the practice of splitting orders. However, we agree with the Learned trial Judge that the fact that the Respondent was aware of the splitting orders does not entail dishonesty on her part. It shows that she was aware of the practice but did not do anything to stop it. We agree with the lower Court that this shows lack of diligence

on the part of the Respondent. Lack of diligence and dishonesty are two different things which cannot be substituted for the other.

We agree with the submission by the Respondent Counsel that the case of **Bank of Zambia V. Kasonde** applies in this case. In that case, this Court held that a dismissal based on dishonesty must be on proven grounds. In the case before us, we find that the charge of dishonesty has not been proved against the Respondent. We therefore find no merit in this Ground of appeal and we dismiss it as well.

We now come to the issue of damages. The lower court ordered compensation to the extent of 12 months salaries at the current rate of a Chief Accountant in the Appellant's employment. Interest was to be paid at the current commercial lending rate approved by the Bank of Zambia with effect from the date of dismissal until Judgment and thereafter at 8% until final payment. However, **Section 4 of the Law Reform (Miscellaneous Provisions Act) Cap 74 of the Laws of Zambia** provides that interest shall be paid between the date when the cause of action arose and the date of the judgment. Therefore, we uphold the lower Court's award of compensation. However, we order that interest will be at the current commercial lending rate approved by the Bank of Zambia with effect

from the date of the cause of action until Judgment and thereafter, a 8% until final payment.

We award costs to the Respondent, to be taxed in default of agreement.

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L. P. Chibesakunda

AG/ CHIEF JUSTICE

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M. S. Mwanamwambwa

SUPREME COURT JUDGE