

IN THE SUPREME COURT FOR ZAMBIA

Appeal No. 60/2014

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

METAL FABRICATORS OF ZAMBIA

APPELLANT

AND

ABLE BANDA

RESPONDENT

Coram: Muyovwe, Malila, and Kabuka, JJJS

On 6th September, 2016 and 12th September, 2016

For the Appellant: Mr. J. Msoni, Messrs J.B. Sakala and
Company

For the Respondent: Mr. D. Tambulukani, Messrs Derrick Mulenga
and Company

J U D G M E N T

Muyovwe, JS delivered the Judgment of the Court

Cases referred to:

1. **Nkhata and Four Others vs. The Attorney General (1966) Z.R. 124**
2. **Wilson Masauso Zulu vs. Avondale Housing Project Ltd (1982) Z.R. 172**
3. **Attorney General vs. Achiume (1983) Z.R. 1**

Legislation referred to:

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

This is an appeal against the Judgment of the Industrial Relations Court sitting at Ndola which found that the respondent was unfairly dismissed and deemed the respondent as having been placed on early retirement.

In the lower court the respondent claimed the following reliefs:

- (a) an order that he be reinstated or be deemed to have been reinstated in his position as purchasing officer and placed on early retirement;**
- (b) damages for unfair or wrongful dismissal from employment and**
- (c) an order that the appellant pays him all monies due and payable to him had he not been unfairly or wrongfully dismissed him from employment.**

According to the lower court, the following facts were not in dispute: the respondent was employed by the appellant on 6th March, 1989. At the time of his dismissal, the respondent held the position of Purchasing Officer stationed at Mufulira. The respondent's duties were to, *inter alia*, procure copper cathodes, a raw material for the appellant's manufacturing plant at Luanshya and arrange for transportation of the copper cathodes to Luanshya. Procurement of copper cathodes depended on information relayed

to him from Luanshya regarding the stocks available via e-mail or fax. After procuring the copper cathodes and securing transport, the respondent would inform Luanshya office via e-mail, fax, cell or telephone on the truck(s) laden with stated weights and quantities of copper cathodes as well as information regarding the time of departure of the trucks from Mufulira and when they would arrive in Luanshya to enable those at Luanshya to prepare for offloading. The respondent would receive confirmation upon the arrival of the consignment in Luanshya failure to which he would make a follow-up.

On the 16th August, 2009 and 20th September, 2009 the respondent dispatched truckloads of copper cathodes to Luanshya from Mopani Copper Mines Plc at Mufulira.

In November, 2009, through a whistle blower, it was discovered that two truckloads out of the trucks dispatched on 16th August 2009 and 20th September, 2009 were not received at Luanshya, yet documentation showed that the trucks were received and payment for the copper cathodes and transportation had been made. As a result, several people including employees of the appellant were arrested and prosecuted. The respondent and one

Major Chabu testified as witnesses for the prosecution. Afterwards, the respondent and Major Chabu were charged with disciplinary offences. Major Chabu was initially dismissed but he appealed and he was reprieved. He was subsequently discharged from employment and was paid his benefits.

As for the respondent, on 25th March, 2010 he was charged with the offence of gross negligence of duty resulting in loss of company property and was suspended from work. The respondent was subsequently summarily dismissed from employment on the ground that he failed to follow laid down procedures and that he released the copper without the consent of senior officials. As a result of the dismissal, the respondent, who had served 21 years in employment, lost his benefits. In sum, these were the facts before the lower court.

After hearing both parties, the lower court narrowed the issues for determination to the following: whether there was evidence to support the offence of gross negligence of duty resulting in loss of company property preferred against the respondent; whether the respondent was treated unfairly when other employees charged under similar circumstances had their contracts merely

terminated and were paid their service benefits; and whether the appellant failed to follow the disciplinary code in dealing with the respondent.

The lower court, after considering the evidence, found that the respondent's superiors were aware that the copper had been dispatched and there was confirmation that the copper was delivered on both dates hence the payment made to the supplier (Mopani) and the transporter. The lower court also found it strange that potential witnesses like Mr. Mbewe and Machaya, who had confirmed receipt of the copper, were not called to testify. The lower court found that it was unfair to put blame on the respondent when he had dispatched the copper and informed the appellant's employees of the dispatch. The lower court took the view that, the appellant's employees should have exercised due diligence in the whole process instead of putting blame entirely on the respondent over the loss. The lower court further found that there was no evidence to show that the respondent was to blame for the loss and the charge of gross negligence was not supported by evidence.

The lower court found difficulty in assessing whether the respondent was treated unfairly in relation to his fellow employees who faced disciplinary action over the loss of copper due to lack of documentation.

In relation to the disciplinary process undertaken by the appellant, the lower court found the manner the appellant dealt with the respondent proper.

After considering the evidence before it, the lower court concluded that the respondent's dismissal was unfair.

On examining the reliefs sought by the respondent, the lower court noted that he, *inter alia*, prayed that he be deemed to have been placed on early retirement. The lower court addressed its mind to the conditions of service for Non-represented Employees and found that Clause 18 provided for compensation for loss of employment in different circumstances including early retirement. The lower court took the view that deeming the respondent to have been separated by early retirement would sufficiently compensate him for the unfair dismissal and it so ordered.

In addition, in line with his conditions of service, the respondent was also awarded 15 months salary plus one month for

each completed year of service. The respondent was also awarded interest at 12% from the date of the Notice of Complaint until 20th August, 2012 when the judgment ought to have been delivered. Further, interest was awarded at 6% per annum from the date of actual judgment, that is, 11th December, 2013 until final payment and costs.

On appeal, the appellant has advanced two grounds of appeal. In the first ground, the appellant contends that the lower court was wrong to hold that there was no evidence to support the offence of gross negligence and yet the respondent dispatched the copper cathodes to Luanshya without authority from his supervisors. In ground two, it is contended that the lower court erred in law and fact when it deemed the respondent to have been separated by early retirement and by also awarding him 15 months plus one month pay per each completed year of service.

At the hearing, Mr. Msoni, learned Counsel for the appellant, relied on his filed heads of argument.

In support of ground one, it was submitted, *inter alia*, that the trial court found that the appellant's superiors were aware of the dispatch of copper on 14th August, 2009 and 20th September, 2009.

Counsel submitted that this holding contradicted the evidence of the respondent who admitted that he did not inform his immediate supervisor regarding the delivery of copper on the 16th August, 2009; that the respondent did not also advise his supervisor regarding the truck which broke down after loading in Mufulira. It was argued that the respondent had all the facilities such as telephone, fax, a computer etc. at his disposal but he did not inform his supervisors as regards the dispatch and delivery of the copper in issue. Counsel pointed out that the evidence of Edith Mbala who was the respondent's supervisor also confirmed that the respondent communicated to her that no copper was expected at Zamefa on Sunday the 16th August, 2009. According to Counsel, Edith Mbala also explained how the respondent sent a copper consignment on the 20th September, 2009 to Zamefa when in fact there was no need for the consignment and that as a result of the negligence of the respondent, copper valued at K3 billion (old currency) was lost.

In support of ground two, it was noted that the court below awarded the complainant 15 months salary plus 1 month's pay per each completed year of service and this translated into 36 months

payment in that the complainant worked for the appellant company for 21 years. The submission was that the deeming of the respondent to have been put on early retirement was not supported by any authorities in this jurisdiction. We were urged to uphold the judgment of the court below and examine the award as the same was excessive taking into account the decisions and the law expounded by this court.

Mr. Tambulukani, learned Counsel for the respondent, also relied on his filed heads of argument.

In response to ground one, Counsel referred us to the paragraph in the judgment where the lower court stated that:

"If some among those employees were dishonest and decided to help themselves to the copper, the complainant can hardly be blamed unless there is evidence, which there is not, that the complainant was complicit in the disappearance of the copper. In our considered view, we do not agree that there was evidence to support the offence of gross negligence charged against the complainant. We, therefore, find that the complainant was unfairly dismissed from employment."

The gist of Counsel's response to ground one is mainly that this ground cannot stand as it is attacking the lower court's findings of fact. In support of this argument, Counsel relied, *inter alia*, on the cases of **Nkhata and Four Others vs. The Attorney General**,¹ **Wilson Masauso Zulu vs. Avondale Housing Project Ltd**² and **Attorney General vs. Achiume**³ in which we have pronounced ourselves that an appellate court cannot reverse findings of fact unless the findings are perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. According to Mr. Tambulukani, the findings of fact by the trial court reveal that the trial court took full advantage of the documentary evidence tendered before it as well as the testimony of the witnesses called by the parties and cannot be faulted.

In response to ground two, it was contended, *inter alia*, that the appellant's action of dismissing the respondent after he testified against fellow employees in the criminal case was in bad faith. Counsel defended the decision of the lower court to deem the respondent as having been separated by early retirement and for awarding him 15 months pay plus one month's salary for each completed year of service on the ground that the dismissal was

unfair. Further, that early retirement was provided for under clause 18 of the conditions of service for non-represented employees. In conclusion, Counsel submitted that the ground has no merit and the whole appeal should be dismissed.

We have considered the evidence in the court below, the judgment of the court and the arguments advanced by the parties before us. We will deal with the two grounds together as the two are dependent on each other. The issue before us, looking at the two grounds of appeal, is whether on the evidence adduced before the lower court, there was sufficient ground to dismiss the respondent for gross negligence.

On one hand, the appellant argued that the lower court was wrong to hold that the appellant's superiors were aware of the dispatch of copper on both dates but on the other hand the respondent argued that this was a finding of fact which cannot be reversed by this court. We are alive to the authorities cited by Counsel for the respondent in which we have pronounced ourselves on the circumstances under which we can reverse findings of fact by a lower court.

In this case, with regard to the dispatch of 14th August, 2009 the evidence on record is clear that the respondent had loaded a truck but it broke down after it left Mopani. This was the reason why the truck arrived on Sunday 16th August, 2009 despite the fact that the respondent had informed the recipients by email that no copper was to be delivered on Sunday the 16th August, 2009. This explanation was accepted by the trial court which found that his superiors knew about the break-down and the rescheduling of the delivery.

Coming to the consignment of 20th September, 2009 the lower court accepted that communication was made to Mr. Machaya and Mr. Mbewe and they confirmed that the copper was received. Further, the lower court accepted the evidence of the respondent's witness Major Chabu that he is the one who opened the gate to allow the trucks into the premises on the material day although the delivery was unexpected as far as he was concerned. Major Chabu confirmed that Edith Mbala the respondent's supervisor was present at the time. We also agree with the lower court that had the appellant's employees exercised due diligence they would also have confirmed whether the trucks had arrived or not. The

issue of lack of authority was only raised after the whistle blower blew the whistle. Before that, the appellant did not raise the issue with the respondent because it was not an issue. It is not in dispute that the appellant even paid the supplier and the transporter and had they involved all the stakeholders they would have discovered the real culprits rather than heap all blame on the respondent alone. We do not find any plausible reason to disturb the finding of the lower court that there was insufficient evidence to support the offence of gross negligence levelled against the respondent.

The appellant has questioned the basis of the lower court's decision to deem the respondent as having been separated by early retirement. The answer lies in Section 85A of the Industrial and Labour Relations Act which provides that:

85A. Where the Court finds that the complaint or application presented to it is justified and reasonable, the Court shall grant such remedy as it considers just and equitable and may-

- (a) award the complainant or applicant damages or compensation for loss of employment;**
- (b) make an order for reinstatement, re-employment or re-engagement;**
- (c) deem the complainant or applicant as retired,**

retrenched or redundant; or

(d) make any other order or award as the court may consider fit in the circumstances of the case.

Section 85A subsection (c) of the Act gave the lower court the latitude to deem the respondent as having been separated by early retirement with effect from the date of his dismissal. Therefore, the cry by the appellant that the award is excessive cannot stand. The lower court was on firm ground and cannot be faulted.

We find no merit in the two grounds of appeal and we dismiss the appeal with costs to the respondent to be taxed in default of agreement.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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M. MALILA, SC
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE