

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO.63/2014
SCZ/8/39/2014

BETWEEN:

CEPHAS MWALE

APPELLANT

AND

PETAUKE DISTRICT COUNCIL
LOCAL GOVERNMENT SERVICE COMMISSION

1ST RESPONDENT
2ND RESPONDENT

CORAM: Mambilima CJ, and Kaoma and Kajimanga JJS

On: 4th October, 2016 and ... October, 2016

For the Appellant: In Person

For the 1st Respondent: N/A

For the 2nd respondent: Ms. M. Kalima Mukwento – Assistant
Senior State Advocate

JUDGMENT

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **The Attorney General v Richard Jackson Phiri (1988/1989) Z.R. 121**
2. **Zambia Electricity Supply Corporation Ltd v Muyambango (2006) Z.R. 22**
3. **Pearce v Foster (1886) 17 Q.B.D 536**
4. **Stockdale v The Woodpecker Inn Ltd and another (1967) Z.R. 164**
5. **Zambia National Provident Fund v Chirwa (1986) Z.R. 70**

Legislation referred to:

1. **Employment (Amendment) Act No. 15 of 2007, section 26 A**
2. **Local Government (Amendment) Act No. 6 of 2010, ss. 91 and 93(a) and (b)**
3. **Local Government Service Regulations, 1996, regs. 38, 41(1) and 41(8)**

4. Local Government Act, Cap 281, ss. 99(1)(c) and 99(2)

This appeal is against a judgment of the Industrial Relations Court (IRC) dismissing the appellant's complaint. In the said complaint, the appellant had alleged that he was unfairly dismissed by the 1st respondent on 16th September, 2004 which dismissal was quashed by the 2nd respondent Appeals Board; that on 14th September, 2012 the 2nd respondent unfairly dismissed him from employment; and that both dismissals were unfair and unlawful. Therefore, he claimed for an order for payment of monthly salaries from September, 2004 to September, 2012, leave days, long service bonus, LASF contribution or alternatively, reinstatement with full benefits, costs and any other relief.

The appellant testified that he was employed by the 1st respondent in 1989 as a revenue collector. In 2004 he was operating from Chikalaba Check Point in Petauke District collecting grain levy when he attended to a man of Asian origin who came with a small truck loaded with maize. The man told him that he had no money to pay for the levy and asked for 3 days in which to sell the maize in Lusaka and promised to pay the levy upon his return.

The man asked for a receipt to clear the truck and he gave it to him. The amount indicated on the receipt was K560,000.00 (unrebased).

Later, Chief Officers from the 1st respondent went to the checkpoint with the receipt the appellant had issued to the Indian man and found that the duplicate in the Receipt Book showed a different name of Kenneth Daka and an amount of K6,000.00. When asked about the differences in the particulars on the receipts, he explained that he did not know what to do because the Indian man had asked for 3 days before he could pay the money. According to the appellant, the following day the Indian man gave him K575,000.00 which he cashed at the office. However he was given a dismissal letter that he used to steal money from the check point.

The appellant further testified that he appealed to the Local Government Appeals Board which quashed the decision and he was reinstated. The 1st respondent then appealed to the High Court but after one year he received a letter inviting him to appear before the Local Government Service Commission. In September, 2012 he was told that the decision of the 1st respondent to dismiss him was

upheld. The appellant felt that he was unfairly and unlawfully treated because he told the respondent the truth and paid back the money. He also alleged that he was not reinstated as directed by the Appeals Board nor given benefits.

The trial court identified the main issue for decision as whether the 1st respondent unlawfully dismissed the appellant from employment. In determining this issue, the trial court first referred to section 26 A of the Employment (Amendment) Act No. 15 of 2007 and was satisfied that the provisions of the law were complied with as the appellant knew the nature of the charges against him, and he was afforded an opportunity to render his exculpatory letter and fashion out a meaningful defence on the charges against him. As such the trial court concluded that the 1st respondent endeavoured to act in accordance with the principles of natural justice, and so, the appellant's dismissal was not unlawful.

Secondly, the trial court was cognizant of the fact that it was not required to sit as a court of appeal to review the decision of the 1st respondent or to inquire whether the decision was fair or reasonable and that it ought to have regard only to the question

whether the employer had valid disciplinary powers and, if so, whether such powers were validly exercised as held in the cases of **The Attorney General v Richard Jackson Phiri**¹ and **Zambia Electricity Supply Corporation v Lubasi Muyambango**².

On the evidence before it, the court concluded that the 1st respondent exercised the disciplinary powers properly in that there were in fact facts established to support the disciplinary measures taken against the appellant. The court found that the appellant grossly misconducted himself when he issued original receipt No. 1204 in the sum of K560,000 to Mr. Riaz without collecting the money and altering the amount and name on the duplicate receipt, which amounted to dishonest and fraudulent receipting of the respondent's funds; and that the appellant conducted himself in a manner inconsistent with the faithful discharge of his duties to the respondent and therefore, his employers were on firm ground in dismissing him from employment.

The trial court also relied on the cases of **Pearce v Foster**³ where it was held that if the servant does anything which is incompatible with the due or faithful discharge of his duty to his

master, the latter has a right to dismiss him and that it is not necessary for the employers to prove that they have in fact suffered by reason of the servant's conduct and that it would be sufficient if the employers might suffer seriously if they kept the servant in their employ and **Stockdale v The Woodpecker Inn Limited and another**⁴ which reaffirmed the same principle.

The trial court rejected the appellant's claim that he was unfairly dismissed because he readily confessed his dishonest conduct when he was confronted by his supervisors and later cashed the money given to him by Mr. Riaz. The court found the appellant's conduct to be immoral and so gross that he could not reasonably be trusted by his employers. Hence, the court dismissed the appellant's claims. The appellant now appeals on three grounds framed in the Memorandum of Appeal as follows:

- 1. The trial judge erred in law and fact when it did not take into consideration the fact that the appellant was re-instated on account that the 1st respondent did not find him guilty of the alleged misconduct.**
- 2. The trial court erred in law when it did not take into consideration the fact that the 1st respondent's appeal to the 2nd respondent was wrongly done.**

3. The trial court erred in law and fact when it gave judgment in favour of the respondents who did not defend the matter despite being served with documents.

In support of the appeal, the appellant has relied entirely on his written heads of argument. First and foremost, we agree with Ms. Kalima Mukwento that the grounds of appeal and the appellant's arguments are incoherent. We have also observed that the first ground of appeal in the heads of argument, attacking the trial court, for stating that the appellant's conduct was immoral and so gross that he could not reasonably be trusted by his employers, is totally different from ground 1 as framed in the Memorandum of Appeal. Since there is nothing on the record to show that ground 1 was amended, we decline to deal with the first ground argued by the appellant in his heads of argument.

In addition, the second ground of appeal as stated by the appellant in his heads of argument is not a ground of appeal at all. It is simply a citation of the case of **Zambia Electricity Supply Corporation Limited v Muyambango**². Therefore, we shall deal with ground 2 in the Memorandum of Appeal.

What we can scrape together from the appellant's heads of argument is that the documents at pages 28, 29 and 30 of the record of appeal do not support the finding of the trial court and that despite the respondents being served with court documents from the application to lodge complaint out of time up to judgment, they never responded as properly observed by the trial court.

The appellant admits that after he was confronted on allegations of theft by servant and fraud, the employer effected the procedure outlined in the Disciplinary Procedure Code; he was suspended from employment and asked to exculpate himself of which he did and which led to his dismissal. However, he appealed to the Local Government Appeals Board which heard the appeal and reinstated him. Therefore, the trial court misdirected itself by not taking into account that procedure was duly followed.

The appellant further submits that the 1st respondent was dissatisfied with the decision of the Local Government Appeals Board and also followed laid down procedure and filed a Notice of Appeal to the High Court of Zambia and he was served with the Notice of Appeal. However, the trial court misdirected itself in not

considering that there was an appeal by the respondents but considered the document at page 53 of the record.

In respect of ground 2, the appellant contends that the trial court misconceived the law and fact regarding disciplinary powers and was ignorant of the case of **The Attorney General v Richard Jackson Phiri**¹ in holding that disciplinary powers were properly excised and yet failed to acknowledge that when the respondent appealed to the High Court, nothing was brought to court on whether the appeal was concluded or whether there was direction that the matter goes to the Local Government Service Commission. We have been urged to overturn the decision of the trial court and to allow the appeal.

The 1st respondent did not file heads of argument or attend the hearing of the appeal. In response to the appeal, the 2nd respondent has also relied entirely on its written heads of argument. Ms. Kalima Mukwento has proceeded to respond to the first ground of appeal argued in the heads of argument. However, for the reason stated earlier in our judgment, we find it unnecessary to discuss this ground or to analyse any arguments relating to this ground.

In respect of ground 2, Ms. Kalima Mukwento has submitted that this ground is unclear and incoherent; that the appellant's dismissal was not wrongful; and that the reinstatement was made by the Appeals Board and not the 2nd respondent which dismissed the appellant pursuant to section 93 (b) of the Local Government (Amendment) Act No. 6 of 2010 which empowers the Commission to discipline any principal officer or officer of a Council.

Ms. Kalima Mukwento further submits that the trial court applied the decisions in the cases of **The Attorney General v Phiri**¹ and **Zambia Electricity Supply Corporation Limited v Muyambango**², and that the appellant had committed a dismissible offence which he did not dispute but accepted through a confession and apology over his illegal and wrongful actions.

In conclusion, counsel contends that the appellant has lamentably failed to demonstrate that the trial court misconceived the law and fact at page J7 regarding disciplinary powers after the court relied on the above mentioned cases; and that he who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable, which the appellant failed to do.

We have considered the evidence on record, the arguments by the parties and the judgment appealed against with regard to the three grounds of appeal. We propose to deal with all the three grounds at once. It is common cause that the appellant was found guilty of the alleged misconduct by his employer and that he was dismissed on 16th September, 2004 because of that misconduct.

In the court below the appellant admitted having written different details on the original receipt and on the duplicate. The dismissal letter which is on record confirmed this fact and also clearly indicated that the appellant was dismissed for theft and fraudulent receipting of Council funds. In substance, the appellant admitted having committed the misconduct alleged.

As we have said earlier in our judgment, the trial court found that the appellant grossly misconducted himself when he issued the original receipt to Mr. Riaz without collecting the money and altering the amount and name on the duplicate receipt, which amounted to dishonest and fraudulent receipting of the 1st respondent's funds. The trial court also found that the appellant conducted himself in a manner inconsistent with the faithful

discharge of his duties to the respondent and so, his employers were on firm ground in dismissing him from employment.

Therefore, it is very misleading for the appellant to allege that the respondent reinstated him on account that the respondent did not find him guilty of the alleged misconduct. Besides, neither of the respondents reinstated the appellant. The appellant appealed against his dismissal to the Eastern Province Local Government Appeals Board pursuant to regulation 41 (1) of the Local Government Service Regulations, 1996 and it was the Appeals Board which reinstated him.

Under section 99 (1) (c) of the Local Government Act, Cap 281, the Appeals Board was empowered to hear an appeal on disciplinary matters from officers and employees of a council and in terms of section 99 (2) the decision of the Appeals Board was binding upon the council and the officer or employee, subject to an appeal to a court of competent jurisdiction. And in terms of regulation 41 (8) of the Local Government Service Regulations, 1996 the Appeals Board was empowered, after considering the case, to make such decision as it considered just.

Now, in his letter of appeal to the Appeals Board, which is also on record, the appellant did not dispute the ground for his dismissal by the 1st respondent. In his grounds of appeal he merely pleaded for leniency stating that he was a first offender, he had worked for the council for 16 years with a clean record, and he was a family man, with 3 school going children and 8 dependants.

The letter dated 23rd May, 2010 from the Appeals Board to the appellant shows that the Appeals Board considered the appellant's appeal at its meeting held on 13th May, 2010 and quashed the decision of the 1st respondent to dismiss the appellant and reinstated him with full benefits from the time of dismissal. But no reasons were given by the Appeals Board for its decision.

Of course, about 21st June, 2010 the 1st respondent appealed to the High Court pursuant to regulation 38 of the Local Government Service Regulations. While we agree with the appellant that there is nothing on the record to show what became of that appeal, the effect of the appeal in terms of section 99 (2) of the Local Government Act, was that the decision of the Appeals Board was not binding on the 1st respondent. Thus, the fact that the trial court

did not say anything about the appellant's reinstatement does not affect the final decision reached by the trial court.

Moreover, the documents on record show that the matter went before the Local Government Service Commission, which on 14th September, 2012 upheld the decision of the 1st respondent to dismiss the appellant for theft and fraudulent receipting of Council funds with effect from 16th September, 2004. We agree again with the appellant that the record is silent on how the matter went before the Commission when there was an appeal to the High Court. However, we take judicial notice of the fact that Part X of the Local Government Act was amended by repeal of Part X and the substitution thereof of a new Part X by Act No. 6 of 2010 which in section 90 (1) established the Local Government Service Commission. The amendment came into effect on 12th April, 2010.

Interestingly, at the time the Appeals Board quashed the decision of the 1st respondent to dismiss the appellant and reinstated him, the Appeals Boards had already been replaced with the Commission and there is nothing in Act No. 6 of 2010 to indicate that the Appeals Boards still had power to hear and

determine appeals on disciplinary matters from officers and employees of a council. The view we take is that the Appeals Board had no jurisdiction to make the disputed decision.

The Local Government Service Commission is mandated under section 91 of Act No. 6 of 2010 to exercise responsibility in respect of all matters relating to principal officers and officers of the councils; and to do all such things as are necessary or incidental to the regulation of service with councils. And in terms of section 93 (b) of the said Act, the Commission has power to discipline any principal officer or officer of a council. And it was pursuant to this provision that the appellant was dismissed by the 2nd respondent.

In the circumstances of this case, even if the respondents had failed to comply with any laid down disciplinary or appeal procedure, and even if the respondents did not defend the proceedings in the court below, the appellant would still have no claim on the ground of wrongful, unlawful or unfair dismissal because he committed an offence for which dismissal was the appropriate punishment. This is clearly explained in the cases of

Zambia Electricity Supply Corporation Limited v Muyambango²
and **Zambia National Provident Fund v Chirwa⁵**.

Further, the appellant has admitted that the 1st respondent duly followed the procedure when dismissing him. Therefore, the only question for determination before the trial court was whether there were facts established to support the dismissal. In the case of **The Attorney General v Richard Jackson Phiri¹** which the trial court properly applied, we put the matter as follows:

“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 fact 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.”

In our view, the trial court properly directed its mind to the issues raised by the appellant in his complaint and rightly found that the appellant conducted himself in a manner inconsistent with the faithful discharge of his duties and that the respondents were justified in dismissing him. The rule in **Pearce v Foster³** which was applied by the High Court in the case of **Stockdale v The**

Woodpecker Inn Limited and Another⁴ to the effect that if the servant does anything which is incompatible with the due or faithful discharge of his duty to his master, the latter is entitled to dismiss him was also properly applied by the trial court.

Consequently, we uphold the trial court's decision and dismiss this appeal for lack of merit. However, we order each party to bear own costs of this appeal.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE