

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO.94/2015

HOLDEN AT NDOLA

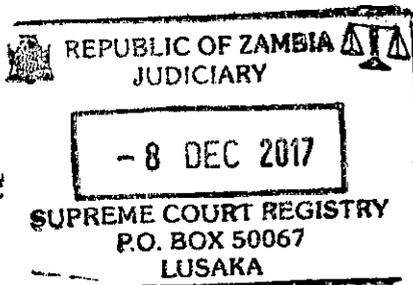
(Civil Jurisdiction)

BETWEEN:

KONKOLA COPPER MINES PLC

AND

HENDRIX MULENGA CHILESHE



APPELLANT

RESPONDENT

Coram : Wood, Malila and Mutuna, JJS

On 5th December 2017 and 8th December 2017

For the Appellant : Mr. T. Chibeleka of Messrs ECB Legal Practitioners

For the Respondent : Mr. P. Kasonde of Messrs Patrick Kasonde and Co.

J U D G M E N T

Mutuna JS., delivered the Judgment of the court.

Cases referred to:

- 1) Zambia Electricity Supply Corporation Limited v Muyambango (2006) ZR 22
- 2) The Attorney General v Phiri (1988/1989) ZR 121
- 3) Barclays Bank (Z) Limited v Chola and Mubanga (1995/97) ZR 212
- 4) Rainward Mubanga v Zambia Tanzania Road Services Limited (1987) ZR 43

- 5) **National Breweries Limited v Philip Mwenya SCZ judgment No. 28 of 2002**
- 6) **Daka v ZANACO (2012) ZR 8 volume 3**

Works referred to:

- 1) **Employment Law in Zambia: Revised edition by UNZA Press, 2011 by W.S. Mwenda, Cases and Materials**

The Respondent was employed by the Appellant as projects engineer and was, at the material time, a team leader for a project team which the Appellant had assigned the task of supervising the construction of Phase II works at Nampundwe High School (the project). The Appellant undertook these works as part of its corporate social responsibility to the community in the area where it carried out its mining operations.

The project team reported to the engineering manager of the Appellant.

During the life of the project, although the Respondent and his team were required to frequently be at the site,

they rarely visited the site. On 27th June 2012, the chief executive officer (CEO) of the Appellant, manager corporate social responsibility and head engineering visited the project to check on the progress of the works. During the visit, the area councillor of Nampundwe complained to the CEO of the poor workmanship of the works done on the project. This prompted the CEO to constitute an audit team, comprising the Respondent, head engineering, Nampundwe, chief surveyor, Nampundwe, project engineer mechanical and safety health and environment, Nampundwe, to visit the site and investigate the complaint. After the audit was conducted, a report was submitted to the Appellant on 30th June 2012 which concluded that the workmanship on the finishing was poor. Following from this on 14th February 2013, the Appellant's acting head capital projects charged the Respondent with the offence of negligence of duty. The charge letter required the

Respondent to exculpate himself within forty eight hours by showing cause why disciplinary action should not be taken against him.

On 15th February 2013, the Respondent submitted his exculpatory letter which the Appellant's project engineer found to be unsatisfactory and informed the Respondent accordingly. The matter was escalated to the disciplinary committee which heard the case and decided to summarily dismiss the Respondent by letter dated 4th March 2013. The Respondent appealed against the dismissal at two appellate levels but his appeals were dismissed thereby confirming his summary dismissal. This prompted the Respondent to commence an action before the Industrial Relations Court on the following grounds.

- 1) That on 21st February 2013 the Respondent was charged with the alleged offence of negligence but the particular of the offence were not availed to him;**

- 2) **The Respondent exculpated himself and following a disciplinary hearing he was dismissed from employment on 15th May 2013 on the basis of the same unsubstantiated charge of negligence;**
- 3) **The charge against the Respondent and the entire disciplinary process embarked on had no relevance to the Appellant's disciplinary code of conduct and, therefore, the Respondent's dismissal from employment was unlawful, wrongful and null and void *ab initio*;**
- 4) **The unsubstantiated charge of negligence preferred against the Respondent and the subsequent dismissal from employment were malicious as the circumstances of the case did not justify the acts.**

The Respondent sought the following reliefs:

- 1) **Reinstatement to the original position held and payment of all the moneys due to the Respondent;**
- 2) **Alternatively, payment of the Respondent's terminal and other benefits for the period he worked for the Appellant;**
- 3) **Damages for wrongful and/or unlawful dismissal from employment;**
- 4) **Damages for loss of employment whereof the Respondent was employed on permanent and pensionable conditions;**
- 5) **Any other relief the court may deem fit;**
- 6) **Interest on all moneys found due and owing;**
- 7) **Costs of and incidental to the proceedings.**

At the trial the evidence lead by the Respondent was that contained in the affidavit in support of notice of complaint and *viva voce* evidence. The gist of the evidence was that although he and his team were supposed to

supervise the works on the project regularly, the Appellant did not facilitate his travel to Nampundwe as often as was required. Additionally, his request to be relocated to Nampundwe during the subsistence of the project was turned down because the Appellant regarded the Nampundwe project as a social corporate responsibility gesture which was not the core business of the Appellant, and thus not deserving the attention the Respondent sought to give it.

The evidence also revealed that the charge leveled against the Respondent by the Appellant was vague, because it did not specifically refer to any evidence of alleged negligence by the Respondent. Further, it did not specify the particular conditions of service nor the clause in the disciplinary code it related to. It revealed, in this regard, that although the charge against the Respondent was based on the audit report, there were no finding of

negligence on the part of the Respondent made in the report. To the contrary, the report revealed that there was ninety eight percent compliance with the specifications of the works by the contractor.

The evidence ended by revealing that the Respondent initiated the authority to pay the contractor on various invoices on instructions by his superior, the manager engineering. That in doing so he stamped the invoices as being "*certified correct and approved for payment.*"

The evidence by the Appellant was led by one Matyola Ndulo and one Rodney Katongo Mutale the Appellant's senior legal counsel and human capital management business partner, respectively. The former was contained in the affidavit in opposition and it revealed that the Respondent was lawfully and legally dismissed from employment for negligence of duty as supervisor of the project because he failed to ensure that the contractor

executed the works according to the required standard. The negligence resulted in very shoddy works by the contractor.

The *viva voce* evidence revealed that prior to the Respondent being charged, the Appellant had received a complaint regarding the poor workmanship in the construction at the project. The Respondent was charged with the offence of negligence of duty because he was the supervisor of the works.

The evidence also confirmed that prior to the Respondent being summarily dismissed, a disciplinary committee meeting had been held which found that a case had been established against him. Following the meeting of the disciplinary committee the Respondent appealed and was unsuccessful. Consequently, his summary dismissal was upheld.

The evidence went on to reveal that according to the Appellant's disciplinary code, the offence of negligence is not dismissible at first instance. It also revealed that the particulars of what constitute negligence are not contained in the disciplinary code and that there is need to particularize an offence in a charge sheet so that the person charged is clearly informed of the charges against him to enable him adequately put up a defence. Further, the charge against the Respondent was based on the audit report and that he responded to the charge in the exculpatory letter.

The evidence went on to reveal that the works the contractor was undertaking were based on a Bill of Quantities (BOQ) and that the Appellant had authorized the contractor to deviate from the BOQ in execution of certain works, as such, the resulting works cannot be referred to as shoddy.

In regard to on the spot supervision of the works, the evidence revealed that the Respondent was stationed at the Appellant's Chingola office whilst the works were conducted in Nampundwe. The Appellant was, in this regard, supposed to facilitate the Respondent's movement to and from Nampundwe, but, during the course of the audit it became apparent that the Respondent had on a number of occasions demanded to go to the site but his superior refused to facilitate the visit.

After the court considered the evidence and final argument by counsel it found that the Appellant's disciplinary code does not provide for the offence of negligence of duty. To this end it surmised that that was why the Appellant omitted to make reference to a particular provision in the disciplinary code for the said offence. The provision of the disciplinary code which the Appellant sought to rely upon in the final submissions relates to

unsatisfactory work performance which in the court's view did not include negligence of duty.

The court also agreed with the Respondent's contention that the charge as contained in the charge letter lacked sufficient particulars and details of the offence to enable him adequately defend himself. It found that the fact, in and of itself, that the Respondent was given an opportunity to exculpate himself does not cure the defect of want of particulars and details in the charge letter. According to the court, this defect was emphasized by the fact that the Appellant's witness conceded that it was important to put particulars and details in a charge letter because they assist in establishing the case against a particular employee and alert him or her of the charge leveled against him to enable him to prepare his defence.

The court went on to find that although the basis of the charge against the Respondent was the audit report

which indicated ninety eight percent compliance with the BOQ by the contractor, the hearing of the second appeal found that the ninety eight percent compliance comprised shoddy works. This, the court held, was an issue that was not specified in the charge letter. It also found that the issue of the Respondent having certified invoices for payments due to the contractor were only raised at the appeal stage.

On the allegation of negligence, the court found that the evidence presented revealed that the Respondent was not negligent because on a number of occasions he expressed concerns to his immediate supervisor on the need to closely supervise the contractor and consequences of failure to do so. The court found further that the audit report itself acknowledged the poor workmanship in respect of the wall finishing to be due to the lack of close supervision of the contractor by the project team because

they were rarely at the site. It also observed that the report recommended that there was need for the project team to be availed an opportunity to inspect and closely supervise the project at every stage to ensure compliance with the required standards.

As a result of the foregoing, the court held that the Respondent did not commit any act that warranted his dismissal and that although the Appellant did have the requisite disciplinary power, the same was not exercised properly. It relied upon the cases of **Zambia Electricity Supply Corporation Limited v Muyambango**¹ and **The Attorney General v Phiri**² in making the foregoing finding. It also found that the disciplinary bodies disregarded the following facts: the few times the Respondent visited the site he wrote reports pointing out defects in the workmanship and suggested remedial action; the BOQ did not specify the type of wall finishing the contractor was

supposed to adhere to; and, there was no close supervision of the works by the project team.

The court concluded by awarding the Respondent damages equal to twelve months salary based on the need to do substantial justice and in recognition of scarcity of job opportunities in the mining industry. Regard was had to our decision in the case of **Barclays Bank (Z) Limited v Chola and Mubanga**³. It also awarded him accrued leave pay and full pension benefits and ordered payment of interest on all the monetary awards. The court, however, declined to order the Respondent's reinstatement on the ground that there were no special circumstances warranting such an order. Reliance was placed on our decision in the case of **Rainward Mubanga v Zambia Tanzania Road Services Limited**⁴.

This is the decision from which this appeal arises and has aggrieved the Appellant prompting it to launch this appeal on six grounds as follows:

- 1) **The court below erred and misdirected itself in law and fact when it held that the offence of negligence of duty is not provided for in the Appellant's disciplinary code notwithstanding the fact that the Appellant cited the clause in the disciplinary code which the offence relates to;**
- 2) **The court below erred and misdirected itself in law by holding that the charge did not specify the particulars of the offence notwithstanding the evidence which revealed that the Respondent understood the charge and responded to it;**
- 3) **The court below erred and misdirected itself at law by failing to properly evaluate the evidence; exceeded its jurisdiction by holding that the ninety eight percent of the construction works that were completed had shoddy works; and that the certification of invoices for payments made to the contractor by the Respondent for works that had not been done only arose at appeal stage and did not form part of the charge letter;**
- 4) **The court below erred at law and in fact and exceeded its jurisdiction when it held that it cannot be said that it is undisputed that the Respondent was negligent in the supervision of the contractor and that he was not negligent in discharging his duties;**
- 5) **The court below erred at law and in fact when it held that the exercise of power by the Appellant was bad because there was no substratum of facts to support it;**
- 6) **The court below erred and misdirected itself in law and fact and exceeded its jurisdiction and functions by acting as an appellate**

tribunal in that it not only reviewed the decisions of the Appellant but indirectly altering its disciplinary code and procedure.

Prior to the hearing, counsel for the parties filed heads of argument which they relied upon at the hearing and augmented with *viva voce* arguments.

We must state from the outset that we had difficulty segregating the arguments in relation to the six individual grounds of appeal advanced by the Appellant's in the heads of argument because they do not state where arguments for each ground of appeal begins from, save for ground 1. The response by the Respondent was also similar and it is a departure from the usual manner of presenting arguments before this court. The parties are warned that they risked our concluding that only one ground was argued and the other abandoned and are, therefore, reminded to desist from such practice in the future.

In regard to ground 1 of the appeal counsel for the Appellant reproduced the findings made by the court below in its interpretation of clause 2.4.2 (c) of the disciplinary code and cited the clause. He then argued that the clause covers the offence with which the Respondent was charged and that it was a misdirection on the part of the court below to conclude that the addition of the words "*of duty*" to the charge of negligence was a departure from the clause. According to counsel, the offence of negligence as envisaged by clause 2.4.2 (c) relates to the discharge of one's duties and to conclude otherwise as the court below did is perverse and no trial court properly directing itself would have come to such a conclusion. Counsel argued further that the flawed finding of fact made by the court below that the offence of negligence should be described as stated in clause 2.4.2 (c) without addition of the words "*of duty*" is the basis upon which the whole judgment is

anchored. As such, the judgment as a whole cannot stand because its foundation is flawed.

In regard to ground 2, counsel argued that the particulars in the charge letter sufficiently describe the charge because the Respondent responded by way of an exculpatory letter. That there was, as a result, no prejudice suffered by the Respondent.

In regard to grounds 3, 4 and 5 of the appeal counsel began by quoting from the works of W.S. Mwenda, ***Employment Law in Zambia***, that when dealing with wrongful dismissal, the question is not why, but how, the dismissal was effected. The concept has been widely accepted to mean that in considering whether the dismissal is wrongful or not, it is the form to be considered rather than the substance. It was submitted that where a dismissal is done according to the prescribed procedure, no claim for wrongful dismissal should be entertained. This, it

was argued, is in line with our decision in the cases of ***National Breweries Limited v Philip Mwenya***⁶. Counsel took the view that prior to dismissing the Respondent the Appellant complied with its disciplinary procedure by charging the Respondent, giving him an opportunity to exculpate himself and to appear before the disciplinary and appellate committees. In the light of this, the view taken by counsel was that in determining the matter before it the trial court should have asked itself two questions as follows: whether the facts of the case disclosed the offence for which the Respondent was charged; and, whether the Appellant's disciplinary committees properly exercised their powers in deciding to dismiss the Respondent and subsequently upholding the dismissal. According to counsel, the answer to both questions is in the affirmative in view of the facts of the case and, to its credit the court below found as a fact that there was no deviation from the

Appellant's disciplinary code in the procedure adopted by the Appellant.

In regard to ground 6 the contention was that the court below erred by sitting as an appellate tribunal because in arriving at its decision it reviewed the evidence before the disciplinary committee. A plethora of authorities both local and foreign were relied upon which restate the principle that in dismissal matters a trial court should not sit as an appellate tribunal.

In the *viva voce* arguments, counsel for the Appellant, Mr. T. Chibeleka argued that the few visits that the Respondent was permitted to make to the project were sufficient to enable him ensure that the contractor carried out the works to the satisfaction of the Appellant.

We were urged to allow the appeal.

In response, the Respondent reproduced the content of the charge letter and urged us to note that as per the findings made by the court below, it did not mention the charge in the disciplinary code pursuant to which the Respondent was charged. The arguments contended further that it is clear from the clause 2.4.2(6) of the disciplinary code that the offence provided for is negligence and not negligence of duty. The Respondent concluded that the court below cannot be faulted for finding that there is no provision for negligence of duty in the disciplinary code.

The Respondent proceeded to make an extensive review of the evidence in the court below which we have not reproduced because it is not relevant to the determination of the appeal.

In the viva voce arguments, Mr. P. Kasonde restated some of the arguments in the heads of argument. He concluded by urging us to dismiss the appeal.

We have considered the record of appeal and arguments by counsel. The six grounds of appeal raise three issues as follows: did the court below misdirect itself when it found that the offence of negligence of duty is not contained in the Appellant's disciplinary code; was the charge laid against the Respondent sufficiently particularized to afford the Respondent an opportunity to defend himself; and, was there sufficient substratum of facts to support the Appellant's decision to dismiss the Respondent.

The first issue is a fairly simple one. The record of appeal reveals that clause 2.4.2 (c) of the Appellant's disciplinary code provides for offences relating to unsatisfactory work performance. Sub-clause (ii) is entitled "*negligence*" which is defined as the "*failure to exercise proper care and regard to the manner of discharging duty to the extent that tasks have to be repeated or equipment or*

persons are at risk of damage or injury." The sub-clause essentially provides for poor performance of tasks by an employee resulting from a failure to exercise proper care which, in effect, is negligence in the execution of ones duties and can best be referred to as negligence of duty. Such an offence can be described either as negligence or negligence of duty because it relates to one and the same thing. To this extent, there was a misdirection on the part of the court below when it found that there was no provision for the offence of negligence of duty in the Appellant's disciplinary code. Our finding is reinforced by the fact that the allegations leveled against the Respondent in the charge letter related to performance of his duties in the supervision of the contractor. The departure by the Appellant in describing the offence does not in any way redefine the offence or prejudice the Respondent and was, as a result, not a fatal flaw in the disciplinary procedure.

We must, as a consequence of this, find that there is merit in ground 1 of the appeal.

The second issue relates to the particularization of the offence in the charge letter. It is important that we reproduce the contents of the charge letter before we make our determination on the issue. It reads in part as follows:

"... After going through report No.WB2012 - Nchanga O, dated 30/06/2012, you neglected your duties in that you failed to inspect and supervise contractor [LOCHI International Limited] leading to the contractor not adhering to his contractual obligations as stipulated on Purchase Order 200001666. Please exculpate yourself within 48 hours and show reason as to why disciplinary action should not be taken against you ..."

It is clear from this that the particulars of the offence allegedly committed by the Respondent related to his *"failure to inspect and supervise the contractor"* and that it arose from the findings in the audit report. These particulars, are restricted to the alleged failure by the Respondent to be at the site and he addressed them in his exculpatory letter of 15th February 2013. In doing so he

explained the difficulty he had experienced getting his superior to sanction trips to Nampundwe, notwithstanding his having expressed concerns at the need for close supervision of the contractor especially when crucial works such as the footing of the structure was being done.

The particulars of the offence did not set out the effect of the Respondent's alleged failure to inspect and supervise the contractor nor did they refer to his having authorized payments to the contractor by signing invoices for works that were not done properly. He, therefore, did not refer to these issues in his exculpatory letter. It is clear, though, from the notes of the proceedings of the appeal hearings on the record of appeal and the letter of rejection of the appeals that this is what formed the basis of his dismissal. The position we take is that it rendered the dismissal unlawful because the Respondent was not given an opportunity to exculpate himself and prepare a defence on

the said issues which the Appellant's witness conceded did not form part of the particulars of the charge. The witness also stated the need for an offence to be specifically particularized to enable an erring employee to adequately respond to it. In the light of this, the court below was on firm ground when it found that the particulars in the charge were insufficient, as such, ground 2 of the appeal has no merit.

This brings us last of all to the third issue which deals with the existence or otherwise of a substratum of facts warranting the dismissal of the Respondent. Our starting point is to restate what we said in the case of ***Attorney General v Richard Jackson Phiri***²

"(1) 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 infact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same.

(2) The court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or inquire whether its decision was fair or reasonable. The court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers, and if so whether such powers were validly exercised."

It is not in dispute that the procedure adopted by the Appellant in disciplining the Respondent conformed to its disciplinary code. The facts of this case reveal that the Respondent was charged, he exculpated himself, and was given an opportunity to appear and be heard before the disciplinary and appeals committees. The Appellant has, however, contended that it was a misdirection on the part of the court below to find the Respondent's dismissal as being unlawful since there was a substratum of facts which justified his dismissal. Further, the handling of the matter by the court below was akin to it reviewing the decision of the disciplinary and appeals committees.

The main grievance which the Appellant had with the Respondent was his alleged failure to supervise and inspect the works of the contractor. The court below found, and evidence abounds, that this was not a deliberate action on the part of the Respondent but rather that of his superior. We are in agreement with this finding because the evidence of the Appellant's witness in the court below and indeed the audit report, confirm this fact. It follows that the consequences of the lack of such supervision and inspection like the building not conforming to the BOQ cannot be placed at the door of the Respondent. This is quite apart from the fact that these consequences were not particularized in the case against him and that there was an alteration to the BOQ on the wall finishing. We also find that the issue of the Respondent authorizing payments he allegedly ought not to was only raised on appeal and was, as such, wrongly considered by the appellate committee

because it was not contained in the charge letter. The effect is that the committees did not properly exercise their disciplinary powers. These observations we have made demonstrate that there was no substratum of facts to support the decision made by the Appellant to dismiss the Respondent. The court below made these observations which we do not consider as a review of the decision of the disciplinary and appeals committees but rather, an examination of the evidence presented to see if the exercise of the power by the committees was valid in view of the surrounding facts.

The Appellant's predicament is compounded by the fact that the instances warranting dismissal reflected in the disciplinary code do not include negligence. This was confirmed by the Appellant witness in the court below. Clause 2.1.10 of the Appellant's disciplinary code sets out the offences which are dismissible as a first offence and

they include offences relating to absenteeism from work, reporting for work under the influence of alcohol or drugs and unprofessional conduct likely to tarnish the image of the Appellant. The fact that the sanction imposed on the Respondent offended the disciplinary code is another demonstration of improper exercise of disciplinary powers by the Appellant.

The foregoing findings deal with grounds 3, 4, 5 and 6 of the appeal which we find lacking in merit. The net result is that the appeal is doomed to fail and we dismiss it with costs. The same are to be taxed in default of agreement.



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A. M. WOOD
SUPREME COURT JUDGE



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Dr. M. MALILA, SC.
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE