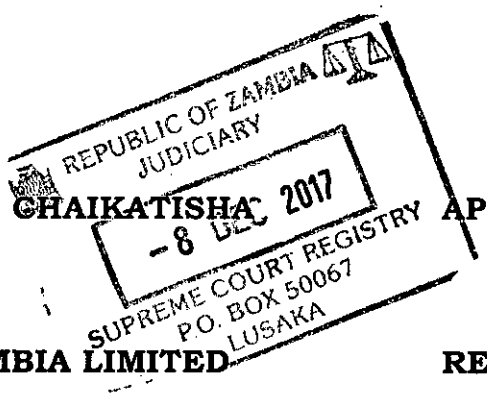
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 95/2015**
HOLDEN AT NDOLA **SCZ/8/110/2015**
(Civil Jurisdiction)



BETWEEN:

PRUDENCE RASHAI CHAIKATISHA **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

Coram: Wood, Malila and Musonda, JJS
on 5th December, 2017 and 8th December, 2017

For the Appellant: Mr. M. Nyirenda, of Kafunda & Co. as agent for Messrs Wright Chambers

For the Respondent: Mr. Nchima Nchito, SC, of Messrs Nchito & Nchito Advocates

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Zambia Airways Corporation Limited -v- Gershom Mubanga**
2. **Francis -v- Municipal Councillors of Kuala Lumpur [1962] 3 ALL ER 633**
3. **The Attorney-General -v- Richard Jackson Phiri**
4. **Nkhata & Others -v- The Attorney General: (1966) Z.R. 124**
5. **Wilson and Clyde Coal Co. Ltd. -v- English (1937) 3 ALL. E.R. 628**
6. **Yotam Manda -v- The People (1988-89) Z.R. 129**
7. **Zambia Electricity Supply Corporation Limited -v- Muyambango: (2006) Z.R. 22**
8. **Samson Katende and Crosby Bernard -v- NFC Mining PLC (2011) Z.R. 112**
9. **Lister -v- Romford K & Cold Storage Co. Limited: (1957) 1 ALL. E.R 125**
10. **Emmanuel Mponda -v- Mwansa Mulenga & 2 Others: Selected Judgment No. 42 of 2017**

Other Works referred to:

1. ***Black Law Dictionary***
2. ***Wood, John Cooper's Outlines of Industrial Law*** **(1972: Butterworths: London), 6th edition,**
3. ***Chitty on Contracts*****, 29th edition**

The appellant in this appeal seeks to impugn a judgment of a High Court judge sitting at Lusaka who had dismissed, with costs, an action which the appellant, then plaintiff, had launched in the court below against the respondent, then defendant, seeking not only to be reinstated in her former job but a motley of liquidated damages of the nature specified in the concluding part of this judgment on account of a variety of grievances which the appellant had conceived and packaged against the respondent.

The background facts and circumstances surrounding the present appeal are of the simplest and were, in the words of the judge below, undisputed.

The appellant was employed by the respondent on 1st September, 2006 as a Bank Teller dedicated to automatic teller machine (ATM) deposits. By a letter dated 28th December, 2006, the appellant was confirmed in her position as indicated above,

following the completion of the applicable probationary period relating to her employment.

Sometime in mid-January, 2007, the appellant was moved to the bulk cash section of the respondent bank where her duties included receiving bulk cash from the bank's customers or clients.

On 13th February, 2007, the appellant received a bulk cash deposit container which was delivered by Mint Master Security Zambia Limited, acting as cash in transit (CIT) agents, on behalf of Bokomo Zambia Limited, a customer of the respondent Bank and which container the appellant duly signed for. At the close of business on that day, the appellant locked away four (4) black bulk cash containers, two (2) white bulk cash containers and one (1) grey bulk cash container in the respondent Bank's strong room in accordance with the Bank's procedures and signed for the lock away. The containers were received by two vault custodians of the respondent who acknowledged receipt of the same. The custodians also signed the lock away record in accordance with the respondent Bank's standard procedures.

On the morning of 14th February, 2007, the appellant withdrew all but one of the four (4) black containers mentioned above and signed for the same. When Bokomo Zambia Limited officials went to the respondent Bank to deposit the contents of the bulk deposit container which had been delivered to the appellant by the CIT agents on 13th February, 2007, it was established that the same had gone missing. As a consequence of this, the respondent paid a cash sum of K27,742,500 to Bokomo Zambia Limited.

On 22nd June, 2007, the appellant was charged with two disciplinary offences under the respondent Bank's Grievance and Disciplinary Code for unionized employees, namely:

1) Negligence of duty resulting in financial loss to the Bank, its employee or any other person dealing with the Bank contrary to Clause 3.8 of the Grievance and Disciplinary Code; and

2) Failure to follow established procedures/instructions contrary to Clause 2.12 of the same Code.

Following this development, the appellant was suspended from work and put on half pay pending the determination of her fate after a disciplinary hearing. On 13th July, 2007, the

appellant's case was heard by the respondent Bank's disciplinary committee which found the appellant guilty on the charge of negligence of duty but cleared her on the second charge of failure to follow established procedures/instructions. On the same day, the respondent wrote to the appellant summarily dismissing her from employment on account of the first offence. The appellant subsequently appealed against her dismissal to the Managing Director of the respondent Bank but the appeal was dismissed.

Following the ultimate sealing of her fate by the respondent's Managing Director, the appellant proceeded to institute the action whose outcome became the subject of this appeal. In her action in the court below, the appellant sought an order of reinstatement to the position she held in the respondent Bank prior to her dismissal in addition to damages of the character earlier described in this judgment. The appellant contended that her dismissal from the respondent Bank on a charge of negligence of duty resulting in loss to the Bank was unfair as she was found not guilty of the offence of failure to follow established procedures and instructions by the disciplinary committee. The appellant further asserted that her exoneration on the second charge implied that the disciplinary

committee found that she had followed the respondent Bank's procedures and had locked away the bulk cash container in the strong room.

In its reaction to the appellant's claims and assertions, the respondent contended that the appellant had been negligent and casual in her handling of the bulk cash deposit container that she had received from the respondent Bank's customer namely, Bokomo Zambia Limited, through the customer's cash in transit (CIT) agent and which container the appellant duly signed for.

The respondent further contended that the container in question went missing while it was under the care of the appellant and that the appellant failed to explain how the container could have gone missing beyond engaging in speculation as to what could have happened to it.

After considering the evidence which had been deployed before her and the arguments of counsel around the same, the learned trial judge began her reflections by observing, as a matter of trite law, that, as a general rule, a court cannot order reinstatement of a dismissed employee unless there are special or exceptional circumstances established to warrant the making of

such an order. This observation was consistent with what we said in **Zambia Airways Corporation Limited v. Gershom Mubanga**[1] when we adopted the former House of Lords' holding in **Francis v. Municipal Councillors of Kuala Lumpur**[2] to the following effect:

> **"When there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court."**

In the context of the matter with which she had been confronted, the court below noted that the appellant had sought reinstatement on the basis of her contention that she was unfairly dismissed from employment for negligence of duty. The judge further noted that the appellant's search for reinstatement was arising against the backdrop of undisputed evidence which suggested that the appellant was dismissed after a disciplinary committee that considered the two charges which had been levelled against her found her guilty on the charge of negligence of duty resulting in financial loss to the respondent Bank. The committee found the appellant guilty notwithstanding her contention that she could not have been negligent given the committee's confirmation

that she had followed the bank's established procedures and instructions by locking away the bulk containers in the strong room or vault at the close of business on 13th February, 2007.

The learned trial judge reasoned that the appellant's counsel's argument, as paraphrased above, overlooked the clear evidence which had been adduced by the appellant herself to the effect that, although she did lock away, in the vault, the black bulk cash deposit container belonging to Bokomo Zambia Limited which she received from that company's cash in transit agents on 13th February, 2007, she withdrew four black containers when she reported for work on the morning of 14th February, 2007. According to the learned Judge, what the foregoing evidence by the appellant meant was that if the Bokomo container was among the four which the appellant had locked away the previous day, then that container ought to have been among the four containers that she collected from the vault at the beginning of the following business day on 14th February, 2007. This reasoning on the part of the trial judge was founded on the fact that the lock away record did not specify the customers that the four black bulk deposit containers

which were locked away in the vault by the plaintiff on 13th February, 2007 belonged to.

The learned trial judge also recalled that, in her own evidence both before the disciplinary committee as well as her ladyship, the appellant had confirmed that, in terms of the applicable procedure, whenever she withdrew a customer's bulk cash container from the vault, it was her responsibility to ensure the safe custody of such container until the owner (customer) returned to claim the same for the purpose of opening it and depositing its contents in the customer's account. On this evidence, the learned trial judge found, as fact, that, as the appellant had received the container in question from Messrs Mint Master Security Zambia Limited on behalf of Messrs Bokomo Zambia Limited and had even signed for the same, she had assumed the responsibility of ensuring its safe custody until the customer returned to claim the same.

The learned judge accordingly concluded that since the container over which the appellant had assumed responsibility regarding its safe custody could not be located when its owner returned to claim the same, the respondent rightly found her

negligent on account of her failure to secure it after she had it retrieved from the vault. In the words of the learned judge:

> *"The [appellant] lamentably failed to explain how the container [which had been under her care] went missing ... after she withdrew it from the vault on 14th February, 2007 and could only speculate as to what may have happened to it...*
>
> .....
>
> *Based on the evidence before me, [I find] that the [appellant] was rightly charged with the offence of negligence of duty resulting in loss to the [respondent] and that the [respondent] was entitled to summarily dismiss her from employment in accordance with its Grievance and Disciplinary Procedure Code. I further find that the plaintiff's assertion that she was unfairly dismissed as the defendant failed to substantiate the charge of negligence against her lacks merit as there was ample evidence before the committee to support a charge of negligence.*
>
> *Furthermore, counsel's contention that the plaintiff assumed her duties as teller - bulk deposits without any training is equally without merit as the plaintiff herself testified that she was trained on the job and was given instructions as to how to perform her duties."*

The learned trial judge went on to observe that the appellant's counsel had rightly conceded in his submissions that the correct

disciplinary procedures had been followed in relation to the appellant and that, this having been the case, and going by the guidance which this court gave in the case of **The Attorney-General v. Richard Jackson Phiri**[3], the only question which the learned judge needed to consider was whether facts had been established to support the disciplinary action which had been taken by the respondent against the appellant.

The judge then proceeded to review the sequence of events in this matter as we recounted them early on in this judgment before making the following observations:

> *"The [appellant] took the container into her custody but failed to account for its whereabouts when the customer turned up at the [respondent] bank to deposit its contents. This evidence has not been rebutted by the [appellant]. In fact the plaintiff confirmed that she received the container from the [customer's] agent and duly signed for it. Her explanation for the disappearance of the container was that [it had] perhaps [been] taken away by the [customer's] agents along with the empty containers."*

The court below agreed with counsel for the respondent's submission that the appellant owed a duty to her employer, the respondent, to:

"...exercise reasonable care and diligence in [her] handling [of] the customer's bulk deposit container knowing fully well that it probably contained cash in bulk or cheques of high value in order not to occasion loss to either the customer or the [respondent]."

The learned trial judge accordingly concluded that by failing to exercise reasonable care in the manner she handled the container in issue, the appellant had breached her contractual duty to the respondent as her employer and that her breach had occasioned a significant loss of K27 million in cash which the respondent had to reimburse its customer.

In the view of the learned judge, the respondent had established sufficient facts against the appellant which had supported the disciplinary charge of negligence which had been preferred against the appellant and that, under those circumstances, the respondent had properly exercised its disciplinary powers under the applicable disciplinary code and that the penalty of dismissal which the appellant had incurred had been perfectly warranted and justified.

The judge below also outrightly discounted counsel for the appellant's theory in terms of which he suggested that the

respondent had singled out the appellant for punishment when other members of staff had access to the respondent's strong room. In the view of the learned judge, the appellant's counsel's theory had been misplaced given that the appellant had confirmed, in her own testimony, that she had withdrawn the container in question from the respondent's strong room when she reported for work on 14th February 2007.

The trial judge also dismissed counsel for the appellant's argument in the alternative in terms of which counsel suggested that if, indeed, there had been negligence on the part of the appellant, then such negligence had been excusable by reason of the following findings of the disciplinary committee, namely:

(a) That there had been no procedure or established practice for handling cash in transit containers and that this forced bank tellers to adopt whatever practice each one of them deemed appropriate; and

(b) Even where procedures or practices existed, there were no induction programmes or proper handover and that this left new comers to act in accordance with their own initiative.

The trial judge's reaction to the appellant's allegation suggesting lack of training or induction was that the appellant had confirmed in her evidence that when she was moved to the bulk section she received on-the-job-training. The judge further noted that the appellant's testimony had revealed that she was made fully aware of her obligation to keep a close watch over the containers. The judge recalled that the appellant's testimony made it abundantly clear that she was under a duty to keep the containers under her care constantly locked even when she had to respond to the call of nature. The judge accordingly concluded that, based on her own evidence, the appellant's failure to exercise reasonable care in the performance of her duties in relation to the container in question had nothing to do with lack of orientation.

In sum, the learned judge concluded that the appellant's dismissal from her employment had been properly founded on her proven negligence of duty which had resulted in loss to the respondent.

The judge accordingly declined to grant any of the reliefs which the appellant had sought on the basis that the appellant was

justifiably dismissed. The learned judge also pronounced costs in favour of the respondent.

The appellant was displeased with the outcome of her exertions in the court below and has now appealed to this court on the basis of the following primary grounds and sub-grounds:

"Ground 1

That the learned trial judge below, failed to give any and/or sufficient account and/or give sufficient weight to the following:-

A. The admission on the part of the respondent that, "there is no procedure or established practice with regards to the handling of CIT boxes. The tellers adopted their own method of doing things and it was the committee's view that, the superiors did not mind what was going on. The committee further noted that, procedure may have been there but because of lack of hand over and induction programs in place new entrants were left to find their own way of doing things."

B. That after the incident of the missing CIT box, new procedures were in fact then put in place, following the Respondent's own disciplinary committee recommendation that, "human resources department should ensure that, new staff should go through an orientation program before or shortly after taking up roles in the bank."

C. That the court failed to give any weight and/or sufficient account to the evidence that, when the Appellant was moved after the incident of missing CIT box: new procedures were introduced so that, tellers were no-longer to receive the cash boxes, as they could not take care of bulk cash and containers

at the same time. Asset custodians were now made responsible for seeing cash box and containers and locking them away in the vault.

D. The court below also failed to give any weight and/or sufficient account to the evidence that, after the missing CIT boxes those who did not work in the cash area were no longer allowed to go there and that staff of cleaning company were also restricted from entering the cash area.

Ground 2

That there was no evidence upon which the Court below could have found (as she did) that, the Appellant was formally trained as a bulk teller. And/or the court misapprehended the fact, when she found as without merit, the Appellant's contention that, upon assuming her duties as bulk-teller the appellant was trained on the job as opposed to being formally trained. And/or the learned trial Judge failed to make any distinction between being formally trained and being trained on the job.

Ground 3

The court below misdirected herself when she found that, the disciplinary procedure or hearing was properly followed, when she ignored evidence that, the appellant was not given the right to mitigate as per the respondent's own grievances and disciplinary code.

Learned counsel for the appellant filed Heads of Argument to support the grounds which had inspired the appeal.

At the hearing of the appeal, Mr. M. Nyirenda, who stood in for the appellant's counsel, informed us that his instructions were to rely solely on the appellant's filed Heads of Argument.

An issue which the appellant's counsel has suggested, ahead of canvassing the individual Heads of Argument, which overarches this appeal in its entirety is whether the appellant could be said to have been negligent in the performance of her duties when, in fact, she had followed all the laid down procedures in the performance of her duties and/or when the respondent failed to provide any procedure.

In opening the appellant's arguments under ground 1, the appellant's counsel drew our immediate attention to the case of **Nkhata & Others -v- The Attorney General**[4] where our predecessor court noted the following in relation to an appellate court's entitlement to interfere with a trial court's findings of fact:

> **"[An appellate court would be entitled to interfere if it is established that] in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account or failed to take into account some matter which he ought to have taken into account" (emphasis by counsel).**

According to counsel, the trial court erred because it did not take into account and give sufficient weight to some matters which it ought to have taken into account. The basis of this complaint was the following passage drawn from the Minutes of the Disciplinary Committee hearing:

> *"There is no procedure or established practice with regard to the handling of CIT (cash in transit) boxes. The tellers adopted their own method of doing things and it was the committee's view that, the superiors did not mind what was going on. The committee further noted, procedure may have been there but because of lack of hand-over and induction programs in place new entrants were left to find their own ways of doing things."*

Having quoted the above passage, counsel for the appellant then went on to contend that an employer owes a common law duty to his/its employee to, among other things, have properly skilled persons to manage and superintend its business and to provide a proper system of working. In this regard, counsel referred us to the House of Lord's decision in **Wilson and Clyde Coal Co. Ltd. -v- English**[5] where that court held that:

> **"To provide a proper system of working is a paramount duty and if it is delegated by the master to another the master is still liable."**

Learned counsel then drew our attention to the following passage which is to be found in the opinion of Lord Maugham in **Wilson & Clyde Coal Co. Ltd**[5], at p.654:

> **"In such employments, it was held that there was a duty on the employer to take reasonable care and to use reasonable skill, first, to provide and maintain proper machinery, plant, appliances and works, secondly, to select properly skilled persons to manage and superintend the business, and thirdly to provide a proper system of work."**

In the view of counsel for the appellant, the contents of the passage which was extracted from the Minutes of the Disciplinary Committee evidenced the fact that the respondent had no proper working system and no induction or handover programs in the section where the appellant had been deployed. Given this state of affairs, counsel contended, the respondent ought not to have dismissed the appellant.

According to the appellant's counsel, the appellant had been following all procedures and instructions relating to her work even though she had not been properly trained for her job as a bulk cash cashier and was working in an environment which did not offer a proper system of work as required under the common law.

In the light of what has been unravelled in the preceding paragraph, counsel for the appellant found it illogical for the respondent to punish the appellant when it had been guilty of the breaches and violations of the law as set out above.

Counsel for the appellant further contended that the respondent's own witnesses, namely "DW1" and "DW2" had confirmed, under cross-examination, that the appellant had followed the laid down procedure. He, therefore, wondered as to how the appellant could have been negligent.

Counsel for the appellant also argued that no evidence was placed before the court below to demonstrate that the appellant had taken the missing container out of the respondent's premises or that she was found with the same in an unauthorized area or that she knew what the contents of the container were. Under these circumstances, counsel argued, citing our decision in **Yotam Manda -v- The People**[6], that a court should, as a general principle, only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts.

With regard to our judgment in **The Attorney-General -v- Richard Jackson Phiri**[3], which the court below cited and relied upon, counsel for the appellant argued that no facts were established to support the disciplinary measure of dismissing the appellant.

Adverting specifically to the Minutes of the Disciplinary Committee, counsel for the appellant argued that the finding by the committee which suggested that there was laxity and want of due diligence on the part of the appellant with regard to the manner in which she had been managing or handling the containers in question was not supported by any evidence. According to counsel, the evidence which the appellant had placed before the court below suggested that the appellant had been constantly keeping the containers in question under lock and key and no containers had been lying around unattended on the material day.

According to counsel for the appellant, the real reason why the appellant was dismissed was not because she had been negligent but because the respondent wanted to use the punishment which was inflicted on her to deter a culture of general carelessness which had taken root in the company *vis-à-vis* the

handling of instruments placed under the charge of staff. This contention was founded on some of the findings of the Disciplinary Committee.

Citing a number of our decisions which we do not propose to recite here, counsel for the appellant fervently contended that there was no legitimate basis for dismissing the appellant in the manner she was.

Learned counsel for the appellant concluded his arguments around the first ground of appeal by submitting that an employee, such as the appellant, who had been constantly keeping the containers in question under lock and key, could not have been negligent in the sense of having failed to exercise reasonable care in the performance of her duties. In the alternative, counsel submitted that, until such a time as the respondent will have put in place proper systems and introduced measures such as staff orientation before taking up new roles, it should not be open to the respondent to rely on negligence as a basis for dismissing an employee as had occurred to the appellant.

As earlier noted, Mr Nyirenda did not seek to augument the filed heads of argument with any oral submissions but relied entirely of the filed arguments.

For his part, Mr. Nchima Nchito, SC, learned counsel for the respondent, confirmed that he too was relying on the respondent's filed Heads of Argument which, however, he wished to augument orally in some respects.

Mr. Nchito, SC, opened his written arguments in relation to ground 1 by observing that the appellant's arguments around this ground related to evidence of the nature of findings by the disciplinary committee which had heard the disciplinary case against the appellant.

In the view of Mr. Nchito, SC, the appellant's arguments around the first ground of appeal seek to invite this court to place itself in the position of an appellate body to review what the disciplinary committee did by scrutinizing its proceedings which, according to counsel, this court could not properly involve itself in. Counsel sharply noted, in this regard, that it would not be legally competent for this court to re-open the disciplinary proceedings,

let alone, to treat the present proceedings as an appeal from the decision of the disciplinary committee. To support this argument, Mr. Nchito, SC, drew our attention to our decision in **Zambia Electricity Supply Corporation Limited -v- Muyambango**[7] where we said:

> **"It is not the function of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to reveal what others have done. The duty of the court is to examine if there was the necessary disciplinary power and if that power had been properly exercised."**

Mr. Nchito, SC, went on to cite our later decision in **Samson Katende and Crosby Bernard -v- NFC Mining PLC**[8] where we said:

> **"The court cannot be required to sit as a court of appeal from decisions of administrative tribunals to review its proceedings or inquire whether a decision was fair or reasonable... the court ought to have regard only to the question whether the tribunal had valid disciplinary powers and if so, whether such powers were validly exercised."**

In the context of the matter at hand, Mr. Nchito, SC, argued that the lower court was on firm ground when it restricted its consideration of the matter to the exercise, by the disciplinary committee, of its powers in the sense of inquiring into whether the

committee had the necessary power and whether those powers were fairly validly exercised.

Beyond the above submission, Mr. Nchito, SC, posited that, in any event, the court below did, in fact, consider the evidence which counsel for the appellant had complained about. The respondent's learned counsel also insisted that the court below had correctly discounted counsel for the appellant's suggestion that the respondent had condoned the appellant's alleged negligence.

Counsel for the respondent summed up his arguments around the first ground of appeal by submitting that the lower court's overriding finding was that the appellant had been negligent in the discharge of her duties and that this breach of the appellant's duty to her employer - the respondent - had resulted in the financial loss which the respondent had incurred. The appellant's negligence, counsel argued, constituted a dismissible offence. In the view of the learned counsel for the respondent, the court below had taken a proper view of the evidence which had been placed before it and had the advantage of observing the witnesses who had testified before her.

Mr. Nchito, SC, concluded his arguments around ground one by inviting us to dismiss this ground on the basis that the appellant had not advanced any cogent reason which would warrant disturbing the manner in which the lower court had pronounced itself on the issues which the appellant had complained about under the first ground of appeal.

As earlier noted, Mr Nchito, SC, wished to augment some aspects of the respondent's filed Heads of Argument. In this regard, State Counsel reiterated his contention that the appellant's arguments under ground one seek to assail findings of fact by the trial court. Counsel also confirmed that even if the contention by the appellant that she had not been trained for her new role were accurate, this fact would not have discounted or negatived the fact of the appellant having been negligent.

Mr. Nyirenda did not say or offer anything in reply.

We are greatly indebted to counsel for the two parties to this appeal for their lucid arguments around the legal and factual issues at play in relation to the first ground of appeal.

In the view that we have taken, it was, with great respect, wholly unnecessary for counsel for the appellant to scatter and dissipate his cognitive and intellectual energy around issues which we have deemed peripheral to the core issues on which the success or failure of this appeal hinges.

In our view, the fate of this appeal depends on how we shall resolve the issue of whether or not the appellant had been negligent in the circumstances which we adumbrated early on in this judgment; whether the respondent's disciplinary mechanism had been properly set in motion against the appellant and whether the medium which had been invoked for the purpose of enforcing the disciplinary powers in question had the necessary power and whether such power had been validly and properly exercised.

Counsel for the appellant passionately advanced arguments suggesting that his client did not act negligently in the performance of her duties.

Having regard to the above contention, it is, perhaps, appropriate that we spend a little time to interrogate this issue,

particularly in the light of the fact that the outcome of such interrogation will decisively define the fate of this appeal.

Although neither counsel appears to have considered the issue we are about to interrogate relevant or important, it is our considered view that the issue as to whether or not the appellant was negligent cannot be resolved or, at any rate, fully resolved in the absence of some appreciation of what the notion or concept of negligence really entails.

The concept of negligence is, perhaps, one of the most well-known concepts in legal theory. ***Black's Law Dictionary*** defines negligence as:

> *"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights. The term denotes culpable carelessness. (emphasis ours)*

The following notes are recorded beneath the above definition of the concept of negligence:

"Negligence is a matter of risk – that is to say, of recognizable danger of injury ... In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act..." (emphasis supplied).

In the case of **Lister -v- Romford K & Cold Storage Co. Limited**[9], undoubtedly, one of the oft-quoted cases in Industrial Law, the House of Lords noted, via Lord Radcliffe that:

"[An employee has] the general duty to exercise reasonable care in carrying out his employer's work."

In the same case, Viscount Simonds added his voice when he said:

"It is, in my opinion, clear that it is an implied term of the contract [of employment] that the [employee] would perform his duties with proper care" (at p.129).

According to Professor John Wood, the author of '**Cooper's Outlines of Industrial Law (1972**: Butterworths: London), 6th edition,

"the dicta in [Lister[9]] show that the duty [of the employee as expressed above] applies to every servant and is not merely restricted to those who bring some particular skill" (at p.98).

For their part, the learned editors of **Chitty on Contracts**, 29th edition have stated, at para. 39-056 that:

"Even where the employee does not profess a particular skill or competence requiring training or experience, there is an implied term in the contract that he will exercise reasonable care in the performance of his duties."

We have taken the trouble of undertaking the above brief conceptual expedition so as to immediately discount the misconception which we discerned from the arguments tendered on behalf of the appellant which suggested that the respondent was to blame for the loss of the container in issue on account of the respondent's failure to formally train or induct or orientate the appellant for the purpose of her new role. The respondent's sharp response to these claims was that the appellant had, in fact, been exposed to or offered 'on-the-job-training'.

In the view that we have taken, and given what our conceptual expedition had revealed, it was totally unnecessary for the respondent to have sought to fend off the appellant's claims by seeking refuge in the contention that the appellant had, in fact, been a beneficiary of its on-the-job-training initiative.

For the removal of any doubt, one distinct lesson that we learnt from the expedition in question is that being guilty of

negligence has nothing to do with lack of 'training', or 'induction' or 'orientation'.

Being negligent, is, in many ways, more about a negative disposition: as in 'culpable carelessness' or 'heedlessness' or even 'inadvertence'. The converse of the preceding narrative would be something akin to a positive disposition: as in taking 'proper or due care'.

Both the learned editors of ***Chitty On Contracts*** and Professor John Wood acknowledge in their respective texts that there is no real correlation between being negligent and possessing any particular skill. In other words, being 'skillful' or 'trained' or 'experienced' would not necessarily insulate one from being negligent. Indeed, a highly skilled, highly trained or most experienced individual can be as much guilty of negligence as can the most reasonable man be found guilty of being unreasonable or acting unreasonably.

It follows, in the context of the matter at hand and as Mr. Nchito, SC, rightly acknowledged, that whether or not the appellant had received any training, or induction or orientation could not

have served to insulate her from being negligent or from acting negligently. If, as the court below found, and as we are inclined to believe, the appellant had acted negligently in the manner she had handled the container in question coupled with her failure to plausibly or sensibly explain how the same could have gone missing in the light of her repeated and open declarations that she had been keeping the containers in question under constant 'lock and key', then the appellant was clearly guilty of negligence. This position would, indeed, remain distinctly impugnable notwithstanding the appellant's clearly misplaced arguments suggesting that the respondent had failed in its alleged common law duty to provide a proper or safe system of work, or to employ properly skilled persons to superintend the respondent's business and so forth. As we earlier observed, none of these factors would have guarded against or insulated or served to guard against or to insulate the appellant from acting negligently in the manner we expounded above.

Quite apart from what we have canvassed above, we also agree with Mr. Nchito, SC, the learned counsel for the respondent, that we cannot properly be invited to move away or depart from the

position which we have repeatedly and consistently articulated in matters of this nature in countless cases such as **The Attorney-General -v- Richard Jackson Phiri**[3], **Samon Katende & Crosby Bernard -v- NFC Mining PLC**[8] and many others. As a court, we simply cannot interpose ourselves as between the disciplinary committee of the respondent on the one hand and the appellant on the other, for the purpose of serving as an appellate body in matters in which the committee had acted in the due discharge of its powers and in circumstances where neither the availability of the relevant powers nor the manner of their exercise is called into question or is plainly impugnable.

In the context of this matter, it was not contested that the disciplinary committee of the respondent had been clothed with the necessary power to deal with the appellant in the manner that it did. There was also no question of the manner in which the committee had exercised its powers having been called into question. Under these circumstances, the appellant's invitation to have this court intervene is clearly misconceived. Ground one accordingly fails.

The 2nd ground revolves around the appellant's complaints over the fact that she had not been formally trained as a bulk teller prior to her taking up the job which she held at the time when disciplinary action was taken against her.

We really cannot see how this ground, which raises the same, or substantially, the same issues which the appellant had canvassed in the context of the 1st ground of appeal, can possibly survive in the light of the fate which had befallen the 1st ground.

To put it plainly the 2nd ground has to incur the same fate as did the 1st. It accordingly stands dismissed.

As to the 3rd and final ground of appeal, the complaint or grievance being asserted via this ground was that the court below fell in error when it ignored evidence which indicated that the appellant was not availed an opportunity to mitigate as dictated by the respondent's grievance and disciplinary code.

We have considered this ground which, in relation to the primary ground in this appeal (the 1st ground) is really peripheral.

While we would confirm that Clause 7.7 of the respondent's disciplinary code did require the Disciplinary Committee to afford an employee who is found guilty of a disciplinary offence an *"opportunity to [inform] the disciplinary committee of any mitigating circumstances which he/she wishes management to take into consideration before the disciplinary action is taken"*, and, even accepting that the appellant was not afforded this by the committee, it seems to us that, in relation to an employee such as the appellant who had to face summary dismissal on her first breach of the disciplinary code, the respite or relief which Clause 7.7 purportedly offers was nothing beyond cold comfort. We take this view because the offence of negligence of duty resulting in serious financial loss to the respondent or its customer attracted the standard punishment of summary dismissal on the occurrence of the first breach. This means that even if the appellant had been afforded the opportunity to mitigate, the punishment would have remained the same.

In any case, if this issue of mitigation meant anything like we are now being made to believe, why did it not feature in the appeal

which the appellant had launched to the respondent's Managing Director?

We really must refrain from engaging in any speculation suffice it to say that the 3rd ground of appeal cannot possibly succeed. We accordingly dismiss it.

Before we conclude, there is one issue in this appeal which struck us in a negative way, namely, the appellant's search for liquidated or specific sums of money purportedly in the name of damages. Only recently, that is, in our judgment in **Emmanuel Mponda -v- Mwansa Mulenga & 2 Others**[10] we deprecated counsel's continuing propensity to pre-estimate the amount of damages which are endorsed in originating court process even in circumstances where the damages being sought sound in tort or breach of contract and would be the subject of assessment or fixing by the court.

It is a wonder indeed that even counsel on the opposite side had to allow this clearly irregular court action to progress instead of taking an appropriate pre-emptive strike to thwart its further progress in the name of obeying court rules which guarantee the

orderly conduct of litigation. Indeed, even if the breach involved here was curable, the fact of condemning the erring counsel in costs would serve the good purpose of inducing obedience to the Rules, particularly where the court ensures that the arising financial consequences are met by the erring counsel as opposed to their innocent client.

As we conclude our reflections in this appeal, we wish to observe that, on the whole, the trial judge in this matter directed herself impeccably on the law, made findings of fact which were open to her on the evidence and was careful in her evaluation and weighing of all the relevant factors. Clearly, her judgment cannot be impugned on the basis of the grounds which the appellant canvassed. Accordingly, we dismiss the appeal in its entirety. The respondent will have its costs and these are to be taxed if not agreed.

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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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M. MUSONDA, SC
SUPREME COURT JUDGE