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SELECTED JUDGMENT NO. 61 OF 2017

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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 86/2015
SCZ/8/70/2015

BETWEEN:

CHILANGA CEMENT PLC APPELLANT

AND

VENUS KASITO RESPONDENT

CORAM: Mambilima, CJ, Kaoma and Kajimanga, JJS.
On: 5th December, 2017 and 8th December, 2017

For Appellant: Ms. G. Kumwenda-ECB Legal Practitioners
For Respondent: Mr. T.T. Shamakamba-Shamakamba & Associates

J U D G M E N T

KAOMA, JS delivered the Judgment of the Court.

Cases referred to:

1. Attorney General v Richard Jackson Phiri (1988/1989) Z.R. 121
2. Zambia Electricity Supply Corporation Ltd v Muyambago (2000) Z.R. 22
3. National Breweries Limited v Philip Mwenya (2002) Z.R. 118
4. Zambia Breweries Limited v Kawisha (1993-1994) Z.R. 32
5. Bridget Mutwale v Professional Services Limited (1984) Z.R. 72
6. Khalid Mohamed v The Attorney-General (1982) Z.R.49
7. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
8. Chambishi Metals PLC v Jean Mbewe – SCZ Appeal No. 27 of 2012
9. Zambia National Provident Fund v Chirwa (1986) Z.R. 70
10. Chimanga Changa Limited v Stephen Chipango Ngombe (2010) 1 Z.R. 208
11. Bond v Dunster Properties Limited (2011) EWCA Civ. 455

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Works and legislation referred to:

1. **Employment Law in Zambia, Revised Edition, 2011, page 41 and 105**
2. **Interpretation and General Provisions Act, Cap 2, section 26**
3. **High Court Rules, Cap 27 Order 36 (8)**

This appeal is against a judgment of the High Court awarding the respondent damages for wrongful dismissal from employment.

The brief background facts to the appeal are that on 24th June, 2004 the respondent had commenced an action by writ of summons against the appellant claiming for a declaration that the termination of his services was wrongful, illegal, and null and void; damages for wrongful and illegal termination of employment; interest and costs. In his statement of claim, which lacked material particulars, the respondent only pleaded that the termination of services had no basis and so it was wrongful, illegal and null and void.

On these shoddy pleadings, which ordinarily would have required the appellant to ask for further and better particulars of the statement of claim, the appellant proceeded to file its defence, averring that the dismissal was justified as the respondent had been found guilty of failing to report an accident with a company vehicle, which amounted to misconduct.

Nonetheless, the matter proceeded to trial. The respondent's evidence was that he was employed by the appellant in May, 1989. At the material time he held the position of Production Manager. On 6th July, 2002 at about 06:00 hours, whilst he was driving to his workplace, where he was required to attend to a kiln that was overheating, he was involved in a road traffic accident with a company motor vehicle, Isuzu KB 260 twincab, registration number AAR 4034, along Luanshya Road in Ndola. He disclosed that he had swerved to avoid a mad man who was crossing the road and the vehicle went into a ditch on the left side of the road.

Immediately he called David Ngenda (PW3), a mechanical engineer at the appellant and asked him to find a recovery truck to remove the vehicle from the ditch. Meanwhile, he reported the matter at a nearby Police Post. When PW3 arrived with a recovery truck from NEDS Motors garage, the vehicle was retrieved and towed to the garage where the respondent told them to straighten the left fender as it was mangled to the tyre. Later, he drove to his workplace and reported the matter to a security officer and the

acting foreman. Afterward, the appellant raised an order for the garage to carry out the repairs and paid for the same.

The evidence of PW3 revealed that he only assisted the respondent to find a recovery vehicle because he was his superior and that the garage section of the engineering department of the appellant was responsible for retrieving motor vehicles.

Remmy Simbile (PW4), a general manager at the garage confirmed that the vehicle had a mangled front fender; that it was initially worked on by straightening the fender; and that it was returned later the same day. He also disclosed that the vehicle had some damage on the front bumper, left front side and rear doors. He confirmed that he submitted a quotation to the appellant and only commenced repairs after authorisation by the latter.

The appellant called two witnesses. Ephraim Chileya (DW1) the safety, health and environmental manager at the appellant testified that he was the one to be immediately informed when an accident happened. Once informed, he would advise his superiors as there were procedures to be followed, which all the employees

knew, because through an induction, rules and regulations were interpreted to all new employees.

On the material date, around 11:30 hours, he was informed by the respondent of the accident. He went to NEDS Motors and found workers working on the left fender; they were almost through. He asked the respondent what was going on. He answered that they were freeing the tyre that was mangled with the front fender. DW1 told the respondent that what he had done was not in line with company policy. According to DW1, they are required to report an accident to the insurer who should give the go ahead. If the amount is below US$5,000, DW1 would go ahead to get quotations from companies that are registered with the appellant. They would examine the quotations and make a choice as to the company to repair the vehicle. NEDS Motors was not registered with them.

DW1 directed the respondent to submit a report the next morning which was done. He then investigated the matter and found that the respondent was not speeding as there were no speed marks. He concluded that the respondent must have fallen asleep and gone into the ditch since there was a gentle fall. He insisted

that the respondent was dismissed for allowing the vehicle to be repaired before a go ahead from the superiors.

Elias Phiri (DW2), the Human Resources Officer at the appellant confirmed that the respondent was charged with three offences under the disciplinary code after he was involved in the road traffic accident; he exculpated himself; a disciplinary committee was convened; and on 7th October, 2002 he was exonerated of two offences but dismissed for misconduct. It was further DW2's evidence that the respondent appealed first to the Works Manager through the Human Resources Manager and secondly to the Managing Director but both appeals failed.

On the evidence before him, the learned trial judge found it undisputed that the respondent was employed by the appellant as Production Manager and that he served from 22nd May, 1989 to 7th October, 2002 when he was summarily dismissed. The judge found that what was in dispute was whether the summary dismissal amounted to wrongful dismissal. In resolving this issue, the judge referred to the well-known cases of **Attorney General v Richard**

Jackson Phiri[1] and **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambago**[2] where we held that:

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

The judge then went on to raise the following two questions:

1. **Whether or not, under the respondent's conditions of service, the appellant had the power to terminate his employment by way of summary dismissal on the basis of the offence he was charged with.**

2. **If the answer to the first question was in the affirmative, whether or not the appellant was justified in exercising its disciplinary powers to dismiss the respondent from employment summarily.**

In dealing with the first question, the judge referred to DW2's evidence to the effect that the respondent was charged with three offences and was found guilty by the disciplinary committee and summarily dismissed for misconduct, which evidence, was confirmed by the disciplinary charge form and letter of dismissal.

The judge also noted the reference in paragraph 2 of the dismissal letter to the disciplinary code as the basis for the summary dismissal and took the view that the appellant had an obligation to demonstrate before court that the offence which the respondent committed attracted a penalty of summary dismissal

and which could only be done by producing evidence of the respondent's conditions of service, particularly, the disciplinary code referred to in the letter of dismissal.

For that reason, the judge found that the appellant had not, in terms of its defence and the authorities he had referred to in his judgment, proved that it had power under the respondent's conditions of service, to summarily dismiss him from employment for misconduct. Thus, the judge found it unnecessary to consider the second question he had posed for himself.

Based on the appellant's admission that it summarily dismissed the respondent from employment, the judge found that the respondent had, on the balance of probabilities, proved his case against the appellant and was entitled to damages for wrongful dismissal. The judge awarded the respondent 12 months' salary and all the perquisites as compensation over and above his contractual terminal benefits together with interest and costs.

Aggrieved by this decision, the appellant filed this appeal advancing five grounds as follows:

1. **The Court below erred in law and in fact in holding that the defendant had not proved that it possessed the power under the plaintiff's conditions of service to dismiss him summarily for misconduct.**

2. **The Court below erred in law and in fact in not considering the documents on record which included an unequivocal acceptance or admission by the plaintiff that he had committed the offences for which he stood charged.**

3. **The Court below erred in law in holding that the defendant's power to discipline and or dismiss the plaintiff summarily for misconduct could only be exercised, if provided for in the Disciplinary Code.**

4. **The Court below erred in awarding contractual terminal benefits in addition to damages of 12 months' salary and all attendant perquisites that would have accrued to the plaintiff.**

5. **The Court below erred in law in awarding interest at short term bank deposit rate from the date of Writ to the date of Judgment, a period amounting to eleven years having regard the time taken for the delivery of the Judgment.**

Counsel for both parties filed written heads of argument on which they relied at the hearing of the appeal.

In support of ground 1, it is the appellant's contention that it had the power both under the company disciplinary code and at common law to summarily dismiss the respondent for misconduct which he had in fact, unequivocally admitted, both in his evidence in cross-examination and in the appeal letter to the Managing Director dated 13th November, 2002.

It was argued that power to discipline an employee is almost always implied in employment contracts; and that in this case, the respondent was charged with three offences of which misconduct was one. Ms. Kumwenda, counsel for the appellant cited the book titled **Employment Law in Zambia, Revised Edition, 2011**, at page 41 where the learned author states that an employer has the right to summarily dismiss an employee who has misconducted himself or is guilty of a fragrant breach of a contract of employment.

It was further argued that in view of the respondent's clear admission, the role of the judge was to decide if the action taken by the appellant in dismissing the respondent was one of the reasonable responses from any employer. Counsel also cited some English cases which we do not intend to review here since we have abundant authorities from this jurisdiction on this point.

As far as the appellant is concerned, it had proved on the balance of probabilities that the respondent committed the offence he was charged with especially that he readily accepted wrongdoing and he was given a right to be heard and informed of his right to appeal which he exercised twice but the dismissal was upheld.

It was submitted that before arriving at whether or not the dismissal was wrongful, the court should have considered whether the disciplinary procedures were followed. The case of **Zambia Electricity Supply Corporation Ltd v Muyambago**[2] was also cited which the trial judge had referred to in his judgment.

It was argued that the employer cannot wait for the promulgation of a disciplinary code capturing conduct which is alleged to be contrary to established norms before meting out punishment and that the respondent's conduct portrays a serious lack of discipline among the employees and a wanton disregard for authority which no reasonable employer would tolerate.

With regard to ground 2, Ms. Kumwenda repeated in the main, the arguments she made in ground 1. In addition, she submitted that where there is an unequivocal acceptance of wrong doing on the part of the employee nor injustice is caused to him by the non-compliance with the procedure stipulated in the contract. She again quoted **Employment Law in Zambia** where the learned author gives the definition of wrongful dismissal at page 105 in the following words:

> **"The concept of wrongful dismissal is a product of common law. Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether a dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was effected. Form of wrongful dismissal is one that involves a legal challenge on the basis of procedural error. When the right procedure in effecting a dismissal has not been followed, the employee may challenge the said procedure with the intention of asking the Court to declare the whole dismissal null and void ..." (Underlining is ours for emphasis only)**

Counsel further cited the case of **National Breweries Limited v Philip Mwenya**[3] where we held that:

> **"Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."**

In respect of ground 3, counsel for the appellant reiterated that there is no law to the effect that an employer can only dismiss an employee if the offence is one found in the disciplinary code and that the employer must not be treated as having waived its rights at common law merely because it has promulgated a disciplinary code.

To buttress this argument, counsel quoted, inter alia, the cases of **Zambia Breweries Limited v Kawisha**[4] and **Bridget Mutwale v Professional Services Limited**[5] where we recognised that there is misconduct at common law and that unless a statute

is intended to override the common law or that if indeed there is nothing to oust the common law position, then the position at common law is deemed to apply.

Additionally, it was argued, on the basis of **section 26** of the **Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia** that the power to appoint includes power to remove if the circumstances of the case justify removal despite that there may not have been a prior warning. Section 26 states that:

> **"Where by any written law a power to make any appointment is conferred, the authority having power to make the appointment shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in exercise of the power."**

Ms. Kumwenda lamented that the trial judge should have adopted an elastic approach in dealing with a case where there was an unequivocal acceptance of misconduct and not a restricted view that unless the offence committed by the employee is stipulated in the disciplinary code, the employer has no remedy.

The gist of the appellant's argument in ground 4 is that the award by the trial judge was wrong in principle because the remedy

for an innocent employee is the normal measure of damages for the contractual notice or the notional reasonable notice.

In respect of ground 5, Ms. Kumwenda contended that an award of interest at short term bank deposit rate from the date of writ to the date of judgment, a period amounting to eleven years having regard to the time taken for the delivery of the judgment was astronomically high, shocking, a real injustice to the appellant and amounted to unjust enrichment since the colossal sums now payable to the respondent are far greater that the principal sum comparable to the amount due under reasonable length of the contractual notice or damages of 12 months' salary.

In his response to ground 1, Mr. Shamakamba supported the decision of the trial judge that the appellant had an obligation to demonstrate that the offence the respondent had committed attracted the penalty of summary dismissal and that this could only be done by producing evidence of his conditions of service and the disciplinary code referred to in the dismissal letter.

Counsel also cited the cases of **Attorney General v Richard Jackson Phiri**[1] and **Zambia Electricity Supply Corporation**

Limited v David Lubasi Muyambago[2] and asked what the penalty is for the offence the respondent was charged with. He argued that there is no proof that according to the disciplinary code the offence was dismissible and that even the dismissal letter does not refer to any provisions of the disciplinary code which makes it dismissible.

In response to grounds 2 and 3, he contended that the respondent's admission of misconduct does not justify the dismissal when there is no evidence that the offence is dismissible; and that it would be a dangerous precedent to dismiss employees if the disciplinary code did not provide for the penalty of dismissal.

In respect of ground 4, the respondent's argument was that the award of terminal benefits and damages was within the law especially that he was dismissed without due regard to the provisions of the disciplinary code. And the respondent's only response to ground 5 was that it was within the discretion of the judge to grant interest.

We have fully addressed our minds to the above arguments and authorities, the judgment of the court below and the evidence on record. As we see it, grounds 1 to 3 are entwined and therefore

shall be considered collectively. The real issues raised by these grounds are twofold: first, on whom did the burden rest to prove that the appellant had the necessary disciplinary power? Secondly, was the respondent's dismissal for misconduct wrongful? The success of grounds 1 to 3 would settle the issues argued in grounds 4 and 5. Even so, an important matter of public interest has been raised in ground 5 on which we shall be constrained to comment.

Regarding grounds 1 to 3, it was common ground in the court below that the respondent was dismissed from employment on 7th October, 2002 following the road traffic accident that occurred on 6th July, 2002 involving the company vehicle. It was also common cause that an investigation was conducted and on 11th July, 2002 the respondent was charged with three offences under the company disciplinary code, of careless driving, misconduct for undertaking repairs to the vehicle without authority from management or superiors and failing to report an accident to management contrary to company safety regulations.

It was undisputed that the respondent was given an opportunity to exculpate himself and he did so in writing. A

disciplinary hearing was held where he was given a chance to make representations. He was cleared of two of the charges but found guilty of misconduct for which he was summarily dismissed. He appealed to two different bodies but both appeals failed.

In the case of **Khalid Mohamed v The Attorney-General**[6] we held that a plaintiff must prove his case and that if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. Furthermore, in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] we restated that:

> **"Where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations it is generally for him to prove those allegations and that a plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

Now, since the respondent had alleged that his dismissal from employment was wrongful, the legal and evidential burden rested on him to prove that allegation on the balance of probabilities. In other words, the respondent had the onus to produce in evidence his conditions of service, including the disciplinary code to satisfy the court that the appellant lacked the necessary power under the

disciplinary code of conduct to dismiss him for misconduct and that if it had that power; the power was not validly exercised.

Mr. Shamakamba argued that the penalty for misconduct is not known and that even the dismissal letter does not refer to any provisions of the disciplinary code which makes it dismissible. At no time did the respondent allege that the appellant did not adhere to the provisions of his contract of service or the disciplinary code or that the rules of natural justice were not observed or complied with. The position we take is that though no specific provisions of the disciplinary code were cited in the charge form or the summary dismissal letter, the respondent was briefed as to the charges against him and a copy of the charge form was given to him, a fact which he confirmed by signing at page 47 of the record of appeal.

Further, there was no assertion in the respondent's pleadings or evidence that the dismissal was wrongful because under the disciplinary code, summary dismissal was not the appropriate sanction for misconduct. The respondent cannot be allowed to raise this issue now. Moreover, he had failed to show that he had the

right, as production manager, to authorise the repair of the vehicle even before the accident was reported to the insurer.

The Terms and Conditions for Non Union Employees, particularly clause 24.1.0 at page 68 of the record, refer to the company disciplinary code and grievance procedure and explain that the disciplinary policy lays down procedures, sanctions and definitions which regulate the maintenance of discipline amongst the company employees; that employees must ensure that they are fully conversant with the policy; and that ignorance will not be accepted as an excuse for breach of the policy.

We believe that as Production Manager, who had worked for the appellant for close to 13 years, the respondent was conversant with the company disciplinary code, including the offences, procedures and sanctions. This in our view explains why he never questioned the appellant's power to dismiss him for misconduct until now.

Anyhow, in the case of **Chambishi Metals Plc v Jean Mbewe**[8], this Court disagreed with and reversed the High Court decision that the failure by the appellant to disclose the clause

contravened by the respondent and the penalty for the offence was fatal and that the failure to produce the disciplinary code ought to have reacted against the appellant. The case of **Zambia National Provident Fund v Chirwa**[9] was specially cited where we held that:

> **"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in the contract of service, no injustice is done to the employee by such failure to follow the procedure and he has no claim on that ground for either wrongful dismissal or for a declaration that the dismissal was a nullity."**

Therefore, we do not agree with the learned trial judge's finding that the obligation to demonstrate before the court that the offence which the respondent committed attracted the penalty of summary dismissal or to produce the disciplinary code referred to in the letter of dismissal rested on the appellant. The trial judge shifted the burden of proof to the appellant, which as Mr. Shamakamba conceded, was a grave misdirection. Therefore, we set aside this finding.

Coming to the issue of whether the respondent's dismissal was wrongful, whilst it is trite that employees have a right not to be treated unfairly or be dismissed unfairly, employers also have a

right to expect acceptable conduct and satisfactory performance by company employees, especially senior managers. Admittedly, the respondent did not follow the company policy and procedures on the handling of road traffic accidents.

Initially, he had asserted that the charge of misconduct was misconceived as it alleged that he repaired the motor vehicle without authority of the company. However, he later admitted having repaired the vehicle without authority that resulted in the charge of misconduct and he asked for pardon over the case. We must say that this kind of misconduct can become a serious problem if it is not managed properly and fairly at the workplace.

As submitted by Ms. Kumwenda, the concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question. We accept that an employer has a legal right to summarily dismiss an employee without notice for serious misconduct or other conduct which justifies such dismissal. In the case of **Chimanga Changa Limited v Stephen Chipango Ngombe**[10], we held that:

"An employer does not have to prove that an offence took place, or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably when coming to a conclusion".

In the present case, there was overwhelming evidence, that the respondent committed the offence for which he was dismissed and he admitted the misconduct. It was irrelevant that the appellant later authorised the repair of the vehicle and paid for the same or that the respondent wanted to avoid further damage to the vehicle because damage had already been caused.

On the facts before the trial judge, the respondent was not entitled to a declaration that the termination of his employment was wrongful, illegal and null and void and the judge did not grant the declaration sought. What is more, the respondent did not prove that his dismissal was wrongful and so, he was not entitled to the damages he was awarded. We find merit in grounds 1 to 3. Hence, it is pointless for us to consider ground 4 touching on quantum.

However, as we stated earlier, an issue of great public importance has been raised by the appellant in ground 5 which attacked the award of interest. **Order 36 (8)** of the **High Court Rules, Cap 27 of the Laws of Zambia** provides that where a

judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment. One may argue, as Mr. Shamakamba did, that it was within the discretion of the judge to award the interest.

However, we recognise that there was a delay of eight years from the date the trial closed on 14th May, 2007 to the date the judgment was delivered on 23rd February, 2015. There was no explanation for this long delay, no apology recorded and nothing complex about the matter. Had this appeal failed, the appellant would have paid a lot of money in interest for a total period of 11 years. The saying goes that judgment delayed is justice denied.

Therefore, we want to take this opportunity to remind judges in our jurisdiction, especially trial judges, of the consequences of delay in the delivery of judgments. In the England and Wales Court of Appeal case of **Bond v Dunster Properties Ltd**[11] the court described a delay of 22 months between the end of the hearing and the delivery of judgment as "lamentable and unacceptable".

The court noted that although there is no statutory rule that a judgment must be delivered within a specified time (in their case the usual period is taken to be three months) judgment has to be delivered "within a reasonable time" and what is reasonable may vary according to the complexity of the legal issues, the volume and nature of the evidence and other matters and where delay occurs, the litigants should receive an apology and, if possible, an explanation. The court went further on to observe that:

> **"The matter goes further than just the effect on the parties. An unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a whole, and reinforces the negative images which the public can have of the way judges and lawyers perform their roles. If there were regular delays of this order, the rule of law would be undermined. There can, of course, be very different reasons for delay, such as ill-health of the judge or a close relative. In rare cases it could be a reprehensible lack of diligence or even sometimes a belief that the parties might do better to settle their differences or to conduct their affairs without knowing the legal result. None of these reasons, except serious ill-health of the judge, would, however, justify a substantial delay beyond the usual period taken for delivering judgments".**

We adopt all the foregoing for the benefit of all judges in our jurisdiction. Suffice to add that a judge who takes too long to deliver a judgment, after hearing the evidence and arguments may have

forgotten some of the arguments or remembered them incorrectly, to the detriment of the parties.

In conclusion, this appeal succeeds and we set aside the judgment of the court below in its entirety. The appellant shall have the costs here and below to be taxed in default of agreement.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE