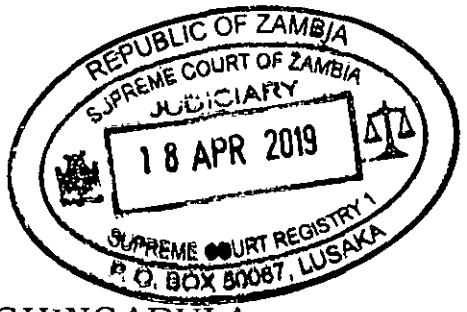
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction),

APPEAL NO. 111/2016
SCZ/8/44/2016



BETWEEN:

CAMFED ZAMBIA — APPELLANT

AND

YVONNE MATEBELE SICHINGABULA — RESPONDENT

Coram: Mambilima, CJ, Malila and Kaoma, JJS

On 2nd April, 2019 and 18th April, 2019

For the Appellant: Mr. M.J. Kawana of Corpus Legal Practitioners

For the Respondent: Mr. H.M. Hamakando of Batoka Chambers

JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Richard Jackson Phiri (1988-89) Z.R. 121**
2. **Zambia Electricity Supply Corporation Limited v Lubasi Muyambango (2006) Z.R. 22**
3. **Lusaka City Council v Thomas Mumba (1976) Z.R. 53**
4. **Albert Mwanaumo and others v NFC Africa Mining Plc and Que Nelson Jilowa – Supreme Court of Zambia Judgment No. 19 of 2007**

This appeal is from a judgment of the Industrial Relations Court (IRC) handed down on 27th January, 2016 in favour of the respondent, a former employee of the appellant.

The respondent was employed by the appellant on 15th August, 2011 as Programme Manager – Monitoring and Evaluation. Her employment was terminated on 11th December, 2013. Aggrieved by the termination of employment, she took out a court action in the IRC asking for several reliefs, including a declaration that the purported summary dismissal was unlawful, illegal and of no legal effect; an order for reinstatement; and damages or compensation for breach of contract and mental torture and inconvenience.

Her evidence in the court below was that she received a letter from the Co-Director, Programme and Impact, Regina Lialabi, on 25th November, 2013 in the presence of the Executive Advisor, Dorothy Kasanda, charging her with an offence of serious and unsatisfactory job performance and conduct. She was accused of making inappropriate comments about the integrity and honesty of teacher mentors, accusing them of conniving with the police after a mobile phone was stolen. She was also suspended from office.

She responded in a letter dated 26th November, 2013 stating that she would not attend the interview scheduled for 2nd December, 2013 because she felt that it would not yield any fair outcome. The main reason she gave was that Regina Lialabi and

enough facts for her to prepare her defence. She also exhausted the internal procedures as she was fired by the people she was supposed to appeal to.

The appellant's case was that the respondent was given an opportunity to be heard but she declined to attend. She was dismissed because of failure to engage in dialogue with management. She became ungovernable. Joseph Yondela agreed that her supervisor was supposed to charge her though the ultimate charge came from the Director of Impact. The appeal was to go to him even if he was at the same level with Regina Lialabi.

According to Regina Lialabi, the appeal could go to a senior manager, then to the chair of the Board of Directors and finally to the Board of Directors. She insisted that they followed all the necessary steps in the HR Manual.

The court below found as common cause that the respondent was in the employ of the appellant as a Programme Manager-Monitoring and Evaluation; that she was supervised by Joe Kanyika; and that the charge/suspension letter dated 31st October, 2013 was authored by Joe Kanyika and was unsigned.

The court identified the main issue for decision as whether or not the respondent's dismissal was unlawful, illegal and of no legal effect. It observed that for a claim of unlawful or wrongful dismissal to stand, a complainant must prove that a provision of the contract of employment (which encompasses the disciplinary and grievance procedure code) was breached by the employer when it terminated the employment; and that if the employer does not follow its disciplinary code when dealing with the employee before being dismissed, that would amount to a breach of contract.

The court also set out four questions a court will ask when considering a claim for wrongful dismissal as follows:

1. **Was the complainant properly charged by a proper officer prior to her dismissal?**
2. **Did the complainant respond to the charge by exculpating herself?**
3. **Did the Disciplinary Committee of the Respondent have necessary powers to conduct a Disciplinary Hearing? and,**
4. **Was the said power exercised properly?**

The court explained the function of the court in a case of wrongful dismissal as we have espoused in the cases of **Attorney General v Richard Jackson Phiri**[1] and **Zambia Electricity Supply Corporation Limited v Lubasi Muyambango**[2] and then proceeded to evaluate how the disciplinary hearing was handled.

The court found that the respondent had adduced evidence and proved that the provisions of the HR Handbook were not adhered to by the appellant when it dismissed her from employment. The court pointed out three procedural flaws:

1. **That there was ambiguity in the charge letter of 31st October, 2013 exhibited as 'YMS6'. In the charge letter it was written that the letter served as official written warning, on behaviour which was seriously prejudicial to Camfed or its work as outlined in the HR Handbook. The court wondered whether this was a charge or warning and noted that the line manager was only authorised to issue a warning as per section 15.2, bullet 10, at page 63 of the HR Handbook.**

2. **That if this was a charge, the charging officer was referred to the respondent's complaint on the work overload after having taken on other responsibilities. That was not gross misconduct or negligence and the charge letter was not signed. Further, Regina Lialabi and Dorothy Kasanda signed the letter of 25th November, 2013 when the HR Handbook stated at section 16.2, step 2 that the line manager would invite the respondent to attend a hearing. This was breached.**

3. **That the appellant constituted a wrong disciplinary committee comprising of Regina Lialabi and Dorothy Kasanda who authored the letter of suspension. It would be difficult to hear the appeal if the respondent decided to appeal as the same officers would have been at the initial hearing stage. It cited *Lusaka City Council v Thomas Mumba*[3] where it was held that:**

> ***'An administrator who exercises quasi-judicial functions cannot in any circumstances take part or appear to take part in hearing an appeal against his own decision.'***

On the basis of the above, the court found that the procedure used to dismiss the respondent was contradictory and legally flawed rendering the dismissal unlawful, illegal and wrongful. Thus, it

awarded the respondent 12 months' salary as damages in lieu of reinstatement and 6 months' salary as compensation for mental distress and inconvenience, together with interest and costs.

Distressed by this decision, the appellant filed this appeal advancing four grounds namely:

1. **That the court below erred in both law and fact when it awarded the respondent six (6) months' salary as compensation for mental distress and inconvenience when the award was not supported by any law and there was no evidence whatsoever adduced by the respondent to support the allegation of mental distress and inconvenience.**
2. **That the court below erred in both fact and law when it held that there was wrongful dismissal by reason of the fact that the appellant constituted a wrong disciplinary committee comprising of Ms. Regina Lialabi and Mrs. Dorothy Kasanda since they authored the respondent's suspension letter without having regard to the fact that the evidence on record shows that the same was permissible under the respondent's terms and conditions of employment.**
3. **That the court below erred in law and in fact when it found that it was going to be difficult to hear the appeal in case the respondent decided to appeal as the same officers will have been at the initial hearing stage without having due regard to all the evidence on record which clearly shows that an appeal from the decision of the initial hearing would have been heard by the Camfed Zambia Executive Director or the Board of Directors.**
4. **That assuming there was wrongful dismissal of the respondent, the court below erred in law and in fact when it did not consider the respondent's alleged misconduct before making a finding that the respondent was wrongfully dismissed and awarding 12 months' salary in damages.**

Both parties filed heads of argument on which they relied. At this initial stage, we shall not deal with ground 1. We shall only do so if we find that the termination of employment was wrongful.

In support of ground 2, counsel for the appellant started by stating that the HR Handbook provided for the disciplinary procedure of an employee who was charged with misconduct and that it formed part of the respondent's contract of employment. The core of his arguments is that the HR Handbook also specifically stated that a senior manager should be appointed as a chairperson to convene a disciplinary hearing.

It was argued that the authority to suspend an employee pending inquiry vested in senior management. A senior manager may author a suspension letter and chair a disciplinary hearing and there were only two people who were senior to the respondent who could conduct the disciplinary hearing; Regina Lialabi and Dorothy Kasanda despite that they authored the suspension letter.

Counsel submitted that the court below erred by not enforcing the contract of employment which was voluntarily entered into by the respondent. We were urged to reverse the lower court's finding on the constitution of the disciplinary committee.

The main argument made by the appellant in ground 3 is that there was an appeal procedure prescribed in the respondent's contract of employment of which clause 20 stated as follows:

'If you are dissatisfied with any disciplinary decision taken in relation to you or a decision to dismiss you, you should apply to the Camfed Zambia Executive Director (who may select an alternative senior individual to hear the appeal on her behalf). Please see Camfed's Disciplinary Rules Procedures (which is available from the executive director.'

It was argued that under Item 16.2, step 3 in the HR Handbook, the respondent could elect to appeal to the chair of the Board of Trustees. Therefore, the finding impugned in this ground must be set aside at it was not based on any evidence and the judgment does not explain the basis of the finding.

It was further argued that as a result of that erroneous finding, the court made more incorrect findings, particularly, that the procedure used to dismiss the respondent was legally flawed relying on **Lusaka City Council v Thomas Mumba**[3] when there was no evidence that the two officers who constituted the disciplinary panel would hear the respondent's appeal against their own decision. We were urged to reverse this finding as it was made without due regard to the evidence before the court.

In support of ground 4 it was contended that the court should have considered whether on the material evidence adduced by the parties, the charge laid against the respondent of issuing inappropriate and detrimental comments about the honesty and

integrity of teacher mentors, merit dismissal. The case of **Albert Mwanaumo and others v NFC Africa Mining Plc and another**[4] was cited to buttress the argument that even if it were found that the appellant did not follow the correct procedure in dismissing the respondent, had the court considered the charges laid against her, it would have found that she committed a dismissible offence and not awarded her any damages. We were urged to allow the appeal.

In response to a question by the Court as to why the appellant did not proceed to make a decision in the absence of the respondent, on the charges laid against the respondent, counsel stated that the appellant deemed it fit to terminate the employment on the basis that the respondent was refusing to engage in talks.

On the respondent's concern that she was not charged with the offence for which she was dismissed and the offence was not captured in the HR Handbook, counsel responded that charging her would have been futile as she had refused to appear for the other charges; and that the offence fell under gross misconduct because the offences in the HR Handbook were not exhaustive.

In response to ground 2, counsel for the respondent submitted that the respondent never refused to subject herself to the

disciplinary procedure contained in her contract. It was the appellant which breached her terms and conditions of service because her line manager was the only person authorised to convene a meeting to discuss any matter concerning her in terms of Item 16.2, step 2 of the HR Handbook.

It was submitted that only the respondent's line manager and the head of finance could conduct the disciplinary hearing because Joseph Yondela, Regina Lialabi and Dorothy Kasanda occupied the senior most positions and were reporting to the Chief Executive Officer in the United Kingdom. Therefore, any decision made against the respondent by her line manager would only be appealed to the three.

However, Regina Lialabi and Dorothy Kasanda disqualified themselves when they performed the duties of the respondent's line manager by writing and suspending her from duty. In addition, Regina Lialabi was not going to be impartial because she was one of the aggrieved persons in the charge letter dated 31st October, 2013. Joseph Yondela would also not be competent to hear her appeal because he instigated the charge letter dated 31st October, 2013 by an e-mail instruction to Joe Kanyika.

It was also contended that instead of addressing the partiality of the disciplinary team, the appellant dismissed the respondent on a new charge of gross misconduct which was not mentioned in her suspension letter. Further, the offence for which she was dismissed was non-existent under gross misconduct or negligence. On her part, the respondent acted in accordance with her contract of service by giving reasons for not attending the disciplinary meeting.

In response to ground 3, counsel reiterated that as there was no senior manager above Regina Lialabi and Dorothy Kasanda to whom the respondent could have appealed, the whole disciplinary hearing was going to be an academic exercise like the written warning/charge. He cited Item 16.2, step 1 of the HR Handbook.

In respect of ground 4, it was argued essentially that all the documents filed by the appellant did not show that the respondent was guilty of the offence charged. We were urged to dismiss the appeal with costs here and below.

In his oral responses to the questions put to him by the Court, counsel for the respondent conceded that the respondent was wrong not to appear for the disciplinary interview but argued that she should have been given written warnings instead of dismissal.

We have considered the record of appeal and the submissions by counsel on both sides. The main issue raised by this appeal is whether the respondent was wrongfully dismissed when her employment was terminated.

It is settled that at common law, an employer may dismiss an employee summarily if the employee has committed an act of gross misconduct. In this case, the disciplinary procedure code which is contained in the HR Handbook outlined the offences that constitute misconduct. Serious and unsatisfactory job performance and conduct fell under gross misconduct and was dismissible. The procedures in the HR Handbook were operated in accordance with the UK ACAS Code of Practice on disciplinary and grievance procedures, alongside the Employment Act 2002 schedule 2.

Although the HR Handbook states that the procedures are for guidance only and are not intended to be contractually binding, it is agreed that if a disciplinary procedure is incorporated into a contract of employment, it must be adhered to, and a failure to do so may attract the usual legal remedies. The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract of employment.

It is trite that an employee accused of misconduct has a right to be heard. The employer should inform the employee in advance of the precise charge they are required to answer, give the employee time to prepare a response, conduct an investigation and afford the employee an opportunity to put forward submissions in defence. The HR Handbook recognises this in Items 15.1 and 15.4 step 1.

An accused employee also has a right to be fairly judged. The purpose of a disciplinary hearing is to enable the disciplinary committee to weigh the evidence for and against the employee and to make an informed and considered decision. In this regard, Item 15.1 of the HR Handbook states that the chairperson appointed to convene a disciplinary hearing should be impartial and should not, if possible have been involved in issues addressed at the hearing.

Clearly, a reasonable fear of bias arises when a member of a disciplinary panel sits in judgment over matters concerning him or herself or a person with whom he or she associates or in matters of which he or she has prior personal knowledge or experience or has an interest in the outcome. The perception of the employee is important but suspicion only will not be sufficient. Allegations of bias must be seen in the sense of impeding justice.

The question that arises is what should an employer do if an employee refuses to attend a disciplinary hearing? The HR Handbook in Item 15.4, step 2 states that the employee must take all reasonable steps to attend and if s/he cannot attend s/he must give reasons in writing but it is silent on the consequences of failure to attend a disciplinary hearing or interview.

In contrast, the ACAS Code states that where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a decision based on the evidence available. If the employee has refused to attend for a specific reason, the employer should investigate the reason given and attempt to resolve the issue and reschedule the meeting at least once. It may be necessary to reschedule on further occasions, depending on the circumstances.

If the employer has made all reasonable efforts to identify and address the concerns of an employee and has made several attempts to invite him or her to the disciplinary meeting, the employer may be justified in proceeding with the disciplinary hearing in the absence of the employee.

Additionally, an employee who chooses not to attend a disciplinary hearing does so at his or her own peril. Even if the employee has objections to the process and procedure, they are obliged to participate in the hearing in order to be able to raise an objection at a later stage as opposed to avoiding the disciplinary hearing. Any employee who refuses to attend a disciplinary hearing without a very valid reason cannot be heard at a later stage to raise an objection to the process.

We shall now address the three procedural flaws identified by the court below which prompted it to find that the dismissal was wrongful. First, the court found ambiguity in the charge letter marked 'YMS6' because it was stated to be an official written warning and or charge. Secondly, the court opined that if 'YMS6' was a charge, the respondent's complaint on the work overload was not gross misconduct or negligence and 'YMS6' was not signed. According to the court, these short-comings were explained by the respondent to the appellant in her letter produced below as 'YMS8'.

From the affidavit in support of her complaint, the respondent received the letter/charge produced as 'YMS4' on 4th November, 2013 wherein she was accused of behaviour which was seriously

prejudicial to Camfed or its work. She exculpated herself in 'YMS5'. On 11th November, 2013 she received 'YMS6' in which she was accused of similar behaviour. The two documents were written by Joe Kanyika. 'YMS6' related to the complaint on work overload and it set out the circumstances leading to the charge in 'YMS4'.

Further, 'YMS6' was the charge/written warning which the respondent claimed was not official because it was not signed by Joe Kanyika and was instigated by an e-mail instruction from Joseph Yondela. It was the same letter where she was told to respect Regina Lialabi. She exculpated herself in 'YMS8'.

Although the respondent mentioned 'YMS6' in her affidavit in support of the complaint, she never alluded to it in her evidence in chief or mentioned any ambiguity in the charge. In cross-examination, she said there was no suspension or disciplinary action resulting from that charge letter.

Conversely, 'YMS3' related to the making of inappropriate comments about the honesty and integrity of teacher mentors following an incident of a stolen mobile phone. The only connection to 'YMS6' was mention that the appellant had continued to receive reports of inappropriate and detrimental comments the respondent

had made about the employer whilst in the field after receiving the formal warning letter of 31st October, 2013. In actual fact, the respondent conceded below that the two issues were quite different.

The position we take, based on what we have said above, is that because 'YMS6' was not in issue in the court below and the respondent never testified that she had not understood the nature and import of the charge she was required to answer in 'YMS3', the court should not have used the alleged shortcomings in 'YMS6' to justify a finding of wrongful dismissal in a matter relating to 'YMS3'.

Moreover, the respondent's employment was not terminated on the basis of the charge in 'YMS6'. Therefore, it was not open to the court to conclude that the respondent's complaint on the work overload after taking on other responsibilities was not gross misconduct or negligence or to delve into the explanation by the respondent to the appellant in 'YMS8'.

Thirdly, the court found that Item 16.2, step 2 of the HR Handbook was breached because Regina Lialabi and Dorothy Kasanda signed 'YMS3' instead of the line manager. We have held in a plethora of cases that mere breach of a procedural requirement,

like the one we are dealing with here, would not make a dismissal wrongful if the respondent had committed a dismissible offence.

Counsel for the respondent argued that the respondent was not even charged with any offence because the issues raised in 'YMS3' were just concerns. If this was the case, then the respondent should not complain about breach of procedural requirements.

'YMS3' stated that depending on the facts established at the interview, the outcome could be disciplinary action, which may lead to termination of employment. The respondent agreed below that before a written warning, or charge there was always some sort of discussion, after which a decision was made. Such meetings or discussions were actually mentioned in 'YMS4' and 'YMS6'. The disciplinary interview, to which the respondent was invited, could have been one such meeting or discussion.

Unfortunately, she refused to attend the interview asserting that the disciplinary team would be biased against her. She was assured that all policies and procedures in line with conducting a disciplinary interview were being followed and she would be given the opportunity to put forward her version of events at the meeting

before any decision was made and the opportunity to appeal any decision made as a result of the disciplinary interview.

Despite the assurances and the meeting being rescheduled twice, the respondent still refused to attend the interview. The appellant proceeded to make a decision in her absence and the decision was to terminate her employment for failing to engage in dialogue with management.

As we said earlier, even if the respondent had objections to the process, she was obliged to participate in the disciplinary interview in order to be able to raise an objection later as opposed to avoiding the meeting. She chose not to attend the interview at her own peril. She could not be heard later to raise an objection to the process.

In fact, the court did not deal with the issue of bias raised by the respondent regarding the disciplinary interview team or the consequences of the respondent refusing to attend the interview after she was assured of the impartiality of the disciplinary team. The court concerned itself only with what would happen if the respondent decided to appeal.

This brings us to the last flaw that the appellant constituted a wrong disciplinary committee since Regina Lialabi and Dorothy

Kasanda authored the suspension letter. And so, it would be difficult to hear the appeal in case the respondent decided to appeal as the same officers would have been at the initial hearing stage.

Indeed, the respondent had a right to appeal any disciplinary decision taken against her in accordance with the applicable procedures. In terms of clause 20 of her contract of employment, the appeal would go to the Executive Director, who may select an alternative senior individual to hear the appeal on her behalf.

Further, under Item 16.2, steps 3 and 4 of the HR Handbook, an employee who wished to appeal should raise the matter in writing with the Executive Director if s/he was not involved in the first stage or with the Chair of the Board of Trustees. This presupposes that the Executive Director may have been involved in the first stage, in which case, the appeal would go to the Chair of the Board of Trustees and a final appeal to the Board of Trustees.

Therefore, it cannot be true that nobody else could hear the appeal had the respondent attended the disciplinary interview. Regina Lialabi and Dorothy Kasanda may have been the senior most officers in the appellant but it could not be assumed that they would take part in an appeal against their own decision if the

respondent decided to appeal. The case of **Lusaka City Council v Thomas Mumba**[3] referred to by the court was of little help.

We are satisfied that the decision to terminate the employment was reasonable in the circumstances as the respondent had become ungovernable. She refused to attend meetings to discuss issues which the employer held to be seriously unsatisfactory when viewed in light of its policies, rules and standards. At trial she alleged that the charges laid against her were not contained in the HR Handbook but agreed that the issues fell under gross negligence. She also said she was not charged with failure to engage in dialogue with management and the offence was not in the HR Handbook.

However, the court below did not base its decision on these matters. We agree with the appellant that charging the respondent with another offence would have been futile since she was determined not to attend any meetings. Suffice to add that there is no definitive list of types of misconduct that employees can commit at the work place and whether the conduct is serious enough to warrant dismissal is always a question of fact in each case.

In this case, the procedure followed by the appellant may not have been without some flaws but these to us were not so gross and

of the nature as to justify the vitiation of the process or the final decision taken by the appellant. We reverse the decision of the court below that the dismissal was wrongful and we set aside the award of damages both for wrongful dismissal and compensation for mental distress and inconvenience.

We allow the appeal but make no order as to costs.

I.C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE