IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.135/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BARCLAYS BANK ZAMBIA PLC **APPELLANT**

AND

STEPHENSON ZAWINJA GONDWE **RESPONDENT**

Coram: Musonda, Ag.DCJ, Hamaundu and Kabuka, JJS
On 7th May, 2019 and 15th May, 2019

For the Appellants : Mr H. Chizu, Messrs Chanda Chizu & Associates (for Messrs Robert and Partners)
For the Respondent : Messrs Nanguzyambo & Co

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Attorney-General v Richard Jackson Phiri (1988-1989) ZR 121**
2. **Zambia Electricity Supply Corporation Limited v Muyambango(2006) ZR 22**
3. **Chimanga Changa Limited v Stephen Ng'ombe (2010) ZR 206**
4. **Konkola Copper Mines Limited v Victor Simwinga, Appeal No. 147/2015(unreported)**

Works referred to:
Selwyn's Law of Employment, 13th edition, NM, Selwn, 2004, Lexis Nexis, UK.

This appeal is against the holding by the High Court that the respondent's dismissal from employment by the appellant was wrongful.

The undisputed facts of this case are these: On 21st June, 2011, the respondent, while working at the appellant's Mutaba House Branch in Lusaka, processed a swift transfer transaction on an account belonging to one of the appellant's clients, China Gansu Eng Corporation, involving a sum of USD60,000.00. This transaction was completed and payment was made. Again, on 30th June 2011, the respondent processed another swift transfer transaction on an account belonging to another of the appellant's clients, Mohab Transport, involving a sum of USD87,000.00. As the transaction was being processed, it was noticed by the client who raised a query at the appellant's Kitwe Branch. The transaction was halted. It is not in dispute that after processing the transactions, the respondent had passed them on to his supervisor, a Mr Mutiya, who approved them. Upon the query by Mohab Transport, the appellant instituted investigations. These were focused on all the employees who were appearing on the documents as having had a part in processing the transactions, that included the respondent's supervisor, Mr Mutiya.

It was discovered that the two clients had never issued instructions for the respective transactions. It was also discovered that the two officers who were purported to have worked on the transaction prior to the respondent had actually not done so on account of the fact that they had been absent from work, for one reason or another, on the days that they were purported to have worked on them. It was further discovered that someone had forged the signatures of the two officers in order to show that they had worked on the transactions. What set the respondent apart from the other employees who were under investigation with him was the fact that he was the only one who, on both occasions, had viewed the respective accounts even before the purported instructions for the transactions had been given. It was found that, on those occasions, the respondent had had no reason to view the accounts. It was further found that the respondent had used wrong forms to process the transactions. As a result of the investigations, the respondent was charged with the offence of gross misconduct, which was particularized as aiding and abetting theft or fraud. He was also charged with the offence of gross negligence, which was particularized as disregarding procedure or system, or instruction. The respondent wrote a letter exculpating

himself. A disciplinary hearing was held, after which the respondent was dismissed. The respondent appealed against his dismissal, but was unsuccessful. He then commenced an action in the High Court for wrongful dismissal. The appellant counter-claimed the loss of USD60,000.

At the hearing, the only witnesses that gave *viva voce* testimony on either side were the respondent and his former supervisor, Mr Mutiya. As we have said, the facts were largely undisputed. Perhaps one important item of evidence on which there was dispute was this: In cross-examination of the respondent, it was pointed out to him that he had viewed the accounts of the two customers prior to the transactions, and on days when there had been no transaction which warranted his viewing the accounts. The respondent denied having viewed the accounts prior to the transactions. Mr Mutiya, on the other hand, when he testified for the appellant, said that prior to the transactions in both cases, the respondent viewed the accounts when there was no business that he was doing on them. We may add here that, in his testimony, the respondent also denied having used wrong forms, and also complained to the judge that he was not accorded a fair hearing because he was not given the report on the investigation

to use for his defence. He also complained that he was not given a chance to ask the investigating officer questions because that officer was not brought before the disciplinary hearing as a witness. Mr Mutiya, for his part, conceded that no handwriting expert was brought in to confirm that the signatures were forged.

The trial court resolved the matter as essentially one of credibility between the two witnesses. From the testimony given by the two witnesses in court, the court below made the following observations;

(a) that while the respondent in his testimony had denied having viewed the accounts prior to the transactions, the appellant's witness did not adduce any evidence to justify the allegation;

(b) that Mr Mutiya, as the final authorizing officer, ought to have detected the forged signatures and any other anomalies on the transactions: yet it was only the respondent who was penalized for them; and,

(c) that there was no evidence to suggest that the respondent forged the signatures because Mr Mutiya conceded in cross-examination that no handwriting expert was called to confirm

that the signatures on the two transactions were forged by the respondent.

The court went on to review cases which hold that allegations of fraud must be specifically pleaded, and noted that the appellant had neither pleaded nor provided particulars of the fraud. We think that this observation was with regard to the counter-claim. As there is no cross-appeal on it, we will not consider the observation any further.

Seemingly in passing, the court said that the respondent should have been availed all necessary documentation, including the investigation report in order for him to adequately conduct his defence.

With the foregoing observations, the court found that the allegations against the respondent had been unfounded and, consequently, the dismissal was wrongful. For essentially the same reasons, the court found that the appellant had not proved its counter-claim.

The court upheld the respondent's claim and awarded him a sum of K300,000 (unrebased) as damages for wrongful dismissal and loss of earnings.

The appellant appeals on four grounds; three grounds relate to the finding of wrongful dismissal while one is against the damages awarded. We will deal with the grievance against the finding of wrongful dismissal first. All the three grounds against this finding raise only one issue, and this anchored on our guidance in the following cases, namely; **Attorney-General v Richard Jackson Phiri**[1] and **Zambia Electricity Supply Corporation Limited v Muyambango**[2]. The main argument arising from all the three grounds is that the court below failed to adhere to the guidance that we have given in the two previous decisions, among others, namely; that the court should merely examine whether the correct procedure were followed and whether there was a substratum of facts to support the decision that the employer took, and not to interpose itself as an appellate tribunal within the domestic disciplinary procedure.

Learned counsel for the appellant argued, in this case, that the court below did not, at any point in time, concern itself with what was before the appellant's disciplinary committee. He submitted that, had the court done so, it would have not decided in favour of the respondent. To illustrate the argument, counsel pointed out that the charge sheet raised against the respondent alleged specific acts or

omissions on his part, to which he was supposed to respond; and yet the respondent chose to write a bare denial in his exculpatory statement, without specifically addressing the allegations. We shall set out only two of the allegations which counsel referred to. One allegation was that the respondent had viewed the accounts prior to the transactions when there was no business that he was doing on them. Another was that he used wrong forms when processing the transactions. In the course of the submissions, several authorities were referred to us, including the two cases we have cited above. Among the authorities that counsel referred to was the book titled *"Selwyn's Law of Employment"*. We take particular interest in this authority because it formed the basis of our decision in another case which has not been cited by the parties, although its holding is very important to this matter. The case is **Chimanga Changa Limited v Stephen Ng'ombe**[3]. Counsel cited a passage from the said book. We shall cite some excerpts therefrom shortly.

The respondent on the other hand, relying on the case of **Attorney General v Phiri**, argued mainly that the court below was on firm ground in finding for the respondent because there was no substratum of facts to support the disciplinary committee's decision.

The respondent also supported the view by the court below that he was denied natural justice because he was not given the documents that he had requested for; and was also denied the opportunity to put questions to the investigating officer. Counsel for the respondent based the submissions mainly on the testimony of the parties in the court below.

The parties do not dispute the principle set out in the case of **Attorney General v Richard Jackson Phiri**, and other subsequent cases. We must add that, when considering whether or not there was a substratum of facts to support the employer's decision, the court should not overlook another of our holdings which is found in the case of **Chimanga Changa Limited v Ng'ombe**. We held therein 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 in coming to a decision."**

As we have said, this holding was derived from a passage in the work *Selwyn's Law of Employment.* Recently, in the unreported case of **Konkola Copper Mines Limited v Victor Simwinga**[4] whose judgment we passed on 28th March, 2019, we took the opportunity to

set out in full that passage. In this case, however, we shall just quote a few excepts from it. The learned author further goes on to state:

> **"The employer is not concerned to apply standards of proof which may be relevant in a criminal court.....The employer is having to decide whether or not he wishes to retain the employee, not whether or not he was guilty of a particular offence. Thus the test is, what would a reasonable employer have done on the facts which he knew, taking into account the Code of Practice and current industrial relations practice"**(page 310)

Elsewhere within the same passage, the learned author states:

> **"The employment tribunal must not act as a court of appeal, nor retry a case..... Thus provided an employer carries out an appropriate investigation, gives the employee a fair opportunity to explain his conduct, etc, it would be wrong for an employment tribunal to suggest that further investigations should have been carried out for, by doing so, they are substituting their own standards of what was an adequate investigation for the standard that could be objectively expected from a reasonable employer"**(P.310)

Now, in this case we do not hesitate to concur with the appellant's argument that the court below rather restricted itself to considering only the testimony that was given in court; and, by so doing, it essentially retried the case. The court below should have concerned itself with examining what was before the disciplinary committee. In this regard, the contents of the charge sheet and the

respondent's letter of exculpation were very important. As counsel for the appellant pointed out, the charge sheet had alleged that the respondent had viewed the two accounts prior to the transactions, when there had been no need to do so. The charge sheet had set out a schedule of the dates on which the appellant's USER Activity Report had picked out the respondent's preview of the accounts. The charge sheet had also alleged that the respondent had used wrong forms in order to process the transactions. The respondent was asked to exculpate himself against these allegations. Instead, as correctly pointed out by the appellant, the respondent chose to submit an exculpation which was scanty in detail, and completely avoided the two allegations. The said allegations were very damning to the respondent because, whereas it may be said that the respondent may have merely failed to notice the forged signatures, in the same way that his supervisor failed to do so, the two allegations tended to separate the respondent from his supervisor. These two allegations meant that the respondent had prior scrutiny of the accounts with an ulterior motive, which became manifest in the fraudulent transactions that followed. The respondent's failure to address the two allegations left the employer with the inference that the

respondent had planned to fraudulently transact on those two accounts and that, for that purpose, he had not only previewed the accounts involved but had gone on to process the fraudulent transactions on wrong forms. That is the substratum of facts that was before the disciplinary committee; and that is the substratum of facts that the court below should have looked for, and not just rely on the testimony in court which, by that time, would have been full of afterthoughts. When one looks at that inference, it is clear that appellant did not act unreasonably in dismissing the respondent from employment. Further, we are satisfied that the appellant in this case carried out an investigation and gave the respondent a fair opportunity to explain the conduct alleged. His complaint that he was denied an opportunity to put questions to the investigating officer, or that he was not given the documents that he required for his defence is immaterial because; first, it is not expected of an employer to conduct a hearing that is on the same footing as a criminal trial. Secondly, the respondent was required only to explain if he did preview the accounts, and why he did so. And also, to explain why he used wrong forms to process the transactions. This did not require putting questions to the investigating officer or obtaining further

documents. So, by sp a ning the opportunity to respond to those allegations when he w as asked to exculpate himself, the respondent sealed his fate.

For the foregoing reasons, we find merit in the appeal against the judgment granting the respondent's claim for wrongful dismissal. In the circumstances we find it unnecessary to deal with the appeal against the award of damages.

This appeal is allowed. We reverse the judgment of the court below and set aside the award of damages given pursuant to that judgment. The appellants will have costs, both here and in the court below.

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M. Musonda
AG/DEPUTY CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE