

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

APPEAL NO. 147/2015

BETWEEN:

KONKOLA COPPER MINES PLC

APPELLANT

AND

VICTOR SIMWINGA



RESPONDENT

Coram: Hamaundu, Kabuka and Mutuna, JJS

On 8th May, 2018 and 28th March, 2019

For the appellant : Mr Chibeleka, Messrs ECB Chambers

For the respondent : Mr S. Twumasi, Messrs Kitwe Chambers

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Undi Phiri v Bank of Zambia (2007) ZR 186**
2. **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa(1986) ZR 70.**
3. **The Attorney General v Richard Jackson Phiri (1988-1989) ZR 121**
4. **Zambia Electricity Supply Corporation v David Lubasi Muyambango (2006) ZR 22**

5. **Zambia Airways Corporation Limited v Gershom Mubanga (1990/92) ZR 152**
6. **Mukobe Musa Bwalya v The Attorney General**(*unreported*)
7. **Chimanga Changa Limited v Stephen Chipango Ng'ombe (2010) 1 ZR 208.**

Works referred to:

1. **Employment Law in Zambia, 2011 edition, Justice W.S. Mwenda.**
2. **Selwyn's Law of Employment, 13th edition, NM, Selwn, 2004, Lexis Nexis, UK.**

This appeal is against a judgment of the Industrial Relations Court by which the respondent's dismissal from employment with the appellant was held to be wrongful and, as a remedy, an order was made that the respondent be deemed to have been declared redundant under the contract of employment and paid accordingly.

The respondent was an employee of the appellant. The appellant had an arrangement with several financial institutions, whereby its employees could obtain loans from the said institutions which were then recovered through deductions from their salaries. Among these institutions were Bayport Financial Services Limited and Indo-Zambia Bank. It was a general rule that an employee could not be allowed to have two loans from different institutions at the same time and that, therefore, an employee was required to discharge any

existing loan before he could obtain another one from the same or different institution.

On 6th February, 2013, an employee of Indo-Zambia Bank brought to the appellant's payroll office, for approval, applications made by nine of the appellant's employees, seeking loans from the bank. Attached to the application forms were receipts showing that the employees had discharged their outstanding loans with Bayport Financial Services Limited. The appellant presented those receipts to Bayport Financial Services Limited for confirmation. The receipts were rejected on the ground that they were forged.

In the meantime, the respondent who had an outstanding loan with Bayport Financial Services Limited had applied for a loan from Indo-Zambia Bank. The loan was approved and disbursed, whereupon the respondent immediately used part of the money to discharge the outstanding loan from Bayport Financial Services Limited. This was on 4th April, 2013; and the amount paid was K27,105.54.

The appellant, meanwhile, tasked one of its departments to investigate the matter concerning the forged receipts by the nine

employees. At the end of the investigation, the department presented a report on 27th May, 2013.

According to the report, the department had established that the nine employees had, between October and December, 2012, applied for loans from Indo-Zambia Bank. When Indo-Zambia Bank declined to give them the loans, owing to the fact that they had outstanding loans with Bayport Financial Services Limited, the employees approached some named money lenders who forged receipts purporting to show that the employees had now discharged their outstanding loans with Bayport Financial Services Limited. The report named the nine employees involved. The respondent's name was not among them.

Subsequently, however, the appellant charged the respondent for unprofessional conduct on the ground that he had forged a receipt dated 12th January, 2013 in order to show that he had discharged his outstanding loan from Bayport Financial Services Limited; and that it was that act which enabled him to obtain the loan from Indo-Zambia Bank.

The respondent denied knowledge of the receipt and explained that he had made an arrangement with Indo-Zambia Bank that he

would use part of the loan to immediately discharge the outstanding loan from Bayport Financial Services Limited. The appellant did not believe the respondent's explanation. It dismissed him from employment on 10th June, 2013. Two subsequent appeals by the respondent were unsuccessful. He then took his grievance to the Industrial Relations Court.

At the trial in the court below, both parties maintained the same positions that they had taken at the administrative disciplinary hearing.

The court below took the view that the whole case hinged on the receipt dated 12th January, 2013. Noting that the amount written on that receipt was K17,457,919 and yet the amount outstanding was well above that sum, the court wondered why the respondent could not have generated a receipt that covered the whole amount outstanding if, indeed, his intention had been to show that he had settled his outstanding balances. The court wondered how the receipt was discovered because no evidence was led in that regard. The court was not convinced that the mere reflection of the respondent's personal employment details on the receipt raised the inference that he was the one who generated it because, in its view, the respondent's

employment details were known to others; and that some other people could have generated the receipt for purposes unknown to the respondent.

With those observations, the court found that the respondent's alleged involvement in fraud was unsubstantiated. Accordingly, it held that the dismissal was wrongful.

Coming to the remedy, the court held that dismissing an employee on an unsubstantiated allegation of fraud was a special circumstance which justified an order of re-instatement. However, it was the court's view that, since the appellant is in private hands, no real purpose would be served in ordering that the respondent be re-instated. The court therefore ordered that the respondent be deemed to have been declared redundant in accordance with a clause under the contract of employment; and that he be paid accordingly.

The appellant appealed.

While the appellant has set out five grounds of appeal, the appeal itself is centred on two areas of dispute; that is, the holding that the dismissal was wrongful and the order that the respondent be deemed to have been declared redundant. We shall deal with the appeal on that footing.

In the appeal against the holding that the dismissal was wrongful, the appellant's arguments are on two areas; the form of the charge and the substance thereof. As regards the form, Mr Chibeleka, counsel for the appellant, argued that the crux of the matter is whether or not an employer has followed the disciplinary procedure. He argued that where such procedure has been followed the question of wrongful dismissal does not arise. For this proposition counsel cited the work of Justice W. S. Mwenda titled "*Employment Law in Zambia, revised edition, 2011*". The full citation, such as the details of the publisher, was not provided. Counsel pointed out that in this case there was ample evidence that a disciplinary hearing was held; and that the respondent even went through an appeal process. Counsel then wondered how, in the light of that evidence, a case of wrongful dismissal could hold. He sought further support for his argument from several decided cases: He relied on the cases of **Undi Phiri v Bank of Zambia**⁽¹⁾ and **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**⁽²⁾. Both cases propound the rule that where it is not in dispute that an employee has committed an offence whose punishment is dismissal, and is dismissed, no injustice arises out of failure by the employer to follow laid down procedures in the

contract. We think that the holding in these two cases is not on point with the appellant's argument that, once the employer follows the disciplinary procedure, no wrongful dismissal arises.

Further support was sought from the cases of **The Attorney General v Richard Jackson Phiri**⁽³⁾ and **Zambia Electricity Supply Corporation v David Lubasi Muyambango**⁽⁴⁾ 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; and that the duty of the court is only to examine if there was the necessary disciplinary power, and if it was exercised properly.

There was further reliance on some foreign authorities on the subject of unfair dismissal. However, we do not think that the issue of unfair dismissal is within the ambit of what this appeal really addresses.

As regards the substance of the charge, the appellant's argument was that there was no requirement at law for the appellant to strictly prove that an offence actually took place, having regard to the fact that the court below had accepted the evidence that the appellant did conduct investigations in the alleged fraud involving a

number of employees. Relying on our holdings in **Zambia Electricity Supply Corporation v David Lubasi Muyambango**⁽⁴⁾ and **Attorney General v Richard Jackson Phiri**⁽³⁾, cited above, counsel for the appellant argued that the court below should have strictly concerned itself with whether the appellant had the necessary disciplinary power and whether that power had been exercised properly. Learned counsel compared this case with the case of **Zambia Airways Corporation Limited v Gershom Mubanga**⁽⁵⁾ and also a recent unreported decision of ours in **Mukobe Musa Bwalya v The Attorney General**⁽⁶⁾ whose cause number was not provided and argued as follows: unlike in the *Zambia Airways* case where the employer did not follow the correct procedures, the appellant in this case had done so. And that, unlike in the *Mukobe Bwalya* case where the employer did not raise a charge sheet but the dismissal was nevertheless upheld because the act of wrongdoing was proved, in this case the appellant not only followed the procedure correctly but also proved the wrongdoing.

Further reliance was placed on our decision in **Chimanga Changa Limited v Stephen Chipango Ng'ombe**⁽⁷⁾. The particular holding relied upon by the appellant states:

“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.”

With the aid of this holding, counsel faulted the court below for demanding a high standard of proof from the appellant even after the court had noted that the appellant had relied on circumstantial evidence at the disciplinary hearing. According to counsel, the court below treated the disciplinary hearing as if it were a criminal trial.

Counsel pointed out that in this case the appellant's witness from Bayport Financial Services Limited testified that the respondent had attempted to clear the loan before its due date but was thwarted by the employer. It was argued, therefore, that the forged receipt constituted part of the initial steps by the respondent towards the commission of the desired end, that is, to fraudulently clear the loan ultimately. Counsel argued that, in the circumstances, it was too high a standard to say that the case of fraud against the respondent could only be established if the respondent could be directly linked to the generation of the receipt. It was counsel's submission that facts in this case were established to show that the appellant investigated the forgery and even engaged Bayport Financial Services to assist in

the investigations. Bayport Financial Services Limited disowned the receipt attributed to the respondent; and that there were further facts to show that the respondent did obtain another loan from Indo-Zambia Bank.

With those arguments counsel submitted that this appeal ought to succeed just on that issue.

Responding to the appellant's arguments on the holding that the dismissal was wrongful, Mr Twumasi, learned counsel for the respondent, relying on the holding in **Attorney General v Richard Jackson Phiri**⁽³⁾, submitted that there was no contention that the appellant followed the correct procedures in this case. Counsel argued, however, that that was only one limb of the holding in that case. According to counsel for the respondent, it is the other limb of the holding in that case which is in issue here; namely that, in addition to the employer following the correct procedures, there must be a substratum of facts to support the decision taken. In this regard learned counsel quoted three passages from the court below. The first passage quoted read thus:

"We are of the view that the details on the receipt did not create sufficient nexus on which to find the complainant's guilt. We

think that to hold otherwise would be unjustifiable and reckless on our part”.

The second passage read:

“He followed procedure to obtain the loan. We conclude the complainant’s alleged involvement in the fraud is unsubstantiated and, on this basis, we find the disciplinary measure of summary dismissal was unjustified”.

The third passage read:

The purported dismissal was for cause which we find not to be justified and is, therefore, wrongful”.

Counsel then argued that the passages showed that the court below examined the facts of this matter and found that the necessary disciplinary power was not exercised properly because there were no facts established to support the disciplinary measure that was taken against the respondent. It was learned counsel’s submission that the court below had, therefore, properly discharged its duty.

Counsel then went on to argue that, in any case, the arguments by the appellant are entirely against findings of fact. In this regard we were referred to **section 97** of the **Industrial and Labour Relations Act, Chapter 269** of the **laws of Zambia** and the case of **Barclays Bank Zambia Limited v Mando Chola and Ignatius**

Mulenga (unreported). The statutory provision permits an appeal against a decision of the Industrial Relations court only on points of law or points of mixed law and fact. The decided case is said to have explained that statutory provision. Counsel then argued that the appeal, in that regard is, incompetent.

We will resolve this issue first. Therefore, we shall consider whether it is necessary to deal with the issues on damages.

First, we must say that we do not agree with the contention by the respondent that the appeal is against findings of fact, and therefore incompetent. It is clear that the appellant is questioning the approach which the court below took in deciding this matter. The appellant contends that the court below did not follow our guidance in cases such as **Attorney General v Richard Jackson Phiri**⁽³⁾, to name just one. Clearly, that is a question of law.

Now, coming to the appeal, we have considered the arguments on this issue. In our view only three authorities are necessary to resolve this issue. These are; our holding in **Attorney General v Richard Jackson Phiri**⁽³⁾, our decision in **Chimanga Changa Limited v Ngombe**⁽⁷⁾ and finally, a passage from the works “**Selwyn’s Law of Employment**”, (13th edition). The relevant holding in the case

of **Attorney General V Richard Jackson Phiri⁽³⁾** has already been quoted. We can only say that the holding defines the court's boundaries when dealing with cases of wrongful or unlawful dismissal; these being that the court can only consider whether the employer had valid disciplinary powers and, if so, whether such powers were validly exercised. According to that holding, it is beyond the permitted boundaries for the court to sit as a court of appeal from the decision of an employer and review the employer's proceedings. The question in this case is; did the court below stay within its boundaries when it heard this matter? Reading the judgment of the court below, several things indicate that the court exceeded its boundaries. The first observation we make is that the court below resolved the matter on the evidence as it was presented at the trial, and failed to consider the case from the issues as they were at the time of the disciplinary hearing. Hence, we find the following statement in the judgment of the court:

"The issue to resolve is whether on the parties' evidence there are facts disclosed which support the disciplinary measures taken by the respondent"

Arising from that view, the court below set out certain facts which were said to have emerged from the evidence and were said to be common to both sides. In setting down part of those facts, the following is what the court below said:

“At a time when the complainant was still servicing a loan from Bayport, he wished to obtain another loan from the Bank. The complainant entered an arrangement with the Bank to pay off the balance outstanding on the loan at Bayport. On 4th April, 2013, the complainant’s loan at Bayport was properly discharged with the payment of the sum of K27,105.54 from funds amounting [to] K60,000 provided by the Bank”

Now, while the court below said that these facts were common cause to both sides, the record shows that that was not the position. In fact, the appellant’s position at the disciplinary hearing, which it maintained at the trial as shown by the averments in its *“Answer”*, was that while, indeed, the respondent may have paid off the Bayport loan through funds from a loan given to him by Indo-Zambia Bank, it is the manner in which the respondent obtained the loan from Indo-Zambia Bank which was in issue; according to the appellant, the respondent obtained that loan by tendering a fraudulent receipt purporting that he had cleared his other loan with Bayport.

Another observation we wish to make is what the court below said when reviewing the testimony of the witnesses. In this particular case, the court said that the appellant's witness (RW2) had brought out nothing of significance in re-examination. To the contrary, the witness brought out a very important piece of evidence, namely, that the employees who were named in the report were just a few of the employees who were involved in the scam that was unearthed. This evidence was important in that it painted a picture of the real situation that the employer was dealing with at the time that it made the decision to dismiss the employees involved, including the respondent. This, in turn, had a great bearing in determining whether the employer exercised his powers validly.

We have already set out at the beginning how the court resolved the burning issue of the fraudulent receipt; namely that the court did not believe that the respondent was responsible for its issuance because, according to the court, there were questions to be answered such as;

- (i) If the complainant intended to clear his indebtedness to Bayport, why did he not endorse the receipt with the full balance of K27,000 instead of the K17,000.**

- (ii) No evidence was shown as how the receipt came to be discovered
- (iii) Considering that the receipt was or ought to have been discovered by early February, 2013, when the fraudulent conduct of the nine employees named in the report was discovered, it was surprising that Bayport and Indo Zambia Bank saw nothing wrong in dealing with a suspected fraudster
- (iv) It was possible that the receipt could have been generated by others for purposes which the complainant had nothing to do with.

We find the reasons given by the court below for dismissing the forged receipt as yet another example of the court having gone outside its boundaries. At this point, we turn to our decision in **Chimanga Changa Limited v Ng'ombe**⁽⁷⁾. In that case we referred to the relevant portions of the work "*Selwyn's Law of Employment*", in summary. In the case at hand, we wish to quote the relevant passage more extensively for further clarity of the court's approach to cases of dismissal.

The passage comes under the Chapter headed "*Disciplinary dismissal and grievance procedures*" but is under the particular heading "*Investigations by the employer*" The passage reads:

"12.3 Clearly, no disciplinary action should be taken in advance of proper investigation by the employer. As Megarry VC stated in *John v Rees* (see para 12.38) the paths of the law are strewn

with examples of unanswerable charges which were eventually answered. But there are certain limits on the extent to which an employer may properly make inquiries into an incident, particularly if the charge is a serious one, such as theft, for there may well be an improper interference with the processes of Justice [*Tesco (Holdings) Limited v Hill*]. The important thing is that the employer does not have to prove that an offence took place, or even satisfy himself beyond all reasonable doubt that the employee committed the act in question. The function of the employer is to act reasonably in coming to a decision. Thus, in *Ferodo Ltd v Barines*, an employee was dismissed for vandalism. The employment tribunal was not satisfied that the employee was guilty, and therefore held that the dismissal was unfair. This finding was reversed by the EAT. The question was not whether or not the employment tribunal was satisfied that the employee was guilty, but whether they were satisfied that the employer had reasonable grounds for believing that the employee had committed the offence and had acted reasonably in dismissing for that offence. The employer is not concerned to apply standards of proof which may be relevant in a criminal court. In *Docherty v Redd*, the employee was dismissed for stealing 50p from the till. The employers took into account that they had suspected him of stealing similar sums on previous occasions, and it was held that they were entitled to have regard to their past suspicions. Clearly, a suspicion of previous theft is hardly evidence which would be admitted in a criminal court, but the issues are different. 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 Relation practice (*Parkers Bakeries Ltd v Palmer*). **The employment tribunal must not act as a court of appeal, nor retry a case, and the fact that in subsequent criminal proceedings an employee is acquitted of a charge against him is irrelevant to the issue of whether or not the employer has acted reasonably** (*Davies v GKN Birwelco [Uskside] Ltd*) In *Sainsbury's Supermarket Ltd v Hitt*, **the court of Appeal confirmed that the band of reasonableness approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss a person from his employment for conduct. 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."**

The above passage clearly sums up the approach that the court below was required to adopt. The passage also shows how the court below went beyond its boundaries.

The court below was merely required to check whether an appropriate investigation was carried out and whether the correct disciplinary procedures were followed. Then the court was to merely consider whether the appellant had reasonable grounds for believing that the respondent had committed the offence, and had acted

reasonably in dismissing the appellant for that offence. In order to determine

whether indeed the appellant's belief was reasonable there was need to look at what its contention was: this was that the respondent had fraudulently created a receipt endorsed with an amount of K17,457,919.00 purporting to show that he had cleared his indebtedness with Bayport Services; and that this was what enabled him to obtain the subsequent loan at Indo Zambia Bank.

In this case, however, the court below dismissed this receipt with several observations. One such observation was that the sum endorsed on the receipt was less than the balance that the respondent was still owing at Bayport Services and that if the respondent indeed intended to clear his indebtedness through that receipt, he would have endorsed a sum of about K27,000.00 which was the balance. The court below clearly missed the appellant's contention. According to that contention, the purpose of the fraudulent receipts by the affected employees was not to deceive Bayport Financial Service Limited in order for the loans to be cleared. The purpose was to deceive Indo-Zambia Bank into believing that the employees no longer had any outstanding loans with Bayport

Financial Services. In reality their outstanding balances at Bayport Financial Services Limited would still be in existence, but the employees would now have two parallel loans running with both institutions. Some employees would then use some of the money from the new loan to clear their outstanding balances at Bayport Financial Services Limited, as the respondent did in this case. So, because the court below missed the point, it failed to scrutinize the receipt and see what else was written thereon. Towards the end of the receipt, there was a portion for endorsing the nature of the payment. On this particular receipt there was endorsed the words "*outright settlement*". These words tended to support the appellant's contention that the purpose of the receipt was to deceive Indo Zambia Bank and not Bayport Services.

The next observation was that the appellant had not shown how it had come to be in possession of this particular receipt; and that because the respondent's personal details on the receipt could be found on the appellant's payroll data, anybody could have forged that receipt. To start with, the appellant had established that the receipts were brought to its attention by Indo-Zambia Bank. Going by the response of the appellant's witness in re-examination, the first batch

of receipts involving the nine employees were not the only ones. There were subsequent ones, including that of the respondent. As for the second aspect of the observation, it should be pointed out that the issue was first raised at the respondent's disciplinary hearing. The appellant rejected that argument on the ground that the receipt was coincidentally forged at the time that the respondent wanted a loan from Indo Zambia Bank, but still had a balance outstanding with Bayport Financial Services Limited; and that subsequent to the forging of that receipt, the respondent obtained the loan from Indo Zambia Bank, part of which he applied to clear his outstanding balance at Bayport Financial Services Limited. The appellant wondered which person could have known about the respondent's financial circumstances at that time and then gone on to extra lengths to forge a receipt that was intended to assist the respondent in his financial circumstances. With that reasoning, the appellant adopted the inference that the respondent caused the receipt to be forged in order to come out of his predicament. While the lower court's inference might be that anybody might have forged the receipt, the appellant's argument against that inference is equally forceful. Consequently, the inference that the appellant adopted is

also reasonable. Going by the authorities that we have cited, it was, in the circumstances, not for the court below to substitute its own inference for that of the appellant. Its function was merely to consider whether the appellant's belief, or inference, was reasonable.

In its final observation, the court below posed the question as to why, if indeed the respondent had been found to be among those who had forged receipts, Indo Zambia Bank had proceeded to give him a loan when it had denied the others. We can say that there was no evidence which supported the respondent's contention that he had made an arrangement with Indo Zambia Bank to obtain a loan, part of which he would apply to extinguish the one that he had at Bayport Services. No one from Indo Zambia Bank, either at the hearing or in the court below, testified to confirm the arrangement. So, the question as to how the loan was obtained is open to speculation. One inference could be that there was insider dealing between the respondent and someone within Indo Zambia Bank, using the forged receipt whose fraudulent nature was only discovered after the loan had been disbursed. But as we have said, the court is not supposed to go into such speculation.

Therefore, in this case, the appellant was faced with a scam in which several of its employees had forged and presented to Indo Zambia Bank receipts purporting to show that they had cleared their outstanding loans at Bayport Financial Services Limited; this was for the purpose of enabling them to obtain loans from Indo Zambia Bank. Among the forged receipts uncovered was that of the respondent. In the latter's case, however, by the time the receipt was uncovered, he had already obtained the loan and applied part of it to clear his outstanding balance at Bayport Financial Services Limited. Looking at the sequence of events; that is, the forging of the receipt and then subsequently the obtaining of the loan, the appellant firmly believed that the respondent had forged the receipt and used it to obtain the loan. On that ground it dismissed him. The question is; were there reasonable grounds for the appellant to hold that belief? Our answer is that there were. The other question is, did the appellant act reasonably in dismissing the respondent for the offence? Again, our answer is in the affirmative, for fraudulent conduct erodes the trust that is supposed to exist in an employment relationship.

The above paragraph sums up how the court below should have approached this case. We find merit in the grounds of appeal that

brought out the above issues. The issues were also the ones at the core of the appeal. The success of the grounds anchored on those issues means that the whole appeal has succeeded. We therefore, set aside the judgment of the court below. We find it academic to deal with the grounds concerning the damages that were awarded.

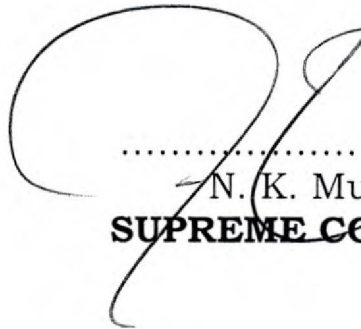
This appeal succeeds. Either party shall bear their own costs both here and in the court below.



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E. M. Hamaundu
SUPREME COURT JUDGE



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J. K. Kabuka
SUPREME COURT JUDGE



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N. K. Mutuna
SUPREME COURT JUDGE