

**IN THE SUPREME COURT OF ZAMBIA**

**APPEAL NO. 223/2016**

**HOLDEN AT NDOLA**

**(Civil Jurisdiction)**

**BETWEEN:**

**SOS CHILDREN'S VILLAGES ZAMBIA**

**APPELLANT**

**AND**

**MOSHEN MUCHELENGA**

**RESPONDENT**

**Coram : Musonda DCJ, Kabuka and Mutuna JJS**

**On 3<sup>rd</sup> December 2019 and 6<sup>th</sup> December 2019**

**For the Appellant : Ms M. Bwalya of Messrs Mwenye and Mwitwa  
Advocates**

**For the Respondent : Mrs. M. Mulenga - Harawa of Messrs M. C.  
Mulenga and Company**

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## **J U D G M E N T**

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MUTUNA 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 Lubasi  
Muyambango, SCZ judgment No. 7 of 2006**
- 3) **Caroline Tomaidah Daka v Zambia National Commercial Bank Plc  
2012/HP/19**
- 4) **ANZ Grindlays Bank (Zambia) Limited v Chrispin Kaona (1995-1997)  
ZR 85**
- 5) **Agholor v Cheeseborough Ponds (Z) Ltd (1976) ZR 1**

- 6) **Swarp Spinning Mills v Sebastian Chileshe and others, SCZ judgment number 6 of 2002**
- 7) **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**

Legislation referred to:

- 1) **Industrial and Labour Relations Act, Cap 269**
- 2) **Rules of the Supreme Court 1965 (White Book)**

## **Introduction**

- 1) This is an appeal against the decision of the then Industrial Relations Court, now a division of the High Court, with Musaluke J (as he then was) as the presiding judge. The decision found that the Appellant's dismissal of the Respondent from employment was wrongful and unfair.
- 2) The appeal also questions the Court's awards of damages equivalent to three months and eighteen months pay for wrongful and unfair dismissal, respectively, on the ground that the awards were unjustified as they were based on the wrong findings of fact by the Court.

## **Background**

- 3) The Respondent was an employee of the Appellant and around 11<sup>th</sup> April 2014 he was acting village director

pending the arrival of the substantive holder of the office. During this period, one of the youths under his charge fell ill and he drove him to Premium Clinic where he was admitted.

- 4) The youth was later discharged but admitted again when his illness persisted.
- 5) On the evening of 27<sup>th</sup> April 2014, during the youth's second admission, the Respondent was involved in a motor vehicle accident while driving the Appellant's vehicle as he drove the youth's mother to Premium Clinic to see the youth. He promptly called the Appellant's procurement officer (as person in charge of the Appellant's fleet of vehicles) who advised him to report the accident to the police. The procurement officer also advised the Respondent that he (the procurement officer) would inform the national transport coordinator at the Appellant's national office of the accident.
- 6) Acting on the advice of the procurement officer, the Respondent went to Emmasdale police station and reported the accident. Unfortunately, when he arrived at



the police station the vehicle which had hit into him had fled to avoid the visit to the police station. The police informed the Respondent to collect the police report the following Monday.

- 7) Later the procurement officer advised the Respondent to inform the Appellant's vehicle insurer of the accident and he did so the following Monday.
- 8) Prior to the incident involving the accident, and acting upon a request from the village educator, the Respondent caused to be issued one cheque instead of two in respect of payments of school fees for some village youths who were attending school at Lusaka Institute of Business Studies and Livingstone Institute of business Studies (LIBSs). He corrected this error promptly and the school fees were paid on time to enable the youths attend school which opened on 12<sup>th</sup> May 2014, after the fees were paid.
- 9) By 9<sup>th</sup> May 2014, the new village director had arrived and taken up office at the Appellant and the Respondent reverted to his substantive position. He later called on the village director and informed him of the accident as



his new supervisor and gave him a copy of the accident report he had written along with the police report.

- 10) On 12<sup>th</sup> May 2014, the village director charged the Respondent with the following offences:

10.1 Failure to report the motor vehicle accident in accordance with the Appellant's and insurer's terms and conditions;

10.2 Damage to motor vehicle, Toyota Hilux, registration number ABX 8416 (the vehicle) and failure to report damage to the said vehicle to his supervisor in accordance with the Appellant's terms and conditions of service, particularly clause 12 of Section 15;

10.3 Misguiding management by preparing one instead of two cheques payable to the two LIBSs resulting in delay in payment of the school fees for the affected youths and delay in their travel to and arrival back at the institutes.

- 11) The Respondent wrote an exculpatory letter and appeared before the disciplinary committee on 10<sup>th</sup> June 2014. The hearing was adjourned to 11<sup>th</sup> June 2014 because the Respondent raised objection in regard to one of the members of the committee.

- 12) On 11<sup>th</sup> June 2014, when the disciplinary hearing was reconvened, the Respondent once again objected to the attendance of one of the members but the meeting still went ahead and on 16<sup>th</sup> June 2014 he was informed that the decision of the disciplinary committee was that he should be dismissed.
- 13) The Respondent appealed to the national director and fifty six days later he was given a notice of hearing for the appeal. The notice indicated that the appeal would be heard at 8:00 hours on 6<sup>th</sup> August 2014.
- 14) Acting on the notice of hearing, the Respondent arrived at the Appellant's premises at 7.30 hours in readiness for the hearing scheduled for 8.00 hours. He waited for the hearing to begin but it was delayed so he left for the clinic at 10.30 hours. At 11.45 hours, the acting human resources manager called to inform him that the committee was ready to hear his case but he declined to attend due to the delay in convening the meeting occasioned by the committee and requested for an alternative date. The acting human resources manager

declined the request which prompted the Respondent to send him an email documenting the events as they occurred with a copy to the Ministry of Labour.

- 15) On 25<sup>th</sup> August 2014, the Respondent received a letter from the Appellant confirming that the appeal committee upheld the decision by the disciplinary committee to dismiss him. At this point, the Ministry of Labour representative intervened by trying to persuade the Appellant to reinstate the Respondent but it declined. The Respondent instituted proceedings in the Court below.

**The Respondent's case in the Court below and Appellant's defence**

- 16) The Respondent commenced the action by way of a notice of complaint pursuant to Section 85(1) of the **Industrial and Labour Relations Act**. He claimed the following reliefs:

16.1 A declaration that his dismissal from employment was illegal, wrongful and unfair;



- 16.2 A declaration that the procedure leading up to his dismissal was legally flawed and a sham;
  - 16.3 Reinstatement or, in the alternative, payment of full salaries and all fringe benefits including those benefits which he could have received at normal retirement age;
  - 16.4 Punitive damages for shock, trauma, embarrassment and humiliation arising out of the dismissal from employment;
  - 16.5 Any other relief the Court may deem fit;
  - 16.6 Interest;
  - 16.7 Costs.
- 17) The Respondent filed an affidavit in support of the notice of complaint and he also testified at the hearing. The gist of the contentions made against the Appellant was that his dismissal was unjustified in view of the fact that he had reported the accident, not only to the proper officer at the Appellant, but also the insurance company. Further, he had corrected the error regarding the issuance of one, instead of two cheques, such that, the youths for whose benefit the cheques were issued did not miss school and neither was their return to school delayed.

- 18) The Respondent contended further that there were procedural flaws in the two committee hearings because the disciplinary committee was not properly constituted while the appeals committee did not hear him, and it was not convened in the prescribed period of time. He also contended that he was charged under a wrong provision of the disciplinary code.
- 19) In his *viva voce* evidence, he clarified that he had reported the accident as was required of him by the Appellant and corrected the error in respect of the two cheques. He also explained his objection to the attendance of one of the members of the disciplinary committee on the ground that she was not a facility head. In relation to the appeals committee, he explained that it was convened late and that one of the members was not a facility head. Therefore, it was wrongly constituted. Further, its decision was backdated to the letter of dismissal issued after the hearing of the disciplinary committee instead of the date of the final decision.

- 20) In opposing the Respondent's case, the Appellant filed an answer and affidavit in support thereof. It denied the Respondent's claim by contending that it had followed the correct disciplinary procedure and the Respondent had been found guilty of the offences leveled against him. Further, the Respondent had abandoned the hearing of the appeal committee.
- 21) In the *viva voce* testimony, the Appellant's evidence in relation to the hearing before the appeal committee was that it considered the appeal abandoned because the Respondent sought the intervention by the Ministry of Labour prior to exhausting the internal channels. The evidence also revealed that the Appellant conceded that the appeal committee hearing ought to have been convened within five days and not fifty-six days of the decision of the disciplinary committee. It also revealed that the hearing ought to have begun at 8.00 hours in accordance with the notice but it was delayed.

### **Consideration by the Court and decision**



22) After the Court considered the evidence and the pleadings, it found that the following facts were not in dispute:

- 22.1 The Respondent was in the employ of the Appellant;
- 22.2 The Respondent was involved in a motor vehicle accident while in the course of taking the mother of the sick youth to the clinic;
- 22.3 The Respondent issued one cheque in respect of the two payments due to the LIBSs;
- 22.4 The Respondent went through the whole disciplinary process at the disciplinary committee stage;
- 22.5 The Respondent was dismissed by Appellant for charges leveled against him.

23) The Court then determined the two claims made by the Respondent of wrongful and unfair dismissal. In respect of the former, it said that the claim is established where the employer contravenes the disciplinary procedure. The Court then reminded itself that in accordance with our decisions in the cases of ***Attorney General v Richard Jackson Phiri***<sup>1</sup> and ***Zambia Electricity Supply Corporation Limited v Lubasi Muyambango***<sup>2</sup>, it was

not called upon to sit as an appellate tribunal but rather to determine if there was the necessary disciplinary power by the two committees and if the power was exercised properly.

- 24) It held that to determine the foregoing a Court should investigate whether the employee: was charged with an offence pursuant to the disciplinary and grievance procedure code; given an opportunity to exculpate himself by way of a written explanation; was heard by a properly constituted committee which should consider the charges in light of the exculpatory letter and the decision of the committee communicated to him; and, afforded an opportunity to appeal where he is dismissed. Consequently, a dismissal which was not preceded by these steps is wrongful and amounts to breach of contract of employment by the employer.
- 25) Taking the matter further, the Court found that whenever a Court is considering a claim for wrongful dismissal it should ask itself the questions posed in the preceding paragraph.

- 26) The Court then applied these principles of law to the facts of the case and found that since the Respondent was employed as village accountant/administrator, the disciplinary committee hearing his case was supposed to comprise facility heads. This was pursuant to clause 5.4.1 of the Appellant's disciplinary and grievance procedure code. The Court found further that one of the persons who sat on the disciplinary committee, a Fungai Chiteta, was not a facility head, therefore, there was a breach of clause 5.4.1 and the disciplinary committee had no powers to conduct the hearing. It concluded that the dismissal was wrongful, and having so found, determined that, the consideration of whether the necessary steps had been followed by the Appellant prior to dismissing the Respondent had been rendered *otiose*.
- 27) Next, the Court considered the claim based on unfair dismissal. In doing so it defined the phrase unfair dismissal by reference to the High Court decision of ***Caroline Tomaidah Daka v Zambia National Commercial Bank***<sup>3</sup> and found that it is linked to



protection of the right to employment and promotion of fair labour practices. In addition, it found that the remedy compels an employer to terminate the contract of employment only on specific grounds and provides the rare remedy of reinstatement. The Court summed up its reasoning by stating that unfair dismissal looks at the merits of the dismissal and the Court will examine the reason for the dismissal to determine whether or not it was just. That contracts of employment should only be terminated where there is a valid reason related to the conduct of the employee.

- 28) The Court reviewed the evidence relating to the charges leveled against the Respondent and found that he had reported the accident to his supervisor and had corrected the error in respect of the two cheques, contrary to the contentions by the Appellant. It concluded that there was malice on the part of the Appellant in effecting the dismissal of the Respondent and it was, therefore, unfair.
- 29) Having found in favour of the Respondent in respect of the two claims, the Court proceeded to determine the

damages he was entitled to. It awarded him three months gross salary in respect of wrongful dismissal on the ground that this Court has guided that a claim for wrongful dismissal is akin to a claim for damages for breach of contract. That damages for breach of contract in employment matters is tied to the notice period for termination which, in the Respondent's case, was three months.

- 30) In determining the appropriate award of damages in respect of the claim for unfair dismissal the Court set out its discretion to order reinstatement in accordance with Section 85A(b) of the ***Industrial and Labour Relations Act***. It took the view that such orders are usually made in cases where a claim for unfair dismissal has been proved. According to the Court, such an order is however, rare as we stated in the case of ***ANZ Grindlays Bank (Zambia) Limited v Chrispin Kaona***<sup>4</sup>. In that case we stated at page 86 as follows:

"... orders for reinstatement are made only in exceptional circumstances ..."

The Court rationalized this by stating that at the point of dismissal of an employee, the employer/employee relationship would have deteriorated beyond redemption. Hence the need to refrain from forcing the employee back onto the employer. The appropriate alternative in such situations is payment of damages, especially in this case where evidence was led to show that the relationship between the parties had deteriorated beyond redemption.

- 31) The Court concluded by awarding the Respondent eighteen months gross salary as damages. It was guided by our decision in the case of ***Dennis Chansa v Barclays Bank***<sup>5</sup> in which we awarded thirty five months salary as damages and in doing so said the following at page J14:

**"The Court in *Zambia Airways Corporation Limited v Gershom Mubanga Supra* awarded 12 month's salaries as damages in lieu of reinstatement in 1992. Seven years later in *Chitomfwa v Ndola Lime Supra*, we awarded 24 months as damages. The lower Court seven years later in the appeal before us awarded 36 months' salary as damages. The rationale is that as the global economics deteriorate, the chances of finding employment even by graduates are slimmer."**



- 32) Lastly, the Court declined to award punitive damages for shock, trauma, embarrassment and humiliation arising from the dismissal on the ground that the Respondent did not adduce evidence to show that the dismissal was inflicted in a traumatic fashion. The Court also awarded the Respondent costs.

**Grounds of appeal to this Court and arguments by the parties**

- 33) The Appellant is unhappy with the decision of the lower Court and has brought this appeal advancing five grounds of appeal as follows:

33.1 The Court below erred in law and in fact when it concluded and held at page J13 of the judgment that the disciplinary committee that heard the Respondent's case did not have the necessary power to conduct a disciplinary hearing and that therefore, the dismissal of the Respondent was wrongful;

33.2 The Court below erred in law and in fact when it held at pages J14 and J15 of its judgment that the Respondent's dismissal was wrongful and unfair for the reason that there was malice on the part of the Appellant when it dismissed the Respondent on the charges of: failure to report an accident;

incompetence; and negligence of duty contrary to clauses 12 Sections 15 and 16 of the Appellant's disciplinary and grievance code, when in fact the said charges were proved against the Respondent during the disciplinary hearing;

33.3 The Court below erred in law and in fact when it awarded the Respondent three (3) months gross salary as compensatory damages for wrongful dismissal from employment when the Court had fallen in grave error in holding that the Respondent's dismissal was wrongful;

33.4 The Court below erred in law and fact when it awarded the Respondent 18 months gross salary for unfair dismissal as the Court's finding of unfair dismissal was wrong;

33.5 The Court below erred in law and in fact when it awarded costs to the Respondent.

34) The parties filed heads of argument prior to the hearing which they relied upon and augmented with *viva voce* arguments.

35) Counsel for the Appellant, Ms M. Bwalya, argued grounds 1 and 2 of the appeal together from two fronts. The first front was simply that the Court misdirected itself when it found that the disciplinary committee did

not have the necessary power to hear the case as it was wrongly constituted. She argued that the misdirection arose from the erroneous finding by the Court below that one Fungai Chipeta was not a facility head and she should not, therefore, have sat on the committee.

- 36) In addition, counsel argued that, in any event, prior to convening the disciplinary committee hearing the Appellant ensured that it complied with the rules of natural justice by: informing the Respondent of the charges leveled against him; giving him an opportunity to respond to the allegations; and, informed him of his right of appeal. In support of the foregoing argument counsel quoted a passage from ***Halsburys Laws of England***, 4<sup>th</sup> edition, volume 40. We have not reproduced the passage because it has no bearing on the decision we have reached in the later part of this judgment. She also reminded us that the role of a Court in matters of such a nature is that it should not sit as an appellate tribunal as per our decision in the case of ***Muyambango***<sup>2</sup>. Here, we understood counsel to be suggesting that the Court



below exceeded its mandate by interposing its decision on that of the disciplinary committee.

37) The second front from which counsel launched her arguments was that, the Appellant was on firm ground in dismissing the Respondent because the charges leveled against him were proven. Counsel referred us to the High Court decision in the case of **Agholor v Cheeseborough Ponds (Z) Limited**<sup>5</sup> in which the judge confirmed an employer's right to terminate an employee's employment by dismissal for misconduct where the misconduct is proven. Counsel was essentially saying that since the misconduct of the Appellant was proven by the disciplinary committee, the Appellant was entitled to dismiss him even if the rules of natural justice were not followed. Our attention was drawn to our decision in **National Breweries v Philip Mwenya**<sup>6</sup> and other decisions which espouse this principle.

38) Counsel's arguments under ground 3 of the appeal, though long, were simply that the Court misdirected itself in awarding damages for wrongful and unfair dismissal

in the light of the fact that the charges laid against the Respondent were proven. That there are a plethora of authorities which show that an ex employee is not entitled to an award of damages where the charges laid against him have been proved because the employer is entitled to dismiss such employee without notice.

- 39) In respect of ground 4 of the appeal, counsel attacked the award of damages equal to eighteen months gross salary for unfair dismissal on two fronts. The first was that the award ought not to have been made in the first place because the charges leveled against the Respondent were proven. Secondly, the Court ought to have considered the general principle we lay down in the case of ***Swarp Spinning Mills Plc v Sebastian Chileshe and others***<sup>6</sup> that the normal measure of damages relate to the applicable length of notice period in the conditions of service. That there was no reason for the Court below to depart from that notice period because the circumstances of the case did not warrant such a departure. In advancing this argument counsel reemphasized her

earlier argument that the circumstances of this case were such that the charges laid against the Respondent were proved. As such, there was no justification for the departure from the principle in the ***Swarp Spinning Mills<sup>6</sup>*** case.

- 40) The last ground of appeal attacked the award of costs to the Respondent. The arguments by counsel for the Appellant were that the Court below ought not to have awarded costs in light of the evidence which revealed that the charges leveled against the Respondent were proven. That costs are in the discretion of the Court and that appellate Courts will not interfere with such discretion unless the trial Court erred. Counsel drew our attention, in this regard, to Order 62 rule 2 sub-rule 12 of the ***Supreme Court Practice (White Book)***.
- 41) In the *viva voce* arguments and following a question posed by the Court, Ms Bwalya conceded that the thrust of the appeal was the misgiving her client had with the finding of fact by the Court below that the Respondent's dismissal from employment was wrongful and unfair



because the charges against him were not proven. The position she took, was that this finding of fact was a misdirection. She also by and large conceded that all the grounds of appeal contested findings of fact.

- 42) We were urged to allow the appeal
- 43) In response to grounds 1 and 2 of the appeal, counsel for the Respondent Mrs. Mulenga - Harawa had very lengthy written heads of argument. The crux of the relevant portions of the arguments was two-fold. Firstly, she rebutted the Appellant's contention that the procedure leading up to the Respondent's dismissal was in accordance with the disciplinary code. Secondly, that ground 1 contests findings of fact by the Court in relation to the position held by Fungai Chiteta and malice on the part of the Appellant, but the Appellant does not challenge the finding based perverseness or want of evidence to support the findings. In support of the argument, counsel drew our attention to our decision in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***<sup>7</sup>.

- 44) Counsel concluded by arguing at great length on the issue whether or not the Respondent had committed an offence warranting dismissal. She did this by reviewing the evidence in the Court below and the findings by the Court and took the view that the Respondent had not committed any offence at all. We have not summarized these arguments in detail for reasons that are apparent in the later parts of this judgment.
- 45) In relation to grounds three and four of the appeal which Mrs. Mulenga - Harawa argued together, the submissions were from two fronts. The first was that the award of twenty one months' salary by the Court was justified because the Court rightly held the dismissal to have been wrongful and unfair. This, counsel argued, negated the argument by the Appellant that the Respondent was properly dismissed from employment.
- 46) The second front was that the circumstances of the case were such that it fell within the exception to the general rule that quantum of damages should be equated to the contractual or reasonable notice period. She went on to

review a number of our decisions on this point and related them to the facts of this case to justify her argument.

47) Under ground 5 of the appeal, counsel's arguments set out the principles and case law on the award of costs that: they follow the event; and, in exceptional circumstances, a winning party may be denied costs because of his conduct during the proceedings.

48) We were urged to dismiss the appeal.

### **Consideration by this Court and decision**

49) In our determination of this appeal we have had occasion to consider the record of appeal and arguments by counsel for the parties. We have no difficulty in dismissing the appeal for being incompetent because all five grounds of appeal, interrelated as they are, attack findings of fact. In terms of Section 97 of the **Industrial and Labour Relations Act**, appeals from the Industrial Relations Court division are only permitted if they seek to challenge decisions on the law and a finding of combined



law and facts. Appeals that seek to challenge findings of fact only, are incompetent.

- 50) To demonstrate what we have stated in the preceding paragraph, ground 1 of the appeal questions the finding by the court below that the disciplinary committee lacked power to hear the Respondent's case because it was not properly constituted. This arose from its finding of fact that one of the committee members, Fungai Chipeta was not a faculty head. The finding was not made by the Court below based on the law but fact and evidence presented to it by the parties. Equally, the finding by the Court that there was malice on the part of the Appellant also arose from the evidence which revealed that the Respondent had actually reported the accident in accordance with the procedure laid down by the Appellant and also corrected the error in relation to the cheques. There was, therefore, in the Court's view, no reason for the Appellant to charge the Respondent because the facts negated the charges leveled against the Respondent by the Appellant.
- 51) Grounds 2, 3, 4 and 5 suffer the same fate because they focus on attacking the finding by the Court below that the Respondent had reported the accident and corrected the error in relation to the issuance of the cheques for the school fees for the youths. The position taken by the


Appellant is that these findings of fact were erroneous because the evidence revealed that the charges leveled against the Respondent were proven. In contesting the award of damages in excess of the contractual notice period, counsel for the Appellant's primary focus is on this point as well. If we are to be led into determining this argument we will be required to consider the evidence led in the Court below against the findings made by the Judge. This would be against the spirit of Section 97 of the ***Industrial and Labour Relations Act***.

### **Conclusion**

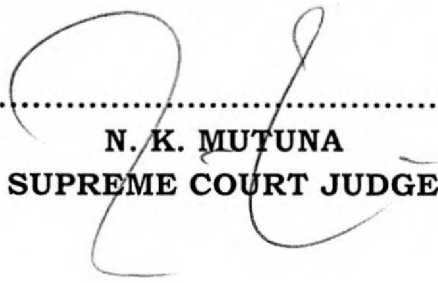
- 52) The fate of this appeal is that it is incompetent and we so order. We accordingly dismiss it and uphold the judgment of the Court below. As for the costs, we order that the parties bear their respective costs.



.....  
**M. MUSONDA**  
**DEPUTY CHIEF JUSTICE**



.....  
**J. K. KABUKA**  
**SUPREME COURT JUDGE**



.....  
**N. K. MUTUNA**  
**SUPREME COURT JUDGE**