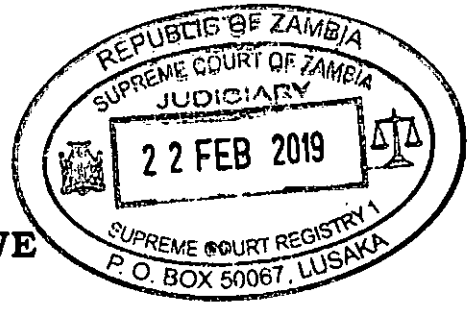
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 212/2015**

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

JUSTIN MWENGWE **APPELLANT**

AND

EXAMINATIONS COUNCIL OF ZAMBIA **RESPONDENT**

CORAM: Wood, Kabuka and Mutuna JJS.

on 7th August, 2018 and 22nd February, 2019.

FOR THE APPELLANT: Mr. A. Chileshe, Messrs Mambwe, Siwila & Lisimba, Advocates.

FOR THE RESPONDENT: N/A

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. National Breweries Limited v Phillip Mwenya (2002) ZR 78 (SC).
2. Attorney General v Richard Jackson (1988-89) ZR 121 (SC).

3. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC).
4. Mulenga v Mumbi Ex-parte Mhango (1975) ZR 78 (HC)
5. Kabeya v Neon and General Signs Limited SCZ Appeal No. 157/2008.
6. Earl v Slater and Wheeler (Airlyre) Ltd, 1773 (1) All ER 145
7. Zambia Airways Corporation Limited v Gershom B.B. Mubanga (1992) SJ 24 S.C.
8. Philip Mhango v Ngulube (1983) ZR 61 (SC).
9. Manda Yotam and NFC Africa Mining Plc, SCZ Appeal No. 94/2013.
10. Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) ZR 70 (SC).

Other works referred to:

1. Hornby AS, Oxford Advanced Learner's Dictionary of Current English, 8th Edition, Oxford University Press, 2010.

Introduction

1. In a judgment delivered on 9th May, 2012 the Industrial Relations Court (IRC) declined to grant the appellant the declaration he was seeking, that his dismissal from employment was wrongful, unfair, null and void. The appellant now appeals against that refusal.

Background

2. The history of the case is that, the appellant was initially employed as Internal Auditor of the respondent on 1st October,

1998 and he later rose to the position of Principal Internal Auditor. His duties, amongst others, was to examine and evaluate financial and operating information, to conduct special investigations and pre-audit payments.

3. After working for the respondent for a period of over twelve years, the appellant was on 25th January, 2010 dismissed from his said employment.

4. Events leading to that dismissal were that, the respondent's Council Secretary, a Ms. Mwale, was scheduled to travel to the Copperbelt and North-Western Provinces in order to brief the Provincial Education Officers about the Grade 9 examinations marking budget.

5. On 30th November, 2009 Ms. Mwale applied for imprest to enable her travel to the said Provinces the following day. When she followed up the payment in the morning of the intended day of travel, 1st December, 2009 she was informed that the appellant had queried why, she who was not an accountant, was travelling to go and brief the Provincial Educational

Officers, upon which he refused or neglected to pre-audit the payment.

6. The appellant only pre-audited the payment after the Principal Accountant explained to him that management had infact assigned him other responsibilities, as well.

7. Offended by the appellant's conduct, Ms. Mwale lodged a formal complaint with the Director of the respondent on 30th December, 2009 who immediately launched investigations into the matter.

8. The following day, 31st December, 2009 the Director requested the appellant to submit a report on why he had refused to pre-audit the payment in issue and the appellant did so, on 4th January, 2010.

9. In this report, the appellant explained that his office had not occasioned any delay as he had received the imprest request for K5, 470. 00 on 1st December, 2009 and pre-audited it the same day. In evidence of his assertion the appellant attached to this report, a payment voucher showing an audit stamp for 1st December, 2009.

10. On 20th January, 2010 the appellant was served with a letter from the Director, in which was enclosed a formal charge against him for the offence of giving false evidence. The appellant was further charged with insubordination or refusal to obey lawful instructions.

11. According to the letter, there was overwhelming evidence indicating payment of imprest had been delayed by the appellant (the insubordination charge) and that, the auditing was only done after the payment had already been made, contrary to the appellant's earlier verbal report (the false evidence charge). The appellant was given two days, within which to exculpate himself in writing.

12. The following day, 21st January, 2010 the appellant handed back the charge sheet to which he attached his written report of 4th January, 2010 where he had explained that the payment had been *pre*-audited.

13. Following his said exculpation, the appellant was by letter from the Deputy Director, dated 25th January, 2010 dismissed from his employment. The letter of dismissal stated that,

management had not accepted his exculpatory statement as the appellant had failed to address the charges of giving false evidence, insubordination and failure to obey lawful instructions that were levelled against him. The appellant was accordingly found guilty of the offences charged.

14. The appellant was further informed that, since he was already on a final warning on an earlier charge, in terms of the respondent's disciplinary and grievance procedure, this subsequent breach warranted the penalty of a dismissal. The appellant was advised of his right to appeal the dismissal within 14 days of receipt of the letter and he did so, on 5th February, 2010.

15. On 9th March, 2010 the respondent's Appeals Committee sat to hear the appeal. And, by letter dated 14th June, 2010, the Deputy Director informed the appellant that the Appeals Committee had upheld the decision to dismiss him, on the basis of overwhelming evidence that he did not pre-audit the payment in issue.

16. After receiving this final decision from the respondent, the appellant, on 19th August, 2010 went to file a notice of complaint before the IRC.

Pleadings before the Industrial Relations Court

17. The appellant was seeking a declaration, that his dismissal was wrongful, unlawful, unfair and a nullity. He prayed for an order that he be deemed to have served and retired at the age of 55 and be paid his full retirement benefits.

18. In the alternative, the appellant implored the court to order that he be deemed to have been retired from 25th January, 2010, the date of his dismissal and be paid full benefits at the rate of 3 months' pay for each year served, together with all other statutory entitlements.

19. In its answer to the complaint, the respondent denied that the appellant was entitled to any of the claims he was seeking. The respondent averred that, the appellant had received a final warning in 2007 for *intimidation* of Ms. Mwale and that, in the present instance, the appellant was dismissed for *insubordination* of the same officer.

Evidence of the parties before the Industrial Relations Court

20. At the hearing of the matter in the lower court, the gist of the appellant's evidence was that the disciplinary procedure was not followed and the penalty for the offences was wrong, as he should have first been issued with a final written warning before being dismissed.

21. The appellant contended that, as his previous final warning of 2007 was only valid for 12 months, it could not be relied upon to dismiss him, two years later, in 2010. The appellant also maintained that, he had pre-audited the payment the same day it was requested for, on 1st December, 2009.

22. In defence of the matter, the respondent's Deputy Director told the trial court below that, upon receiving the imprest application forms for Ms. Mwale at 09:00 hours in the morning of 1st December, 2009 he quickly authorised the payment. Later, around mid-morning, Ms. Mwale came to his office to find out what was causing the delay in payment.

23. A quick investigation by this witness revealed that the delay had been occasioned by the appellant who apparently, had

refused to do a pre-audit of the payment. Due to his said refusal, the other accounts personnel in addressing the complaint, decided to ignore the procedure of *pre*-auditing and instead proceeded to process the payment, to avoid any further delay in Ms. Mwale's travel.

24. The witness confirmed that there was no disciplinary hearing of the appellant's case at the first instance and that management made the decision to dismiss him based wholly on his exculpatory statement.

25. That on appeal however, the Appeals Committee upheld the appellant's dismissal, only after it conducted a formal hearing. He further clarified that, the disciplinary code for 2010 was released in February, 2010 but its effective date was backdated to 1st January, 2010 with the appellant being charged three weeks later, on 20th January, 2010.

26. He said in terms of the 2010 disciplinary code, the penalty for giving false evidence is a final warning with a dismissal being reserved as the penalty for a subsequent offence. On the charge of insubordination, the penalty was a recorded warning

on first breach and that the appellant was not given such warning, as management had relied on his disciplinary record, showing he had a subsisting final warning from an earlier charge of intimidation.

27. The Deputy Director confirmed that, pre-auditing payments was a mere practice which was introduced by the appellant and was not a financial regulation requirement. He further confirmed that, he is the one who signed both letters relating to the appellant's initial dismissal as well as the dismissal of his appeal.

28. Evidence on record from the respondent's second witness, was that, she recorded minutes for the appeals committee that heard the appellant's appeal. The appeals committee that consisted of a group of managers, found the appellant guilty of the offences with which he was charged and upheld his dismissal.

29. The witness confirmed that the disciplinary code of 2010 was used for the disciplinary process and that the two-year old

warning given to the appellant in 2007 was taken into account when dismissing him.

30. She also confirmed that the offences committed by the appellant were not dismissible offences under the 2010 disciplinary code, except where the employee had a prior valid warning still in force.

Consideration of the matter by the trial court and decision

31. After considering the evidence that was before it, the trial court noted that, having initially refused to pre-audit the payment, the appellant only did so after payment was effected, which conduct it found, amounted to insubordination.

32. The trial court also found that, although the appellant was serving a warning on an unrelated offence, from the holding of this Court in the case of **National Breweries Limited v Phillip Mwenya**[1] there was no basis to find that the previous warning had lapsed. It was the trial court's further finding, that as Principal Internal Auditor, the appellant's questioning of a management decision to assign the Council Secretary certain duties out of station, exceeded his mandate.

33. The court considered that the reason the appellant did not appear before a disciplinary committee at the first instance, was due to non-availability of such a committee in the respondent organisation. The court however found that, as a chance to exculpate himself through a written statement was accorded to the appellant, with a further opportunity to appeal the dismissal availed to him, it could not be said that he was not heard on the matter and that, there was breach of natural justice.

34. The court also reasoned that, as other people were involved in the appeal process, the danger of anyone being a judge in their own cause claimed by the appellant against the Director and Deputy Director, had been eliminated. The trial court's findings in conclusion were that, the respondent had complied with the dismissal procedure and the complaint lacked merit.

The grounds of appeal to this Court

35. Aggrieved with that outcome, the appellant has appealed to this Court on four grounds, the substance of which can be stated as

follows:

1. **that the court below erred in law and fact when in the face of lack of evidence supporting the charges levelled against the complainant, it held that the complaint had no merit;**
2. **that the court below erred when it failed to consider which disciplinary code was in existence at the time of the charges and whether or not the same had been breached;**
3. **that the court erred in law and fact when it held that there was no breach of natural justice;**
4. **that the court below erred in law when it held that the respondent was in order to use a warning of over 2 years old and relating to a different offence, as a basis for dismissing the appellant.**

The arguments presented by the appellant

36. When the matter came up for hearing of the appeal, there was no attendance on the part of the respondent and the respondent having not filed heads of argument despite having had notice of the hearing date, we proceed to hear the appeal. Learned counsel for the appellant who was present, informed the Court that he would entirely rely on his written heads of argument filed on record.

37. In his heads of argument, the appellant in ground one, relied on the case of **Attorney General v Richard Jackson**[2] in which

this Court held that, when considering a dispute relating to dismissal, a trial court should only determine whether the correct procedures were followed and whether there was a sufficient substratum of facts to support the decision made.

38. The argument in that regard, was that, although the appellant had initially raised a query, he did subsequently pre-audit the payment the same day he had received it. This was confirmed by the date stamp appearing on the payment voucher indicating 1st December, 2009 and the respondent's own witnesses, who both testified that the appellant did undertake a pre-audit before the documents were sent for payment.

39. It was further argued that, the practice of pre-auditing was not part of the financial regulations of the respondent, but was merely one introduced by the appellant himself.

40. The submission on behalf of the appellant was that, there was nothing to support the finding made by the trial court, that the charges of insubordination and giving false evidence proffered against the appellant were proved. That the trial court misapprehended the facts and the evidence before it, as

a result of which its findings were perverse and should be reversed, in line with the holding of this Court in the case of **Wilson Masauso Zulu v Avondale Housing Project[3].**

41. The contention in ground two was that, the lower court had failed to adjudicate upon every aspect of the matter, as no finding was made on which of the two disciplinary codes was supposed to be used in disposing of the charges against the appellant.

42. On ground three, the argument was that, there was uncontroverted evidence of a denial of natural justice as the appellant's overall boss and his second in command were essentially the witnesses, the prosecutor, and the judge, which made them judges in their own cause.

43. Counsel submitted that, such conduct amounted to a violation of the tenets of natural justice and the lower court's decision should be quashed purely on that account. The case of **Mulenga v Mumbi, Ex-parte Mhango[4],** was cited as authority for the submission.

44. Lastly, on ground four, the appellant faulted the trial court's

interpretation of our decision in **Phillip Mwenya**[1] where we held that, there must be a provision in the disciplinary code, as to the length of the warning, in the absence of which the warning would be deemed perpetual.

45. The argument on the point, was that, the facts of that case could be distinguished from those in the present appeal. That, in the **Phillip Mwenya**[1] case, the prior warning related to a charge of negligence which was brought up on a subsequent charge, also of negligence; while in the present appeal, the former charge of intimidation was unrelated to the subsequent charges of insubordination and giving false evidence.

46. Counsel concluded by submitting that, a final warning on an unrelated charge that spanned a period of over two years, should not have been taken into account, at all.

Consideration of the matter by this Court and decision

47. We have considered the heads of argument, submissions by counsel for the appellant, evidence on record and the case law to which we were referred. We take note of the specific issues raised in the four grounds of appeal as being that: (i) there was

no evidence to support the allegation that the appellant did not pre-audit the payment; (ii) the disciplinary code used was not identified; (iii) the Director and Deputy Director of the respondent were involved at all stages of the disciplinary process which resulted in breach of natural justice; and (iv) a warning of over 2 years old and relating to a different offence was wrongly used to justify the appellant's dismissal.

48. We are also satisfied, that the main issue underlying all the four grounds and on which the same will stand or fall, is whether on the facts of the case, the appellant was properly dismissed or deserved to be dismissed? We will in the process of determining that question simultaneously address the issues raised in the grounds of appeal as identified.

49. For convenience, we will first consider the issues raised in grounds two and four of the appeal, questioning which disciplinary code was used in the appellant's case and, that a warning of over 2 years old, relating to a different offence was wrongly recoursed to justify the dismissal.

50. We have looked at the evidence on record which shows that, the appellant was charged for the first infraction of intimidating the same Council Secretary in 2007, for which he was given the penalty of a final warning. It was not in dispute that the disciplinary and grievance procedure code, which had been in force from 1st January, 1999 up to 31st December, 2009 was used in dealing with that infraction of 2007. In terms of that code, there was no expiry period for the final warning.

51. In that regard, the record further shows, unchallenged evidence from the respondent's second witness was that, from 1st January, 2010 it was the 2010 disciplinary code that was in force and the appellant was charged on 20th January, 2010. Those facts do not assist the appellant to argue, as he has done in ground two of the appeal, that the disciplinary letter of 20th January, 2010 did not cite which disciplinary code was used or the specific clauses that were contravened.

52. The fact remains that, the offences charged of 'insubordination' and refusing or, failure to obey/carrying out lawful instructions were provided for under Clauses 5.2.3 and 5.2.6 of the list of

offences in the 2010 disciplinary code in force at the time, appearing at page 97 of the record.

53. Defence evidence on the record, as given at the hearing by the Deputy Director, which was not challenged by the appellant, was that the 1999 – 2009 disciplinary code did not provide for an expiry period for the final warning given to the appellant in 2007. As we held in the **Phillip Mwenya**[1] case relied on by trial court, that final warning was still subsisting as a record of the appellant's conduct, at the time the subsequent offences were established against him in 2010.

54. Grounds two and four of the appeal questioning which disciplinary code was used; and contending that the final warning given in 2007 had expired, fail for those reasons.

55. Coming to ground three, in which the appellant argues that as the Director and Deputy Director of the respondent were involved at all stages of the disciplinary process, this resulted in breach of natural justice. Suffice to note that, natural justice ordinarily falls in the realm of administrative law. In

employment law, the emphasis is placed on whether an employee has been heard before he is dismissed.

56. In the case of **Kabeya v Neon and General Signs Limited**[5] we did hold that, in an employment dispute, it was sufficient hearing if the employee was given an opportunity to exculpate himself. A dismissal will therefore only be considered 'unfair' where the affected employee has not been accorded this right.

57. In the same vein, the case of **Earl v Slater and Wheeler (Airlyre) Ltd**[6]**,** guided trial courts that, in considering whether a dismissal is fair or unfair, or the employer acted reasonably or unreasonably, the tribunal should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality.

58. Proceeding from that premise, and with regard to the involvement of the Director and Deputy Director of the respondent organisation in the disciplinary process, the record discloses no evidence, at all, suggesting that the identified individuals harboured a vendetta against the appellant or that they had any interest in the outcome of the hearing, as was the

case in **Zambia Airways Corporation Limited v Gershom Mubanga**[7]

59. In dealing with the issue of being judges in their own cause, the record further shows the trial court infact specifically considered that allegation and found that, other than the persons complained against, there were many others who were involved in the disciplinary process, thus ruling out the danger of partiality. The evidence on record confirms that position, as it shows the Appeals Committee consisted not only of the Director and his Deputy but a number of other managers.

60. Before we proceed to finally determine ground one of the appeal, we wish to observe, in passing that, by **section 97 of the Industrial and Labour Relations Act, Cap 269,** an appeal from a judgment or other decision of the IRC to this Court (now to the Court of Appeal) can only lie against findings of law or any point of mixed law and fact.

61. We have also in previous decisions of this Court said that, a finding of fact becomes a question of law and liable to be set aside on appeal, only if it is shown that in arriving at such

finding the trial court did not take into account any relevant evidence or that the findings were perverse or made on a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make: **Philip Mhango v Ngulube[8].**

62. Ground one of the present appeal attacks a finding of fact made by the trial court that the appellant did not pre-audit the payment in question for reasons that, there was no evidence to support such a finding and his dismissal was thereby wrongly upheld.

63. It appears the appellant wants his conduct considered in piecemeal fashion when evidence on record has disclosed this was not the first infraction suffered by the same superior which was perpetrated by the appellant. It is not disputed that the evidence shows the appellant did in fact pre-audit the payment, contrary to the trial court's finding in this regard, that he did not. The point is, however, that he did so at his own leisure. He also questioned the choice of person who was to travel for the trip when he had no authority to do so.

64. The record further shows that, the Deputy Director had processed the imprest forms and forwarded them to accounts for payment before mid-morning. Around 11: 00 hours, the Council Secretary followed up payment but found that the forms had not been pre-audited for payment by the appellant, who had since left the office despite knowing about the urgency of the matter.

65. While we acknowledge that the evidence points to the pre-audit having indeed been undertaken the same day that the imprest forms were presented to the appellant, yet we cannot ignore that this was done very late in the day, as a result of which the Council Secretary was inconvenienced as she was made to travel in the evening.

66. All these factors including the previous conduct of intimidation and the subsequent one of insubordination, make us arrive at the inescapable conclusion that, the respondent was entitled to take into account the appellant's previous misconduct for which he was given a final warning which in terms of the relevant disciplinary code, had not lapsed.

67. Considered as a whole therefore, the appellant's conduct warranted the penalty of a dismissal. This was also our holding in the case of **Manda Yotam and NFC Africa Mining Plc**[9] where the appellant had been charged with poor time keeping, poor performance and failure to follow instructions on three different occasions.

68. The appellant had argued that he could not be dismissed for poor work performance as the disciplinary code provided for the penalty of a reprimand and that he was only dismissed for being allegedly on a final warning. He disputed this final warning on the basis that, he was not informed of it in writing and that the rules of natural justice had not been followed as there was no disciplinary hearing in respect of the charge of giving false information.

69. The respondents however, argued that, the evidence showed the appellant was dismissed because he was found guilty of the offence charged at the particular time and he had many previous cases of poor work performance. We in that case,

agreed with the respondent that the appellant had a string of disciplinary offences which warranted his dismissal.

70. Regarding the case in *casu*, evidence from the respondent's witnesses established that the appellant delayed processing the payment as he did not agree with management's decision to involve the Council Secretary in a budgeting matter which he, apparently, considered was in the realm of accounts.

71. Quite apart from the evidence of the respondent's own witnesses, who both testified to the effect that, the appellant did eventually pre-audit the payment, the charge against the appellant also specifically speaks to the fact that, *'there was overwhelming evidence indicating payment of imprest had been delayed'*, as constituting the particulars of insubordination. The record shows this evidence of unwarranted delay was not challenged by the appellant who in evading to answer to the accusation of causing such delay, only, insisted that he did *pre*-audit the payment.

72. Even if it were accepted that the appellant indeed pre-audited

the payment and the charge of false evidence thereby falls away. The unchallenged evidence as earlier highlighted, still shows it was not disputed that the appellant did cause significant unjustified delay. The question remains whether, that conduct constituted insubordination, if so, the correct penalty for the said offence on the particular facts of this case?

73. The 2010 disciplinary code defines insubordination in item 18 at page 107 of the record as:

> "An act of disobedient, defiance and non-compliance by an employee to a superior officer's reasonable instructions or lawful directions."

74. The appellant was charged with insubordination for deliberately causing delay in the departure of his superior, while his earlier charge against the same superior, was that of intimidation. According **to Hornby AS, Oxford Advanced Learner's Dictionary of Current English, 8th Edition, Oxford University Press, 2010** *'insubordination'* is defined as:

> "the refusal to obey orders or show respect for somebody who has a higher rank".

The same dictionary also defines *'intimidation'* to mean:

> "to frighten or threaten somebody so that they will do what you want".

75. The above definitions of the two offences in issue, in the circumstances of this case, show that the conduct of the appellant towards the Council Secretary amounts to no more than *'belittling'* his said superior whether it is termed *"intimidation"* or *"insubordination"*. Indeed, the particulars of the intimidation on record attests this fact, where the appellant had gone into Ms. Mwale's office, shouted at her and banged the door in her face on his way out.

76. Having accepted that the final warning in respect of that earlier intimidation charge had no expiry period, and, in view of the common ground evidence between the parties that the subsequent offences committed by the appellant were dismissible offences, if the employee's disciplinary record had a subsisting final warning. On the totality of that evidence, which is on record, the trial court cannot be faulted for reaching the conclusion it did.

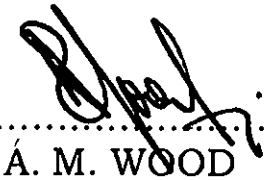
77. The 2007 warning which had no expiry timeframe and was still on the appellant's file as part of the appellant's disciplinary record, was not, on the particular facts of this case, wrongly used to justify the penalty of dismissal for the subsequent offence of insubordination, committed by the appellant against the same superior officer.

Conclusion

78. Even assuming we accepted that the procedure employed to dismiss the appellant was flawed, we, in that event, still find the principles stated in **Richard Jackson Phiri[2];** and **Zambia National Provident Fund v Yekweniya Mbiniwe Chirwa[10]** apply. That, an employee such as the appellant, who deserved to be dismissed for the offence committed and was infact so dismissed, cannot claim to have been wrongfully dismissed on account of mere failure on the part of the employer to follow the disciplinary procedure. In substance, that was also our holding in the **Phillip Mwenya[1]** case which was relied on by the trial judge in upholding the dismissal.

79. All the four grounds of appeal having failed, the appeal is hereby dismissed. The respondent having not defended the appeal, we make no order as to costs.

80. Appeal dismissed.



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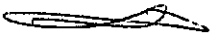
A. M. WOOD

SUPREME COURT JUDGE



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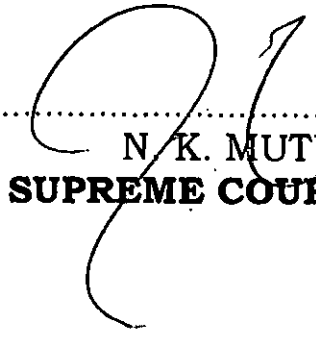
J. K. KABUKA

SUPREME COURT JUDGE



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N. K. MUTUNA

SUPREME COURT JUDGE