

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

APPEAL NO. 87/2022

(Civil Jurisdiction)

BETWEEN:

ZAMBIA SUGAR PLC

AND

FLYWELL SICHILABA



CORAM: MAJULA, NGULUBE AND BANDA-BOBO, JJA.

On 18th January and 15th March, 2024.

For the Appellants: Mr. M. Kasofu, Messrs Tembo, Ngulube and Associates

For the Respondent: Mr. L. Mung'ambata, Messrs M. Likezo and Company

J U D G M E N T

NGULUBE JA, delivered the Judgment of the Court.

Cases referred to:

1. *Zambia Electricity Supply Corporation Limited vs Muyambango (2006) ZR 22*
2. *Florence Sikombe vs Stanbic Bank (Z) Limited, SCZ/08/327/2023*
3. *Samson Katende and Crosby Bernard vs NFC Mining Plc (2011) ZR 112*

1.0 INTRODUCTION

- 1.1 This is an appeal from the Judgment of Honourable Mrs Justice G.C. Chawatama (General List) delivered on 15th December, 2021. In the said Judgment, the learned Judge found that the basis on which the respondent was dismissed from employment was unjustifiable. The court was of the view that the respondent did not engage in dishonest or disruptive behavior which could have led to a breach of the employment relationship, thus eroding confidence and trust between him and his employer, the appellant.
- 1.2 The court was further of the view that the transaction between the respondent and the third party was private and had nothing to do with the respondent's work, or the appellant. It accordingly concluded that the dismissal was unfair and awarded the respondent 24 months' salary based on his last salary, with interest. The court awarded costs to the respondent, to be taxed in default of agreement.

2.0 BACKGROUND

- 2.1 The respondent, who was the plaintiff in the lower court commenced an action by way of writ of summons and statement of claim seeking the following reliefs-

1. A declaration that his dismissal from employment on 20th October, 2016 by the defendant (now appellant) was null and void;
 2. Damages for wrongful dismissal;
 3. Any other reliefs the court may deem fit;
 4. Interest;
 5. Costs.
- 2.2 In the statement of claim the plaintiff averred that he was an employee of the defendant having been offered employment as an Artisan Auto Electrician on 31 August, 2007, and was confirmed on permanent and pensionable employment on 1 February, 2009.
- 2.3 On or about 3 June, 2016, the plaintiff borrowed K3,400.00 from Watson Munamwenda so that he could use it to sort out a pressing personal matter. The parties agreed that the money would be paid back on 14 June, 2016. However, on the agreed date, the plaintiff only managed to pay back K2,000.00 and he was given an extension by the lender to pay back the money on 21 June, 2016.
- 2.4 The plaintiff still failed to pay the money back on the appointed date and Watson threatened to report the plaintiff to his employer, the defendant so that the plaintiff could be put under pressure to honour his obligations.

- 2.5 In September, 2016, Watson made a report to the plaintiff's supervisor at work to the effect that the money that the plaintiff allegedly borrowed from him was in fact a bribe, for the plaintiff to help him get a job in the defendant company. Consequently, on 26 September, 2016, the plaintiff was charged with the offence of gross misconduct. The defendant constituted a disciplinary hearing and subsequently found the plaintiff guilty as charged. He was summarily dismissed from employment on 20 October, 2016.
- 2.6 The plaintiff's contention was that the dismissal was unlawful and wrongful as the facts upon which he was charged and dismissed were unrelated to his duties and conduct as an electrician. The plaintiff went on to state that the charge was outside the scope of Appendix B to the Collective Agreement between the defendant and the National Union of Plantation and Agricultural Workers. The plaintiff alleged that he suffered loss and damages and was deprived of the opportunity to remain in gainful employment.
- 2.7 The matter proceeded to trial and the plaintiff gave evidence as PW1. He testified that in 2016, he was charged by the Agricultural Workshop Manager, a Mr Esau Phiri for having obtained money from Watson after assuring him that he would help him to secure a job in the defendant company.

- 2.8 The plaintiff was accused of having obtained K3,400.00 from the said Watson but when he could not deliver, he returned K2,000.00, and failed to pay back the balance of K1,400.00. He was then charged with the offence of gross misconduct and was asked to exculpate himself. The Plaintiff was heard on the charge that was leveled against him and was eventually dismissed.
- 2.9 The plaintiff was aggrieved because he was charged over an issue that was independent of his employment. He stated that he borrowed money from Watson because his wife was unwell and that the agreement that he entered into with Watson was reduced to writing.
- 2.10 PW2, Mike Namakando, a depot supervisor at the respondent testified that he was present when the plaintiff borrowed K3,400.00 from Watson to assist him because his wife was in hospital.
- 2.11 The evidence of DW1, Watson Munamwanda was that he worked for the defendant as a driver in 2014 and when the contract ended, he went back to his home town. In 2016, he learnt that the defendant was employing drivers.
- 2.12 He went to the defendant company and met the plaintiff who told him that if he gave him K5,000.00, he would assist him to secure a job because he was in good relations with relevant officers in the

defendant. Watson gave the plaintiff K3,400.00 but was told that he was too late since other candidates for the job he desired had already completed sitting for the aptitude tests. He was told to wait until the following Monday. However, by Wednesday nothing had materialized. Watson heard that the candidates who sat for the tests had since obtained their results. He then decided to pursue the plaintiff to recover the money that he gave to him.

2.13 After about two months, the plaintiff gave Watson K2,000.00 but failed to give him the balance of K1,400.00. He then reported the matter to the workshop manager, a Mr Esau Banda and he was asked to write a complaint about how he gave a bribe to the plaintiff so that he would assist in securing a job in the defendant.

2.14 He admitted signing an agreement with the plaintiff on 3 June 2016 and that the reason why he gave the money to the plaintiff was not stated in the agreement.

2.15 DW3, Zinaze Banda Zulu was the Human Resources Practitioner. She confirmed that the plaintiff was charged with the offence of gross misconduct and referred to the disciplinary committee whose findings were that the plaintiff was guilty as charged and the punishment that was meted out was summary dismissal.

3.0 DECISION OF THE LOWER COURT

- 3.1 The lower court considered the evidence before it and came to the conclusion that the investigations that were embarked on by the defendant did not show that the plaintiff behaved dishonestly. The court was of the view that the agreement that was dated 3 June, 2016 showed that the plaintiff and Watson entered into an agreement in which the plaintiff borrowed K3,400.00 from Watson and managed to pay back K2,000.00 on 14 June, 2016, leaving a balance of K1,400.00 which he should have paid back by 21 June, 2016.
- 3.2 The court found that on the facts and evidence before it, the defendant could not have found the plaintiff guilty of dishonest or disruptive behavior. The lower court concluded that the basis upon which the plaintiff was dismissed was unjustifiable as he did not engage in dishonest or disruptive behavior which breached the foundation of the employment relationship.
- 3.3 The court found that the dismissal was unfair and awarded the plaintiff 24 months' salary based on his last salary. The court awarded him interest at the bank's short term deposit rate from the date of issuance of the writ to the date of judgment and

thereafter at current Bank of Zambia lending rate until date of payment.

4.0 THE APPEAL

4.1 The appellant was dissatisfied with the decision of the lower court and appealed to this court, advancing three grounds of appeal couched as follows-

1. ***The court below erred in fact and law when it interposed itself as an Appellate Tribunal to the Appellant's Disciplinary Committee.***
2. ***The court below erred in law and fact when it erroneously evaluated the appellant's evidence that DW1 and DW2 did not say that there was anything more that was said concerning this transaction at the time it was being signed.***
3. ***The court below erred in fact when it found that there was an absence of evidence other than the Credit Agreement.***

5.0 APPELLANT'S CONTENTIONS

5.1 The appellant's counsel argued grounds one and three together because they are interrelated. It was submitted that ground one stems from the court below's findings in the judgment appealed against at page 21 lines 13 to 21 of the record of appeal. Regarding

ground three, the lower court's finding of fact at page 22 of the record was that-

“However, there was nothing in the investigations, according to the records on file that shows that there was evidence in the investigations, according to the records on file, that shows that there was evidence of such conduct.”

5.2 It was submitted that regarding ground three, the lower court found and stated that-

“In the absence of any other evidence, it does not make sense to conclude that the K3,400.00 was for any other purpose other than what is stated on that paper.”

5.3 It was argued that for the respondent to succeed, that he was unfairly dismissed, the onus was upon him to impugn the power of the tribunal that heard the matter, as well as the manner of the exercise of the power to discipline him, than considering the merits or demerits of the investigations prior to the hearing.

5.4 The case of ***Zambia Electricity Supply Corporation Limited vs Muyambango***¹ was referred to, where the Supreme Court 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. The duty of the court is to examine if there was the necessary disciplinary power and if that power had been properly exercised.”

- 5.5 It was submitted that the lower court misdirected itself when it held that the agreement at page 49 of the record of appeal was produced at the case hearing. This was because the respondent failed to produce the agreement at the disciplinary hearing. The court’s attention was drawn to page 76, lines 2, 3 and 4 of the record of appeal to show that the agreement was not presented at the disciplinary hearing. It was further submitted that in the respondent’s letter of appeal at page 81 lines 3 to 15 of the record of appeal, the agreement was not produced nor was it considered at the case hearing on 6th , 10th and 12th October, 2016.
- 5.6 It was submitted that the disciplinary committee was entitled to render a decision based on the oral evidence of the witnesses who gave their testimonies at the hearing. This is contained in the minutes of the case hearing at pages 63 to 77 of the record of appeal.
- 5.7 It was argued that at the hearing, the respondent did not advance the position that the K3,400.00 was credit that he obtained from

Watson. The respondent conceded in cross-examination at the disciplinary hearing that he had nothing to prove that he borrowed money from Watson.

5.8 It was contended that when the respondent was referred to page 72 line 2 to 5 of the record of appeal, he conceded that he did not dispute the testimony of Olimas Ngenda at the case hearing that the money was meant to secure a job for Watson Munamwenda in the defendant company.

5.9 It was submitted that the disciplinary committee properly accepted the evidence of Olimas Ngenda that the K3,400.00 was a bribe to secure a job for Watson. It was argued that the lower court ought to have found that the respondent obtained the money in issue as a bribe on the pretext that he would assist Watson to be employed as a driver in the defendant company. It was contended that the lower court found for the respondent based on an agreement that was not considered by the disciplinary committee.

5.10 The case of ***Florence Sikombe vs Stanbic Bank (Z) Limited²***, was referred to where the Supreme Court held that-

“. . . the learned trial Judge refused to consider the merits of the evidence adduced in the disciplinary

proceedings or inquire whether the defendant's decision was reasonable."

5.11 The Supreme Court commended the Judge for complying with the principle that she could not interpose herself in what the disciplinary committee had done. It was argued that the disciplinary committee properly found the respondent guilty as charged.

5.12 The learned Counsel for the appellant further urged this court to reverse the finding by the lower court that the respondent was unfairly dismissed. It was submitted that the lower court interposed itself as an appellate tribunal as it analysed and determined the matter based on the "Agreement" that was not considered by the disciplinary committee. It was submitted that rather, the lower court should have considered what formed the substratum of facts as was indicated in the minutes of the case hearing. It was contended that the lower court should have considered whether the appellant's disciplinary tribunal had the power to discipline the respondent and whether the said power was properly exercised. This court's attention was drawn to the case of ***Samson Katende and Crosby Bernard vs NFC Mining Plc³*** where the Supreme Court guided that the court should have regard

to the question whether the tribunal had valid disciplinary powers and whether the same were validly exercised. We were urged to allow grounds one and three of the appeal for the aforesaid reasons.

5.13 Turning to ground two, it was submitted that the lower court erred in law and fact when it erroneously evaluated the evidence of DW1 and DW2 that nothing more was said regarding the transaction at the time the agreement was signed. The lower court concluded that the K3,400.00 was for the purpose that was stated on the “Agreement” and not otherwise.

5.14 It was submitted that the evidence of DW1 was that he wanted the “Agreement” to capture the fact that he gave the money to the respondent so that he could help him secure employment, but the respondent insisted that the “Agreement” should indicate that the money was for a credit.

5.15 The court was urged to reverse the lower court’s finding of fact that the “Agreement” did not say anything more at the time it was signed because it was arrived at without considering the evidence of DW1. It was submitted that there was evidence at the case hearing that led to the finding that the respondent was guilty of the offence of Gross Misconduct.

5.16 The court was urged to allow the appeal and set aside the lower court's Judgment because the respondent's conduct breached the foundation of the employment relationship between the appellant and himself as he was intentionally dishonest. We were urged to allow the appeal in its entirety.

6.0 RESPONDENT'S CONTENTIONS

- 6.1 The respondent filed heads of argument on 14 June, 2022. Responding to ground one, it was submitted that the lower court did not interpose itself as an appellate tribunal and was cautious not to interpose itself as such. It was argued that the lower court did not agree with the tribunal's findings that the respondent engaged in dishonest or disruptive behavior which breached the foundation of the employment relationship.
- 6.2 According to counsel, the lower court was of the view that there was no substratum of facts to support the exercise of the power that led to the appellant dismissing the respondent. This was because the lower court was of the view that the respondent's conduct, that the appellant presided over, occurred outside the respondent's work and did not have anything to do with his employment.

- 6.3 It was argued that the lower court should not be faulted for considering the investigations and the evidence at the hearing as its aim was to determine whether there was a substratum of facts to support the exercise of the disciplinary power against the respondent.
- 6.4 Responding to ground three which is that the lower court misdirected itself by holding that the agreement was produced at the case hearing, it was submitted that the lower court was on firm ground when it found that the credit agreement was produced because it was indeed produced.
- 6.5 It was argued that in a letter to the managing director, the respondent informed him that he had attached the agreement.
- 6.6 It was further argued that the respondent was consistent during the hearing that the money he was paying back was a mere debt and was not for securing any favours for DW1 in the appellant company. It was argued that the oral testimonies against the appellant cannot overrule the written agreement that was signed between DW1 and the respondent. We were urged to dismiss grounds one and three of the appeal for the aforesaid reasons.
- 6.7 In arguing ground two it was submitted that the lower court was on firm ground when it found that the agreement was signed freely

by the parties and that nothing was said at the time of the signing of the agreement to indicate otherwise. We were urged to dismiss the second ground of appeal.

6.8 The respondent's counsel submitted that the appellant had failed to show that the lower court interposed itself as an appellate tribunal to the appellant's disciplinary committee. It was contended that the lower court merely evaluated the evidence to determine whether there was a substratum of facts to support the charge against the respondent.

6.9 According to Counsel, the lower court correctly evaluated the evidence as the written agreement stated that the funds the respondent got from DW1 were a mere debt to be repaid at a specific time. We were urged to dismiss the appeal.

7.0 CONSIDERATION OF THE MATTER AND DECISION OF THE COURT

7.1 We have considered the record and the appellant's arguments in support of the appeal. We have also considered the respondent's arguments in response. We will deal with the three grounds of appeal together as we are of the view that they are intertwined. The main issue that we are called to interrogate in this matter is

whether the lower court interposed itself when it heard and determined the matter.

- 7.2 In grounds one and three of the appeal, the lower court is attacked for interposing itself as an appellate tribunal to the appellant's disciplinary committee and finding that there was no evidence in the matter other than the Credit Agreement.
- 7.3 The evidence on record is that the appellant did hold a disciplinary hearing on 6th, 10th and 12th October, 2016, at which the respondent failed to produce the "Credit Agreement" which the lower court relied on when it arrived at the conclusion that the respondent was unfairly dismissed. In fact, there was evidence at the disciplinary hearing that led the appellant to conclude that the respondent was guilty of Gross Misconduct.
- 7.4 Having perused the proceedings of the disciplinary hearing that was conducted by the disciplinary committee, we are convinced that they were comprehensive and that the respondent failed to produce the "Credit Agreement" which he only made available to the lower court at the trial.
- 7.5 As earlier stated, the lower court based its finding that the respondent was unfairly dismissed on the "Credit Agreement" which was not available at the disciplinary hearing. In our view,

the duty of the lower court was to examine if the disciplinary committee had the necessary disciplinary power and if the said power was exercised properly. As earlier stated, a perusal of the proceedings at the disciplinary hearing, the respondent was given an opportunity to exculpate himself and there were witnesses who testified against the respondent. When the disciplinary committee analysed the evidence before it, a decision was arrived at, that the respondent was guilty of the offence as charged. Consequently, he was summarily dismissed.

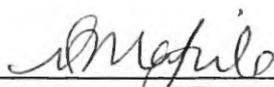
7.6 We are of the view that the disciplinary committee substantiated the allegation that the respondent obtained a bribe from Watson so that he could assist him in securing a job. We take the view that there was a substratum of facts upon which the dismissal was predicated. There was sufficient evidence against the respondent which made the lower court's finding that the "Credit Agreement" was just a "Credit Agreement" erroneous.

7.7 That being the case, we are of the view that the lower court interposed itself when it considered the merits of the evidence adduced at the disciplinary hearings and found that the appellant's dismissal was unfair.

7.8 It was not the function of the lower court to interpose itself in what the disciplinary committee did. There was sufficient evidence against the respondent from the witnesses who testified at the disciplinary hearing to substantiate the allegations against him. We find merit in the three grounds of appeal and we allow them.

8.0 CONCLUSION

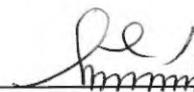
8.1 The net result is that the appeal succeeds. The lower court's finding that the respondent was unfairly dismissed is accordingly reversed. The lower court's award of 24 months' salary to the respondent is also set aside for lack of merit. The lower court's order for costs is also set aside. Each party to bear its costs.



B. M. MAJULA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



A. M. BANDA - BOBO
COURT OF APPEAL JUDGE