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**IN THE COURT OF APPEAL FOR ZAMBIA**  
**HOLDEN AT NDOLA**  
(Civil Jurisdiction)

APPEAL NO. 81/2017

**BETWEEN:**

**NATIONAL MILLING CORPORATION LIMITED**

**APPELLANT**

**AND**

**DERRICK SIBAMBA**



**RESPONDENT**

*Coram: Makungu, Kondolo and Majula J.J.A*  
*On the 20<sup>th</sup> day of February, 2018 and 4<sup>th</sup> July, 2018*

*For the Appellant: Mr. N. Nchito (SC) of Messers Nchito and Nchito*  
*For the Respondent: No appearance*

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**JUDGMENT**

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**Makungu, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Agholor v. Cheesebrough Ponds (Zambia) Limited* (1976) Z.R. 1.
2. *British Home Stores v. Burchell* (1979) 1 IRLR 379
3. *Moses Mwaanga v. Konkola Copper Mines – Appeal No. 123 of 2014*
4. *The Attorney General v. Marcus Kapamba Achiume* (1983) Z.R. 1 (S.C)
5. *Attorney General v. Richard Jackson Phiri* (1988/89) Z.R. 121
6. *Chimanga Changa limited v. Stephen Chipango N'gombe* (2010) Z.R. 208
7. *Zambezi Ranching and Cropping Limited v. Lloyd Chewe – Appeal No. 128 of 1999 (SC)*



In the summary of the evidence and the judgment of the lower court we shall refer to the appellant as the respondent and the respondent as the complainant as those were their designations in the court below.

This is an appeal against the judgment of the Industrial Relations Division of the High Court dated 25<sup>th</sup> July, 2016 to the effect that the complainant was wrongfully dismissed and therefore he is entitled to damages for wrongful dismissal equivalent to three months' salary with perquisites. The damages to attract interest at short term bank deposit rate from the date of the notice of complaint to the date of judgment, thereafter at the current bank lending rate as determined by the Bank of Zambia until date of payment. Further that, the K19, 874.25 that was deducted from his terminal benefits be paid back to him that the respondent should bear the costs.

The undisputed evidence before the lower court was as follows:

The complainant was employed by the respondent on permanent and pensionable basis as a Depot Assistant and stationed at Masala Sales Depot in Ndola. His duties included making daily sales and orders and merchandising. On 12<sup>th</sup> February, 2015 there was an internal audit which revealed loss of K39,748.50 from the Masala Sales Depot. Following the audit, on 13<sup>th</sup> February, 2015 i.e. only 7 months after the complainant was employed, he together with his immediate supervisor Doris Sibale were suspended without pay on allegations that they had acted together in misappropriating the



said sum of money. On 26<sup>th</sup> February, 2015 the complainant was formally charged with theft of the said amount. After a disciplinary hearing, he was dismissed from employment with effect from 13<sup>th</sup> March, 2015 and his appeal against dismissal failed.

After dismissal, the complainant was paid for accrued leave days and days worked, less money owed to the company and less half of K39,748.19 i.e. the loss incurred by the respondent. It was also in evidence that the complainant had signed a document entitled "Depot Procedures" which was produced in evidence. Stock counts were done every last week end of the month. The complainant and his immediate supervisor Doris Sibale were both duty bound to keep the records at the depot properly. Other undisputed facts were that Doris Sibale was later convicted by the Subordinate Court of the offence of Theft of the same amount of money and sentenced to two (2) years imprisonment. The complainant was not criminally prosecuted for theft. It was also common ground that Doris Sibale informed the respondent that the complainant was not aware of the missing money and that she tried to cover up the loss.

The lower court found that the laid down procedure was followed to a large extent but with a few lapses. That the rules of natural justice were also observed. That the respondent had the necessary disciplinary power but did not exercise it properly in that it shifted the burden of proof from itself to the complainant. That Doris Sibale acted alone in misappropriating the money. Further that the respondent was dismissed for the alleged negligence in not



detecting the misappropriation of the money and not for theft and yet there was no tangible evidence of negligence to warrant disciplinary action let alone dismissal.

From this point onwards we shall refer to the parties as cited in this appeal.

The appeal is based on three grounds which are framed as follows:

1. The court below erred in law and in fact when it found that the respondent was wrongfully dismissed by the appellant.
2. The court below erred in law and in fact when it found that the appellant did not properly exercise its discretionary power over the respondent.
3. The court below erred in law and in fact when it found that there was no evidence on record to justify any disciplinary action against the respondent.

On the hearing of the appeal, the appellant's counsel was present while the respondent was absent. The appellant's counsel relied on the heads of argument filed herein on 18<sup>th</sup> July, 2017. The respondent did not file any heads of argument.

In support of ground one, he submitted that it is trite law that wrongful dismissal is concerned with the procedures used to bring the employment relationship to an end. He relied on the case of ***Agholor v. Cheesebrough Ponds (Zambia) Limited*** <sup>(1)</sup> where the Supreme Court stated that:



***“In order for an employer to terminate an employee’s contract, he must follow the laid down procedures as well as the rules of natural justice. If an employer fails to follow the laid down procedures or the rules of natural justice the purported dismissal is null and void.”***

He further stated that in the present case there is no evidence of breach of the rules of natural justice or laid down procedure by the appellant. Therefore, there was no basis for the finding that the dismissal was wrongful.

On the second ground of appeal, Mr. Nchito contended that the appellant’s power to discipline the respondent was exercised fairly considering the circumstances of the case. The appellant did not shift the burden of proof from itself to the respondent. Reliance was placed on the case of ***British Home Stores v. Burchell*** <sup>(2)</sup> where the following guidelines for the exercise of disciplinary power were given:

***“First the employer must show that he genuinely believes the employee to be guilty of the misconduct in question, secondly he must have reasonable grounds upon which to establish that belief, thirdly he must have carried out such investigation into the matter as was reasonable.”***

Counsel pointed out that as shown on page 84 of the record of Appeal lines 19-26, RW1 who carried out the spot check told the Court that all depot staff were bound by the written Depot



Operating Procedure (page 46-48 of the Record). RW1 further testified that the respondent's responsibilities included looking after petty cash and banking slips. Because of his line of work, it was impossible for him not to have had a hand in the missing funds. As indicated on page 85 of the Record, lines 1-5, RW2's evidence was that both the complainant and his supervisor had keys to the safe which contained money from sales and that evidence was unchallenged. Counsel therefore contended that the appellant had reasonable grounds upon which to establish the respondent's guilt. The court below therefore erred when it found that the disciplinary powers were not exercised properly. Counsel contended that by making that finding, the court substituted the findings of the disciplinary committee with its own and that is untenable. To fortify this, counsel relied on the case of **Moses Mwaanga v. Konkola Copper Mines** <sup>(3)</sup> where the Supreme Court stated that:

***"As we have said countless times before, 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 necessary disciplinary power and whether it was exercised in due form."***

In light of the foregoing, Mr. Nchito submitted that the appellant exercised its disciplinary power properly and on valid grounds.

On the third ground Mr. Nchito argued that the court erred when it found that there was no tangible evidence to justify disciplinary



action against the respondent and this finding should be reversed taking into account the case of ***The Attorney General v. Marcus Kapumba Achiume*** <sup>(4)</sup> where it was held that:

***“The appellant court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.”***

Counsel stated that the court failed to address its mind to the fact that according to the charge sheet which appears on page 35 of the Record of Appeal, the offence that the respondent was charged with was that of theft of monies jointly with his supervisor and that they both failed to exculpate themselves. The appellant therefore had reasonable grounds upon which to establish the respondent's guilt. There was never an allegation of negligence against the respondent nor was any evidence led to that effect. Therefore, the court erred to consider the elements of the offence of negligence. On the totality of the arguments, Mr. Nchito argued that the appeal be allowed.

We have considered the record of appeal and arguments made by counsel for the appellant. We shall deal with the three grounds of appeal together because they are in our view interrelated.



The court below had taken into account the case of **Agholor v. Cheesebrough Ponds (Zambia) Limited** <sup>(1)</sup> which was cited by the respondent's counsel. After finding and holding that the laid down disciplinary procedure was followed to a large extent and that the rules of natural justice were also complied with, the court went on to consider whether the dismissal was justified under the circumstances of the case (see page 18 of the judgment on page 23 of the Record of Appeal). In the case of **Attorney General v. Richard Jackson Phiri** <sup>(5)</sup> it was held *inter alia* that:

***"Once the correct procedures have been followed, the only question which can arise for the consideration of the court based the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same."***

In the case **Chimanga Changa limited v. Stephen Chipango N'gombe** <sup>(6)</sup> it was held *inter alia* that;

***"An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision."***

It is clear from the cases of **Moses Mwanga**, <sup>(3)</sup> **Attorney General v. Richard Jackson** <sup>(5)</sup> and **Chimanga Changa** <sup>(6)</sup> that after the **Agholor** <sup>(1)</sup> case, Zambian jurisprudence on wrongful dismissal has developed tremendously.



In light of the aforementioned cases, it is our considered view that the lower court was on firm ground when it considered whether there was a substratum of evidence to support the dismissal and whether the disciplinary power was exercised properly.

In the letter dated 25<sup>th</sup> March in response to the appeal against dismissal the appellant stated in paragraph 3 that ... *"the disciplinary committee that convened to hear your matter had proved beyond reasonable doubt that both you and your co-accused had at one time or another handled the day to day daily sales transactions of the said sales depot."*

In the fourth paragraph it was stated that *"further note that you are also on record of having failed to provide proof of your non-involvement in the daily sales transactions of your assigned sales depot."* When the above paragraphs are read together, it is clear that the burden of proof did not shift from the appellant to the respondent because the appellant was of the view that it had proved beyond reasonable doubt that the respondent and his co-accused had at one time or another handled the day to day daily sales transactions. Taking into account the case of **Attorney General v. Marcus Kapumba Achiume** <sup>(4)</sup> we are of the view that, the lower court's finding that the burden of proof had shifted was contrary to the evidence on record and therefore it is upset.

However, we cannot fault the lower court for finding that there was no proof that the respondent stole or participated in the theft of the



money. Further that the appellant did not show how the respondent had contravened the depot procedures. The court also rightly found that Doris Sibale absolved the respondent of any knowledge or participation in the misappropriation of the subject money. The court's finding that it is clear from the evidence that Doris Sibale acted alone in misappropriating the money cannot also be faulted (see J18 – 23 of the Record).

As a court of substantial justice, the lower court acted within its jurisdiction to delve behind the reason given for the dismissal which was theft. Upon delving behind the reason given, the court was of the view that the respondent was dismissed for alleged negligence in not detecting the misappropriation of the money and not for theft and that there was no evidence in form of a disciplinary code to the effect that negligence was a dismissible offence. The court further found no evidence of negligence to justify any disciplinary action. The court fortified its decision with the case of **Zambezi Ranching and Cropping Limited v. Lloyd Chewa** <sup>(8)</sup> where it was held that:

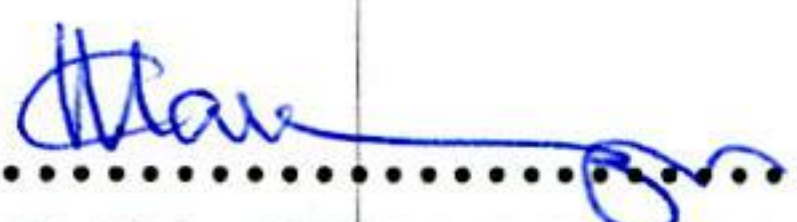
***“The court should be wary of misdirecting itself by glossing over the wrong doings by a complainant and coming to a conclusion that on a view of facts and evidence which cannot reasonably be entertained.”***

Applying the case of **Chimanga Changa Limited v. Stephen N'gombe**,<sup>(6)</sup> we are of the view that the appellant did not act reasonably in coming to its decision and the dismissal was not justified because the respondent was exonerated by his supervisor



Doris Sibale and there was no proof that he acted together with her to steal the money.

For the forgoing reasons, the appeal entirely fails. The judgment of the court below is hereby upheld. The respondent is entitled to costs in the court below. Each party to bear its own costs for the appeal.

  
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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

  
.....  
**M.M. KONDOLO, SC**  
**COURT OF APPEAL JUDGE**

  
.....  
**B.M. MAJULA**  
**COURT OF APPEAL JUDGE**