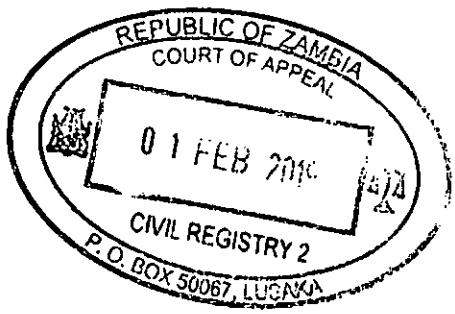
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 48/2018
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:

AFRICAN SUPERMARKETS T/A SHOPRITE CHECKERS — **APPELLANT**

AND

BETHEL MUMBA — **1ST RESPONDENT**

ESTHER BANDA — **2ND RESPONDENT**



CORAM: **Mulongoti, Sichinga and Ngulube JJA**

On the 16th October 2018 and 1st February, 2019

For the Appellant: *Mr. C Tafeni of Suba Tafeni & Associates with Mr.K Mwiche of Robert and Partners*

For the Respondents: N/A

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court*

Cases referred to:

1. ***Ms Sciemed Overseas Inc v BOC India Limited and other Laws of the Supreme Court 2016-1-20***
2. ***Kedrick Sikazwe v Proxy and Dara Holdings SCZ Appeal No. 111/2013***
3. ***Barclays Bank v Luwi and Ngulube SCZ Appeal No. 07/2012***

4. ***Chilanga Cement Plc v Singogo SCZ Judgment No. 13 of 2009 (2009) ZR***
5. ***Shiling Bob Zinka v Attorney General (1990-1992) ZR 73***
6. ***Mulambo Mazila Hamene Mukando v African Life Assurance Co. Zambia Limited CAZ Appeal No. 71/2017***
7. ***Kawimbe v Attorney General (1974) ZR 244***
8. ***APG Milling Co. Limited v Programme Against Malnutrition SCZ Appeal No. 17/99***

Legislation referred to:

1. ***The Employment Act, Chapter 268 of the Laws of Zambia***
2. ***The Industrial and Labour Relations Act, 269 of the Laws of Zambia***

Works referred to:

1. ***N.M. Selwyn, Selwyn's Law of Employment, 14th edition Oxford University Press 2006***

The appeal is against the decision of the High Court, (Industrial Relations Division) which found for the respondents and awarded 24 months salaries as damages for unlawful and wrongful termination. The background to this appeal is that the respondents were employed by the appellant at its Kasama store. The first respondent was employed in the year 2002 while the 2nd respondent was employed in 1998. The respondents used to work from the cashier's office at the appellant's store in Kasama.

On the 3rd of May, 2013 around 11:00 hours the cashier's office caught fire while the two of them were in the main store, shopping.

On 4th May, 2013, they were reported to the police where they were charged with arson and theft by servant. They were detained and released on bond. They were told by their Branch Manager not to report for work until the case had concluded.

On 16th September 2014, they were acquitted and took their acquittal certificates to the appellant's Branch Manager.

On 28th July, 2015 they appeared before the High Court following an appeal by the State. However, the appeal was abandoned and dismissed. They went back to the appellant and even wrote letters to inquire about the status of their employment but got no response until 11th August, 2015 when they were called and given letters of dismissal on grounds of desertion. They sued for damages for unlawful and wrongful dismissal.

The trial court found that the dismissal of the respondents without being charged nor being heard was wrongful and awarded them 24 months salaries as damages.

Dissatisfied the appellant launched an appeal and filed four grounds of appeal as follows:

1. ***This case having hinged on the respondents staying away from work without lawful excuse and visiting the appellant's premises resulting into the respondents being considered deserters and in light of evidence in cross examination of the respondents admitting to lying touching the respondents' staying away and visiting the appellant's premises, the court below erred in law and fact when it failed to make any finding, let alone to reveal its mind and thus failing to pronounce itself on the legal effect of the respondents' admitted lie(s).***
2. ***The court below erred in law and fact when it failed to consider or evaluate or assess or to fully or sufficiently or seriously consider or evaluate or assess the respondents had availed themselves for disciplinary process immediately following their first attendance at court as such finding would have fairly and conclusively resolved the question whether or not the respondents only resurfaced in August, 2014 following their acquittal when they wrote letters to the appellant.***
3. ***The court below erred in law and fact in considering dissertation from work, as happened in this case, as in every sense akin to dismissal.***
4. ***The court below erred, on the facts of this case, to have ordered payment of 24 months salary as damages for the respondents' loss of jobs instead of lesser damages.***

In support of the grounds of appeal, the appellant's counsel also filed the appellant's heads of argument. He argued in grounds one and two that the appellant's case in the court below was that the

respondents without lawful excuse stayed away from work from the time they started appearing in court from 9th May, 2013. The respondents failed to prove that they approached anyone in the appellant's store to inquire about their jobs other than the letters they wrote in October, 2014 and August, 2015.

According to counsel, the respondents' affidavit evidence revealed that they were aware that other employees who were connected with the arson case had been charged and put through the disciplinary proceedings. Their affidavits show that the respondents had deserted and only surfaced after their acquittal. The appellant's witness RW1 (Branch Manager) testified that it was almost impossible for him to get hold of the respondents so he could charge them like the others. He insisted that if the respondents had gone to see him at the store, they would not go unnoticed as the store is big and moreso that they were still employees at the time. It is counsel's contention that it was not disputed that the appellant charged two of the respondents' colleagues who did not bolt after the fire incident. The respondents were not charged because they had absconded from work. They were unreachable on their mobile phones and had relocated to new addresses.

It is further argued that the court below failed to consider that under clause 5 of the appellant's rules, terms and conditions of employment/disciplinary code, which is at page 73 of the Record of Appeal, failure to report for work rendered the respondents deserters. The respondents' testimony also revealed that they lied when they said they could not remember who they had seen when they allegedly went to the store. The 2nd respondent even admitted that they lied in their further affidavit. This, according to counsel, means that the respondents' story hangs in a balance and cannot be believed. The case of **Ms Sciemed Overseas Inc v BOC India Limited and others**[1] was cited where it was held that:

> ***"A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen (15) years as compared to the number of cases prior to that. This trend is certainly an unhealthy one that should be strongly discouraged well before the filing of false affidavit gets to be treated as routine and normal affair."***

By their action of surfacing over a year later from the time they were released, the respondents showed a clear unequivocal intention to abandon their employment, which is a dismissible offence. The case of **Kedrick Sikazwe v Proxy Limited and Dana**

Holdings[2] was relied upon where the Supreme Court observed that:

"During his oral submissions, the appellant complained that he was heard before his dismissal. For our part, we cannot declare his dismissal wrongful on grounds that he was not heard or that procedure was not followed, because he committed a dismissible offence."

In ground three, it is argued that the court erred in law and fact in considering desertion from work as being akin to dismissal. According to counsel, 'desertion/absconding' entails the employer advising the employee that he/she has terminated his or her own employment by failing to report for duty. On the other hand, that 'dismissal' occurs when an employee leaves employment at the instance of termination by the employer. The respondents were therefore, duly terminated by their failure to report for duty for over a year.

In ground four which is argued in the alternative, it is contended that the court should have awarded damages of three months salaries and not twenty-four months. This is so, because the common law measure of damages for wrongful termination is the notice period. A plethora of cases were cited as authorities for this position of the law like **Barclays Bank v Luwi and Ngulube**[3] and

Chilanga Cement Plc v Singogo[4]. Furthermore, that these cases also established that the notice period as damages, is only departed from where there is evidence that the termination caused inconvenience or distress. In *casu*, there is no evidence to ground an award of twenty-four months. We were therefore, urged to substitute it with an award of three months salaries.

In response to grounds one and two the respondents' counsel argued, in its heads of argument, that the respondents' case in the court below rested on the argument that the appellant did not charge them with any disciplinary offence for desertion or otherwise. They were therefore, denied a right to be heard contrary to the rules of natural justice. The case of **Shiling Bob Zinka v Attorney General**[5] was relied upon where the Supreme Court observed that no man shall be condemned unheard and that parties should be given adequate opportunity to be heard. Furthermore, the trial Judge opined that:

> ***"The only reason for the respondent's (appellant) failure to charge the complainants with any disciplinary offence as I see it from the facts of the case is because the complainants were being prosecuted criminally at the time. However, that does not justify the conduct of the respondent."***

According to counsel the appellant's Branch Manager confirmed that the respondents were not charged with any disciplinary offence, and, if they were deserters as contended, the appellant could still have charged them with desertion. Counsel further argued that the respondents did not lie regarding visiting the appellant's store. That Joshua Museba the one who took over from RW1, who was not called as a witness, had stated in his affidavit that he had received letters from the respondents, inquiring about their employment status. RW1 also confirmed this in his oral testimony, contrary to his affidavit. RW1 was therefore, the liar and not the respondents.

Thus, the respondents proved on a balance of probabilities that they used to visit the appellant through the testimonies of RW1 and his successor Joshua Museba. The appellant if anything, did not need the physical presence of the respondents in order to charge them. They could have done so in their absence and produced the charge letter in court below, but failed to do so.

It is further argued that the case of **Kedrick Sikazwe v Proxy and Dana Holdings**[2], does not apply here, as the respondents did not commit a

dismissible offence. They wrote inquiring of their employment status and used to visit the appellant's store.

In ground three, it is contended that the respondents made efforts to follow the appellant to inquire on their employment status. The appellant failed to prove that they had deserted.

As to ground four, it is submitted that in awarding twenty-four months, the court stated at page 19 of the Record of Appeal lines 6-11:

> ***"In ascertaining the damages for wrongful and unlawful dismissal from employment, I apply my mind to the fact that the complainants were in employment for 13 years in respect of 1st complainant and 17 years for the 2nd complainant. I should also state that unemployment as is the case for the complainants herein results in the worst kind of human degrading and suffering. It is for this reason that every employer should tread with caution before meting out the ultimate sanction of dismissal."***

Counsel concludes that the circumstances of this case are such that the respondents suffered inconvenience and distress as a result of loss of employment. In **Chilanga Cement Plc v Kasote Singogo**[4] the Supreme Court stated that in deserving cases, the courts have awarded more than the common law notice period, as

damages. We were urged to also consider job prospects in Kasama where the respondents are based. The case of **Kawimbe v Attorney General**[7] was relied upon where the Supreme Court elucidated that ***"An appellate court should not interfere with the finding of a trial court as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum."***

We were urged to dismiss the appeal in its entirely.

The appellant filed heads of argument in reply. It is contended that the respondents admitted lies were as follows:

> ***"(i) On three occasions the respondents allege to have been visiting the appellant's shop in Kasama, both respondents failed in court to name any person (staff) who saw them or who they saw on one occasion they alleged to have visited the appellant's shop."***

It is argued that a finding on this was critical as it could have assisted the respondents in establishing that the respondents had not stayed away from work without lawful excuse and that the respondents had not been available to be put under disciplinary hearing as had been their other named colleagues who were implicated in the arson case.

The other lie was:

"(ii) CW2 told the court below on pages 80-81 of the record that:

"On 5th May, 2013 police picked me. We were charged with arson and theft by servant I was taken in cells and found Esther Banda.

On 9th May, 2013 at about 20:00 hours, we were bonded. On 10th May, 2013 we went to the police as we had been told to report everyday depending on what would happen.

Later, we went to Shoprite to see Mr. Nkandu the Branch Manager.

Branch Manager was not explaining like a person we had worked with. He told us to go back as matter was still at the police and would be informed about next stage.

On 11th May, 2013 we went to report at police station. More than 1 year six months court issue lasted. Found new Branch Manager Mr. Museba. Museba on 10th October, 2014 told us to collect acquittal letter and to put our position in writing. Took the letters on 15th October, 2014.

I was staying in Mbala. I did not desert from work, as we used to go there and the letters we wrote were acknowledged."

According to counsel it is again evident from the above evidence that the respondents never passed through the appellant's shop in Kasama for 1 year six months of the duration of their criminal case.

The final lie was:

"(iii) The respondents' lies in the court below on their alleged visits to the appellant shop in Kasama and thus their

unavailability to undergo disciplinary process could also be seen on pages 26-35 of the record where CW2 in her affidavit in support of notice of complaint, stated that the respondents had not passed through the appellant's shop after appearing at the police as "we waited until we were taken to court."

It is contended that this court would note in paragraphs 9 and 10 of the affidavit in support that the respondents speak of only visiting the appellant's shop in Kasama on 16th September 2014 and 28th July, 2015. Still further, in their further affidavit found on page 36-41 of the record and in particular paragraphs 7 and 8, CW2 had told the court below that from 3rd May, 2013, when they were charged with the criminal offence they were told to ***"stop reporting for work till (the manager) receives further directives from head office"*** and yet they claimed they continued visiting the manager twice a month.

According to counsel authorities abound on the lower court's lack of consideration, analysis and making of findings on the import of the Respondents' lies.

He cited the case of **APG Milling Co. Limited v Programme Against Malnutrition**[8] as one such case where it was held that the court is duty bound to make findings of fact on the evidence adduced.

That nothing in the Judgement suggests that the court below had seriously analysed or evaluated the issue or import of the respondents' lies on the critical issue of their availability to be amenable to disciplinary process. Thus, they were not denied the right to be heard.

In ground three it is reiterated that the court below did not address its mind to desertion, which under **section 36(1) of the Employment Act** is a way of termination.

In ground four it is reiterated that the award of twenty-four months was not supported by established principles.

We note that only the appellant attended the hearing and relied on their heads of argument. We have considered the Judgment appealed against and the submissions by counsel.

The issue that arises, flowing from the grounds of appeal, is mainly, whether the termination of the respondents on grounds of desertion was wrongful and or unlawful because they were not charged nor given an opportunity to be heard. This issue cuts across grounds

one to three. We will therefore, consider these grounds simultaneously.

It was not disputed that the respondents were charged with arson following a fire in the cashier's office, where they operated from. They stopped reporting for work as they appeared in the Subordinate Court for arson. They were acquitted. But there was an appeal which was abandoned and dismissed.

The trial Judge found that the appellant admitted that it did not charge nor hear the respondents because they did not report for work after their release from police custody on 9th May, 2013. Furthermore, that RW1 admitted that he met the respondents on 5th and 9th May, 2013 when they were released. The appellant also acknowledged receipt on 15th October, 2014 of the letters of "**request to know their position and receipt of salaries**" per exhibit 'EBMM1' of the respondents' affidavit. The Judge also found as a fact that the respondents' follow up letters of 4th August, 2015 and 5th August, 2015 on their status of employment, which were written after the appeal, attracted a response from the appellant via letter dated 11th August, 2015 which was in effect a letter of dismissal on grounds of desertion.

The Judge opined that the failure to charge the respondents was because they were being criminally prosecuted at the time. He reasoned that this does not justify the conduct of the appellant. Relying on the case of **Shilling Bob Zinka v Attorney General**[5] that no man shall be condemned unheard, he concluded that the respondents dismissal without being charged was wrongful and unlawful.

The appellant is essentially asking us to interfere with this finding of fact. It is settled law that **section 97 of the Industrial and Labour Relations Act** prohibits appealing against findings of fact of the Industrial Relations Court now, a division of the High Court. According to the section appeals should be on any point of law or any point of mixed law and fact. See our decision in **Mulambo Mazila Hamene Mukando v African Life Assurance Co. Zambia Limited**[6]. Even without the restriction in **section 97**, it is trite that as an appellate court we can only interfere with the findings of a trial court if they are perverse, not supported by evidence or the trial Judge misapprehended the facts.

We note in *casu*, that the trial Judge properly analysed the evidence before him. He did not take into account irrelevant considerations and the finding that the dismissal was wrongful and unlawful was based on the evidence. It was undisputed that the respondent were not charged nor given an opportunity to be heard. The incident of arson occurred in 2013. They immediately started appearing in court until 2015. The appellant did nothing and sat back, only to awaken after the appeal was dismissed and to accuse them of desertion. On the facts of this case, we find the use of disciplinary power to dismiss on grounds of desertion was not validly exercised and not supported by the facts.

Accordingly, we cannot fault the trial court. The appellant's arguments that the respondents' lied and that they could not be charged because they were nowhere to be found are therefore, meritless. The appellant called the respondents to collect their letters of dismissal which entails they knew where to find them or were able to communicate with them. Furthermore, the appellant knew they were appearing in court, and as opined by the trial Judge, the appellant waited to see the outcome of the criminal case

before it could charge them. According to the learned author of the book **Selwyn's Employment Law**:

> ***"The question is not whether or not the employee was guilty or would have been found guilty if tried, but whether it was reasonable for the employer to dismiss taking into account all the circumstances of the case".***

The circumstances of this case are such that the respondents stopped reporting for work as advised by the Branch Manager because they were facing a criminal charge of arson. Then they were dismissed for desertion. Taking into account the circumstances of the case, it was not reasonable for the appellant to dismiss them for desertion. For the foregoing we find no merit in grounds one to three and dismiss them.

Turning to ground four, which is in the alternative, we are inclined to maintain the award of twenty-four months. We are guided by the case of **Kawimbe v Attorney General**[7].

Furthermore, the trial court took into account the circumstances of the case, that dismissal on grounds of desertion when they were appearing in the Subordinate Court on criminal charge of arson, distressed the respondents. Consequently, they deserved an award

above the normal measure of notice period. The trial Judge properly directed himself. Ground four is also dismissed.

In the net result the appeal lacks merit and is dismissed. We order each party to bear own costs in this court and below as ordered.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE