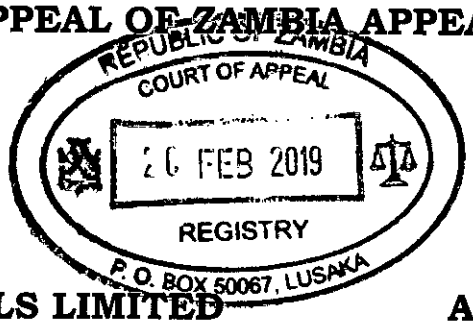
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO 59/2018
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

KALUMBILA MINERALS LIMITED **APPELLANT**

AND

BUPE KABAMBA **RESPONDENT**

CORAM: Chishimba, Lengalenga and Siavwapa, JJA
On 21st November 2018 and 20th February 2019

FOR THE APPELLANT: NO ATTENDANCE

FOR THE RESPONDENT: IN-PERSON

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court

Cases referred to:

1. *ZESCO Limited v. David Lubasi Muyambango (2006) Z.R. 22*
2. *The Attorney-General v Richard Jackson Phiri (1988-1989) ZR 127*
3. *Chimanga Changa v Stephen Chipango Ngombe SCZ Judgment No. 5 of 2010*
4. *Yekweniya Mbiniwa Chirwa v National Provident Fund*

This is a matter in which the Respondent was an employee of the Appellant from 3rd November 2015 working as a Truck Dozer Operator until February 2017 when he was dismissed following a disciplinary process. He moved the Industrial Relations Division of the High Court seeking a declaration that his dismissal was unfair, wrongful and unlawful.

The Court below, after considering the evidence, came to the conclusion that the Respondent was entitled to the reliefs sought on account that the Appellant had frustrated the Respondent's efforts to appeal against his dismissal administratively as provided for by the Disciplinary Code.

The Appellant herein raised three grounds of appeal as set out in the memorandum of appeal as follows;

1. *The Court below erred in law when it held that the Respondent was wrongfully and unfairly dismissed from employment because he was denied his right to appeal against his dismissal.*
2. *The Court below erred in law when it placed undue emphasis on the charges and process against the Respondent before the disciplinary committee which were not the cause of the Respondent's dismissal while totally ignoring the charges and process that led to his dismissal.*

3. *The Court's finding that the failure by the Respondent to appeal against his summary dismissal was caused by the Appellant is not supported by the evidence on record.*

Both parties filed their heads of argument which we shall entirely rely upon as neither party made any oral submissions.

In the heads of argument filed, the Appellant contends that it was misdirection on the part of the learned trial Judge to have based his decision in favour of the Respondent on the failed appeal process as that was not the basis upon which the Respondent lodged the complaint in the Court below. It is argued that what the Respondent sought to challenge in the Court below was the disciplinary process leading to his dismissal.

The argument in support of the second ground is that the learned trial Judge ought not to have used the charges that were not the cause of the Respondent's dismissal to find in favour of the Respondent but rather on whether the tribunal had the requisite disciplinary authority and if it exercised it properly.

We were referred to the cases of *ZESCO Limited v. David Lubasi Muyambango*[1], *the Attorney-General v Richard Jackson Phiri*[2] *and Chimanga Changa v Stephen Chipango Ngombe SCZ Judgment*[3].

In the third ground, the Appellant rejects the learned Judge's finding that it was responsible for the Respondent's failed appeal on account that the Respondent had access to the mine as options such as taking a bus or other company vehicle to access the mine premises were open to him.

In his arguments in response the Respondent has maintained that because he was not availed the appeal form and had his identity card withdrawn, the learned Judge was entitled to find that he was wrongfully dismissed. He also argued in ground two that being a Court of substantial justice the Court below was entitled to find in his favour after finding that the tribunal did not exercise its power in due form.

In ground three he maintained that the Respondent impeded his right of appeal and the Court below rightly so found. He also relied on the case of *ZESCO Limited v. Muyambango.*

The record clearly shows that the Respondent was charged and served with two separate charge forms, both dated 20th February 2017 which are exhibited at pages 72 and 73 of the Record of Appeal.

The first charge form contains two offences of over-speeding within the mining working zones on 3rd February 2017 and 6th February

2017 while the second charge form contains one offence of leaving/absconding from place of work without permission.

After the disciplinary hearing process, the Respondent was acquitted of the offence of absconding from place of work but dismissed for the two offences of driving above the speed limit. In his Judgment, the learned trial Judge, after reviewing the evidence before him, made the following summation of what fell to be determined by the Court;

> ***"Clearly from the pleading and the evidence adduced in this case, the Court is called upon to determine whether or not the complainant was unfairly treated in the manner he was dismissed from employment".***

The above summation is understood to refer to the disciplinary procedure leading to the point of termination. We believe this is the true import of the Supreme Court's holding in the case of *ZESCO Limited v David Lubasi Muyambango* when it stated as follows;

> ***"The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised in due form."***

In every disciplinary case leading to a summary dismissal, the trial Court's duty is to consider whether the disciplinary body was duly constituted in accordance with the disciplinary and grievance procedure code applicable to the institution.

Having established that, the Court will proceed to consider whether the process was conducted within the rules and in a fair manner. Once the trial Court is satisfied with the above then it cannot invalidate the end product, which is the dismissal of the employee.

The only exception is where, being satisfied with the process, the Court finds that the disciplinary authority did not have before it any evidence upon which to hold that the employee did commit the offence for which he was dismissed. In other words, if the Court forms the view that the disciplinary authority did not act reasonably in dismissing the employee, it can hold the dismissal unlawful not withstanding fairness of the process.

For avoidance of doubt, conversely, where the process is found not to have been fair, no prejudice is occasioned if the employee was found to have committed the offence for which he was dismissed as per the case of *Yekweniya Mbiniwa Chirwa v National Provident Fund.*[4]

It is therefore, our considered view that in considering the fairness of the disciplinary process, the Court shall not go beyond the stage of the dismissal where there was no appeal.

However, even where it goes beyond that and an administrative appeal is successfully lodged and heard, it is not the duty of the trial Court to interrogate the appeal process unless there is an

appeal against the appeal process itself. The fact however is that even where there is an appeal; it is not the appeal process that leads to a dismissal. An appeal simply confirms or rejects the disciplinary process leading to the dismissal.

It therefore follows that where a dismissed employee fails to lodge an administrative appeal for whatever reason, when they move the Court, they would be seeking to challenge the dismissal and not the failed attempt to appeal. It can never be a plausible argument that the dismissal was due to the failed appeal because at the appeal stage, the position is that the intending appellant is dismissed unless and until the appellate authority rules otherwise.

In this case, the affidavit in support of the notice of complaint filed in the Court below and appearing at pages 95 and 96 of the Record of Appeal clearly shows that what the Respondent was challenging was his dismissal and not his failure to appeal. It was therefore, misdirection on the part of the trial Court to found the case for unlawful dismissal on the Respondent's failure to appeal.

It has always been the principle of the law that when dealing with a case of unlawful, wrongful or unfair dismissal, the Court will only confine itself to the procedural correctness of the process leading to the dismissal and not post facto issues.

The failed appeal was a consequence of the dismissal and it cannot therefore, be the basis for founding a decision that the dismissal was wrongful, unlawful or unfair.

At page 19 of the record of appeal, from line 19, the learned trial Judge made the following statements;

> ***"Taking the view that had the complainant appealed if not for the frustration by the Respondent's Human Resources Department, the General Manager as an appellate body should have honestly dealt with the merits of the appeal and if need be reverse the decision of the disciplinary hearing committee".***
>
> ***"I therefore, find and hold that the Respondent did not conduct its disciplinary process against the complaint in a proper manner. The complainant was denied to exercise his right of appeal against his dismissal from employment."***

Clearly, the learned trial Judge based his finding for wrongful and unfair dismissal on the basis that the Respondent was denied the right to appeal.

This was an erroneous consideration because the Respondent was already dismissed at the time he was trying to appeal and a dismissal meted out in compliance with procedure is not rendered unlawful by reason of failure to prosecute an appeal.

Having failed to appeal, the dismissal remained valid until and unless the trial Court ruled otherwise on account only of an unfair disciplinary process.

In this case, we have already found that the learned trial Judge premised his decision on a wrong consideration. As regards the role played by the Respondent's immediate supervisor, who, having charged him with the offence of absconding from work, went on to exonerate him before the disciplinary body leading to his acquittal, the learned trial Judge had this to say at page 20 from line 1 in the record of appeal;

> ***"Further, I find notwithstanding the acquittal, inordinate that the shift boss, an immediate supervisor who granted permission to the complainant to leave the place of work should be the same person to charge and subsequently exonerate him of the same offence at the disciplinary case hearing".***

We only dare say that this finding has no bearing on the disciplinary process more so that the Respondent was acquitted of that particular offence.

As regards the cause of the Respondent's failure to appeal, the learned trial Judge made a finding that the Appellant frustrated his efforts to appeal. We note from clause 9 of the Disciplinary Code of Conduct at page 64 of the Record of Appeal that an appeal should

be in a prescribed form to be lodged with the Human Resource Officer.

However, the letter of dismissal, dated 23rd March 2017 appearing at page 92 of the Record of Appeal in line 26 states as follows;

> ***"You have the right to appeal against this decision. If you wish to exercise that right of appeal, you should do so by writing to the General Manager within 2 working days of the date of this letter".***

We note that despite this clear instruction, the Respondent insisted on accessing the prescribed form from the Human Resource Office. There is no evidence that he did write a letter of appeal to the General Manager as instructed.

As a matter of fact the dismissal letter is signed by the Manager Human Resources, the same office from which the Respondent should have got the form.

With such a clear instruction from the Human Resources Manager to write a letter of appeal directly to the General Manager, which instruction the Respondent did not obey, we would find it difficult to accept the learned Judge's finding that the Respondent's efforts to appeal were frustrated by the Appellant. This finding of fact is not supported by the evidence.

In any case, even if the frustration were real, we do not find that the same would in any way affect the disciplinary process that led to the Respondent's dismissal.

All in all, we find merit in the appeal on all the grounds. We accordingly allow the appeal and set aside the Judgement of the Court below.

We order that parties bear their own costs.

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE