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IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

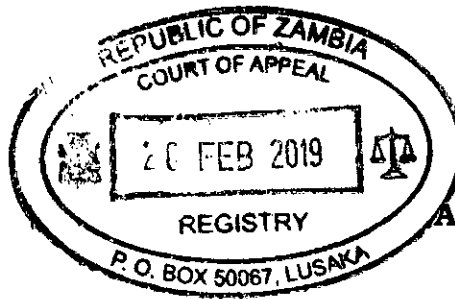
APPEAL NO. 68/2018

BETWEEN:

VICTOR BWEUPE

AND

ZAMBIA NATIONAL COMERCIAL BANK



APPELLANT

RESPONDENT

CORAM: CHISHIMBA, LENGALENGA AND SIAVWAPA JJA

On 21st November, 2018 and 20th February, 2019

FOR THE APPELLANT : IN PERSON

**FOR THE RESPONDENT: MRS. MBUYI OF MESSRS PAUL NORAH
ADVOCATES**

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court

Case referred to:

- 1. *The Attorney General v. Richard Jackson Phiri (1988-1989) ZR 121***
- 2. *Galaunia Farms Limited v. National Milling Company Limited and National Milling Corporation Limited (2004) ZR1***

This is an appeal against the Judgment of the Industrial and Labour Division of the High Court delivered at Ndola on 8th February, 2018.

By Notice of Complaint filed into Court on 1st July 2016, the Appellant herein alleged that his termination from employment was wrongful and unjustified.

He accordingly sought reliefs as follows:

- (i) *An order that the Complainant's termination was wrongful and unjustified.*
- (ii) *An order for payment for wrongful and unjustified termination of employment*
- (iii) *An order for payment of terminal benefits*
- (iv) *Costs and interest.*

The Notice of Complaint was accompanied by an affidavit in support thereof.

The facts in brief before the Court below are that the Appellant, was employed as a Clerk, until his dismissal on 15th March, 2016.

It is not in dispute that whilst on duty, the Appellant made a credit entry to the account of one Lazarus Malite, a customer of the Respondent but that the same was not supported by any cash deposit. The amount credited was K1,700.00 while there were also cash withdraws of K1,000.00 and K300.00 which could not be connected to the said Lazarus Malite but to a K. Chulu who is not a customer of the Respondent.

In his evidence, the Appellant attributed the credit transaction to an error although he did not follow the available procedure for reversing entries made in error.

He also averred that his dismissal was as a result of his decision to blow the whistle over an amount of K20,000.00 which allegedly went missing from the Respondent on 2nd March, 2016.

The Respondent denied the allegation stating through its witnesses that no such amount had been lost by the Respondent. According to exhibit VB4 occurring at page 30 of the Record of Appeal, the Appellant was dismissed on 7th March 2016, twelve months after the alleged whistle blowing. The record also shows that the Appellant was dismissed in connection with the sum of K1,700.00 which he was found to have misappropriated as charged.

After considering the evidence and the submissions by both parties, the learned trial Judge dismissed the Complaint for lack of merit.

We have carefully perused the record and examined the Judgment delivered by the learned trial Judge in the Court below upon which we will be commenting hereinafter.

However, dissatisfied with the decision of the Court, the Appellant lodged an Appeal with a Memorandum of Appeal containing three grounds as follows:

1. *The Court below erred in law and in fact when he found that the only issue that the complainant raised with the disciplinary procedure was the one to do with clause 7.2 of the Respondent's new disciplinary code of conduct when in fact not.*
2. *The learned trial Judge of the Court below erred in law and in fact when he directed that the complainant had not called any evidence to demonstrate that the two supervisor's Mrs. Kazembe and Mrs. Siame played a pivotal role in the case that led to his dismissal when in fact the Appellant had done so.*
3. *The Court erred both at law and in fact when he failed to direct his mind to the fact that the Respondent had failed to produce the said report concerning findings by the Respondent of the investigations over the K20,000.00 that went missing.*

In dismissing the Complaint, the learned trial Judge found as a fact that the Appellant was not dismissed for whistle blowing against two employees for allegedly being responsible for the K20,000.00 which he claimed had gone missing in 2015 but for misappropriation of K1,700.00 in accordance with the charge he was given. The learned trial Judge also found as a fact that in dismissing the Appellant, the Respondent's disciplinary procedure had been followed.

In ground 1, the Appellant agrees that clause 7.2 of the Code of 5th October, 2015 was effective but contends that the charge under that clause was not the appropriate charge as he should have been charged with miss-posting and not misappropriation. This is as contained in his heads of arguments.

We find the argument to be at variance with the ground because when the learned trial Judge made the statement which forms the first ground of appeal as reflected from line 10 to 13 at page 18 of the Record of Appeal, he was making the point that other than raising the issue of clause 7.2 the Appellant did not challenge the propriety of the procedure employed leading to his dismissal. What the Appellant is now saying is that the charge was wrong as what he is guilty of is not misappropriation of funds but miss-posting of funds.

The concerned trial Judge, in applying the law to the fact that the Appellant credited K1,700,00 to an account of an existing bank customer without corresponding cash, found that the charge was appropriate and most importantly that the appropriate disciplinary action had been taken.

The learned trial Judge called into aid the case of The Attorney General v. Richard Jackson Phiri.¹ What the Supreme Court underlined in that case is that, once disciplinary action is taken by an employer, all the Court needs to satisfy itself is that the disciplinary body or employer had the requisite disciplinary power. Once that is established and it is found that the said power was exercised correctly, then the next inquiry would be to establish whether the facts supported the taking of such disciplinary action.

The learned trial Judge was therefore, on firm ground in dismissing the Complaint because, there is no question that the Respondent herein had the disciplinary authority over the Appellant and the disciplinary process was exercised in the correct form and supported by the facts described in evidence that the Appellant made the deposit entries without supporting cash and withdrawals were made purportedly by a fictitious client of the Respondent. The said K1,700.00 was transacted by the Appellant whose only defence was that it was an error. This ground must therefore fail.

The second ground opposes the learned trial Judge's finding that Mrs. Kazembe and Mrs. Siame did not play any pivotal role in his dismissal based on the K20,000.00 allegations. The learned trial Judge found that no evidence was led by the Appellant to show that the two supervisors played any role in the disciplinary charge against the Appellant.

We have perused the record of proceedings at pages 147 and 148 of the Record of Appeal, the Appellant's evidence is that on 2nd March 2015, he incurred an excess amount of K20,000.00 which he reported to the two supervisors but that they refused to create a suspense account for the amount. The following morning the two told him that the said amount was missing from the vault as a result of which he blew the whistle.

The point we note is that the evidence tendered by the Appellant related to the allegation that the sum of K20,000.00 went missing. What the learned trial Judge was dealing with was the Appellant's failure to lead evidence that, as a result of his whistle blowing, in relation to the K20,000.00 it was the two ladies, who initiated the disciplinary action that led to his dismissal and indeed, we have not seen such evidence on the record.

We further note that the reason the learned trial Judge was looking for that evidence was to establish a nexus between the Appellant's dismissal and the K20,000.00. Having found none, he was entitled to dismiss the Appellant's allegations and accept the established reason for his dismissal. This ground must equally fail.

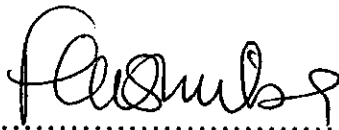
In ground three, we note that the Appellant seeks to use the Respondent's none-production of the report on how the matter of the allegedly stolen K20,000.00 was concluded as a basis for his argument that it was the reason for his dismissal. This argument is easily resolved by the case of Galaunia Farms Limited v. National Milling Company Limited and National Milling Corporation Limited² in which the Supreme Court of Zambia stated that:

"A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment".

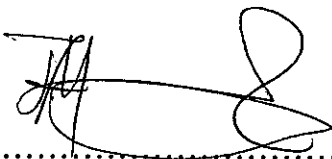
So even if the report showed that the said K20,000.00 had gone missing, it was not for the Respondent to prove that in fact the money had not gone missing. It was the Appellant's duty to prove not only that indeed the money had gone missing but most importantly that his dismissal was as a result of his whistle blowing in connection with the theft of that amount.

We therefore uphold the learned trial Judge's finding that the Appellant failed to prove that he was dismissed because he acted as a whistle blower in connection with the allegedly stolen K20,000.00.

Ultimately, we find no merit in the entire appeal and we dismiss it accordingly with each party to bear their 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