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IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 100/2018

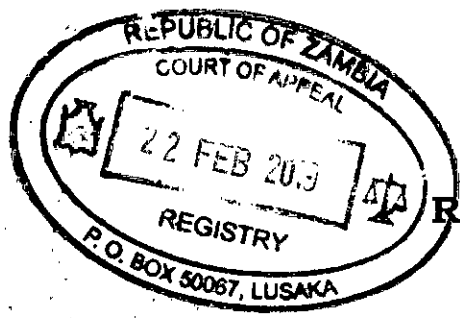
HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

KANSANSHI MINING PLC **APPELLANT**

AND



RAPHAEL CHANDA **RESPONDENT**

CORAM: **Mchenga DJP, Chashi and Mulongoti, JJA**

On 23rd January, 2019 and 22nd February, 2019

For the Appellant: *Mr. M. Mwitumwa of Mando and Pasi Advocates*

For the Respondent: *In Person*

J U D G M E N T

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

Cases referred to:

1. ***Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) ZR 22 (SC)***
2. ***Attorney General v Richard Jackson Phiri (1988-1989) ZR 121 (SC)***
3. ***Chimanga Changa v Stephen Chipango Ng'ombe SCZ Judgment Number 5 of 2010***
4. ***Chintomfwa v Ndola Lime (1999) ZR 172 (SC)***

Works referred to:

1. ***N. M. Selwyn, Selwyn's Law of Employment, 4th edition, Oxford University Press (2006) p.169***

This is an appeal against the decision of the High Court (Industrial Relations Division) pursuant to which the appellant, Kansanshi Mining Plc., was ordered to pay the respondent Raphael Chanda, 12 months' salary as damages for unfair dismissal. The background leading to this appeal is that, the respondent an employee of the appellant was charged for entering the mine after being found with 0.015% of alcohol upon entering the mine and was dismissed.

The respondent entered the mine lease on 28th September, 2017 after doing a voluntary alcohol test on a machine which gave him a negative reading i.e. zero percentage alcohol content in his breath.

After he entered the mine he was subjected to another alcohol testing by the safety officer and was found with 0.015% of alcohol.

He alleged that he re-tested on the voluntary testing machine in the presence of a safety officer and he again tested negative with 0% alcohol.

According to the respondent, it was then that he noticed that the volume breathalyser machine, which he used for the voluntary test was beyond its service period of 18th September, 2017 as per exhibit "RC2(a)". However, the appellant charged him with the offence of being found on the mine lease under the influence of alcohol contrary to clause 6.1 of the appellant's disciplinary code. The respondent appeared before a disciplinary tribunal hearing. He was found guilty and dismissed.

The appellant contended that notwithstanding the faulty voluntary testing machine, the respondent entered the mine and tested positive for alcohol intake.

The respondent sued for unfair dismissal. The lower court found that the dismissal was unfair and awarded him 12 months' salaries as damages.

The Judge reasoned that, an employee who tested positive with the voluntary test may choose not to enter the mine and probably be charged with a lesser offence other than the dismissible offence of being found with alcohol in the system.

Dissatisfied, the appellant has raised four grounds of appeal as follows:

1. ***The court below erred in law by reviewing the disciplinary committee's findings of fact during the disciplinary proceedings and the interpretation of the appellant's disciplinary code and replacing them with its own to hold that the respondent was unfairly dismissed from employment.***
2. ***The court below erred in law when it made findings of fact not supported by the evidence on record.***
3. ***The court below misdirected itself when it evaluated the evidence on record in an unbalanced manner by disregarding the appellant's persuasive evidence on record.***
4. ***The court below erred in law when it awarded the respondent 12 months' salary inclusive of all taxable allowances as damages for unfair dismissal which was outside settled principles on assessment of damages in such cases.***

In support of the grounds of appeal, the appellant's counsel filed heads of argument. In relation to ground one it is argued that at page 19 lines 22 to 27 and page 20 (lines 1 to 12) the trial Judge stated that:

"Clearly, I have come to the conclusion that the complainant raised pertinent issues as regards the voluntary testing machine which the email of David De Vries addresses as a reaction. The issue of a voluntary alcohol testing machine being defective as was raised by the complainant was vital, which should have been taken into account in considering his case during the disciplinary process. Upon considering all the facts and evidence before me I find that the respondent failed or neglected to maintain the voluntary alcohol testing machine in a serviceable condition or state and as a consequence of the said failure the complainant was denied the proper use of the said alcohol voluntary tester to his advantage. The purpose for which the voluntary alcohol testing machine was provided to the employees was defeated by the said failure to maintain the same in the serviceable condition."

According to counsel, the trial Judge misdirected himself by so holding because the disciplinary tribunal considered the respondent's claim that he tested negative per the voluntary test and that this was mentioned as a mitigating factor. Counsel, also argued that there was even no evidence, that he had voluntarily tested himself. And, that the tribunal clearly stated that the appellant's policy on alcohol was *'zero tolerance'* and that employees were cautioned on the implications of alcohol drinking before entering the plant. According to counsel, the tribunal also thoroughly examined the documents and testimonies before it

recommended dismissal. Learned counsel amplified that the respondent was the only one who claimed that the voluntary alcohol tester machine had malfunctioned that day. The tribunal found that there was no evidence that he had voluntarily tested himself for alcohol. That whereas, the tribunal's interpretation of the policy was based on the disciplinary code, the trial Court relied entirely on an email produced by the respondent on his affidavit. The said email was dated 7th November, 2017 more than a month after the respondent was dismissed. Counsel argued that the Judge substituted the tribunal's interpretation of the rules and procedures with his own, which was wrong. The cases of **Zambia Electricity Supply Corporation v David Lubasi Muyambango**[1] which followed the **Attorney General v Richard Jackson Phiri**[2] that the Court should not interpose itself as an appellate tribunal within the domestic disciplinary measures to review what others have done. And, that the duty of the Court is to examine if there was the necessary disciplinary power and if it was validly exercised. Reliance was placed also on the case of **Chimanga Changa v Stephen Chipango Ng'ombe**[3] that:

> ***"What is crucial is that an employer carried out investigations as a result of which he reasonably believed that the employee is guilty of misconduct...The employer does***

not have to prove that an offence took place or satisfy himself beyond reasonable doubt the employee committed the act in question. His function is to act reasonably in coming to a decision. The rationale behind this is clear; an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens."

In conclusion, counsel prayed that the finding that the dismissal was unfair be set aside as it was a misdirection for the trial Court to rely on the contents of an email which was not in existence at the time.

In ground two, it is argued that the reasoning of the trial Judge that after testing positive on the voluntary alcohol machine, the respondent could have opted not to enter the mine, and thus probably charged with a non dismissible offence was not supported by the evidence. Furthermore, that the finding by the trial Judge that the email of 7th November, 2017 was a reaction to the issues raised by the respondent over the voluntary tester machine was also not supported by the evidence as there was nothing in the email which stated so. To the contrary, RW1 told the Court that the email was sent following a meeting between the union and management after the union requested that the disciplinary code be revised to incorporate the procedures contained in the email.

Additionally, that the conclusion the trial Court made that: ***"Finding employment in the mining industry, after being dismissed on disciplinary grounds is difficult especially in the present world economy which is challenging,"*** was equally not supported by any evidence on record. Yet this was the basis for the Court's award of the 12 months' salary plus allowances as damages for unfair dismissal.

In ground three, it is submitted that the trial Court evaluated the evidence in an unbalanced manner and disregarded the appellant's persuasive evidence on record as follows:

> ***"3.4.1 That the respondent readily admitted the charge and pleaded for leniency on the ground that the voluntary testing machine had misled him and that he was a first offender during the disciplinary hearing (page 143 lines 26-27, page 144 lines 4 to 12, page 13 lines 19 to 23, page 74 lines 1 to 11)***
>
> ***3.4.2 That the issue of the respondent having voluntary tested himself was raised during the disciplinary hearing, but the tribunal rejected it because there was no evidence to support the claim (page 144 lines 14 to 21, page 74 lines 5 to 25, page 75 lines 1 to 7)***

3.4.3 ***That the email on pages 160 and 161 of the record of appeal was sent after the respondent's case following the union's plea to management to revise the disciplinary code to incorporate the procedures stated in the email and that these procedures were not applicable at the time of the respondent's case (page 76 and page 77 lines 1 to 7)***

3.4.4 ***The admission by the respondent that he was found wanting and his plea for leniency in his application for appeal at page 1146 of the record of appeal."***

It was a misdirection of the Court to ignore the evidence above without stating why. Had he done so he would not have found in the respondent's favour.

The Court ignored the flaws in the respondent's evidence such that he lied in cross examination that he does not take alcohol. He also lied that the appellant's safety officers get a bonus for getting employees fired which lie he retracted in cross examination.

Ground four is against the award of 12 months' salary *'inclusive of all taxable allowances'*. Counsel pointed out that the reason for the award of the damages above the normal measure was not supported by any evidence.

The respondent filed his heads of argument. From what we can glean, it is argued in ground one that the respondent informed the appellant about the malfunctioning voluntary tester machine. This led to the email of 7th November, 2017, though it was written after he had been dismissed. He maintained that the disciplinary tribunal ignored his pleas that the machine in question expired long before 27th September, 2017 when he tested positive for alcohol intake.

In ground two it is argued that the appellant failed to justify the reasons for his dismissal. In relation to ground four it is argued that the circumstances of his case warranted an award of damages above the normal measure.

At the hearing of the appeal both parties relied on their heads of argument. We have considered the arguments and submissions. The cardinal issue that arises in this appeal, is whether the respondent's dismissal on grounds of entering the mine under the influence of alcohol, was justified.

It was not disputed that the appellant followed procedure in as far as it charged the respondent and afforded him an opportunity to be heard by the disciplinary tribunal, which found him culpable.

The pertinent issue as we see it, is whether there were facts established to warrant the use of disciplinary power as elucidated in the cases of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango**[1], and **Attorney General v Richard Jackson Phiri**[2].

According to the learned author of the book **Selywyn's Law of Employment**:

> "***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.***"

In *casu*, the appellant conceded that he tested positive for alcohol intake when he entered the mine. He maintained that he entered the mine after he tested negative, 0% alcohol, when he used the voluntary tester machine.

After testing positive upon entry, he told the mine safety officer that the voluntary tester misled him. They re-tested on the voluntary tester and he again tested negative.

It is noteworthy that the mine safety officer who re-tested him was not called as a witness by the appellant. As an employee of the appellant it was much easier for the appellant to call him than for the respondent. We, in this regard therefore, find no merit in the arguments that he did not prove that he had tested negative.

Further, we are of the considered view that the trial Judge did not review the tribunal's findings. He simply evaluated the facts and applied the law, namely whether on the facts or evidence the dismissal was justified. He found as a fact that the machine was faulty and misled the respondent into entering the mine. This evidence was not disputed by the appellant who simply insisted that the respondent did not prove that he had tested negative.

We are inclined to uphold the findings of the trial Judge as they were supported by the evidence. Having perused the disciplinary code, especially the schedule of offences at pages 131 to 136 of the Record of Appeal we note that clause 1.2 provides that absconding

or loafing on the job is penalised by counselling for the first offender. Clause 1.3 states *'AWOL-1 day shift'* which attracts a written warning for a first offender. Thus, the trial Judge cannot be faulted for reasoning that the appellant could have decided not to enter the mine had he tested positive for alcohol intake on the voluntary tester and could have been charged with a lesser offence such as 'AWOL for 1 day shift' which attracted a written warning, not dismissal. The Judge was on firm ground when he held that the respondent was misled by the machine. The respondent did in fact adduce evidence to show that the machine was long overdue for service at the time of the incidence leading to his dismissal. The trial Judge evaluated the evidence adduced by both parties. We note that some of the appellant's arguments are that the Judge mishandled their witness RW1's testimony. Yet, in one breath they argue that he did not properly analyse the evidence, and in another they argue that he did not consider their evidence which is contradictory and not helpful to them. The alleged lies of the respondent highlighted by the appellant do not go to the root of this case and thus not fatal. Whether the respondent takes alcohol or not does not change the fact that the voluntary tester machine was faulty.

Regarding the email, we note that at page J4 the trial Judge reproduced the email. And at page 19 he did state that:

> ***"Clearly, I have come to the conclusion that the complainant raised pertinent issues as regards the voluntary testing machines which the email of David De Vries addresses as a reaction. The issue of a voluntary alcohol testing machine being defective as was raised by the complainant is vital, which should have been taken into account in considering his case during the disciplinary process."***

As argued by the appellant's counsel. However, the Judge noted that, what was crucial and should have been taken into account during the disciplinary process was the defective machine. Otherwise as regards the email he stated that it was a reaction to the respondent's complaint. He did not rely on the email to declare the respondent' dismissal unfair. He considered the circumstances of the case especially that the defective machine misled the respondent into entering the mine. In light of the foregoing, we find that grounds one, two and three lack merit and are dismissed.

Regarding ground four, it is clear that the Judge considered the prospects of the respondent finding employment in the mine. He considered this to be a factor in determining the quantum of

damages. It is trite, as argued by the appellant that the normal measure of damages in employment cases is the notice period. However, this is departed from where the termination was for instance, done in a traumatic fashion and where the justice of the case so demand. In **Chintomfwa v Ndola Lime**[4] the Supreme Court awarded 24 months' salary as damages after considering that prospects of the appellant getting employed as a general manager were almost nil. We would therefore, not interfere with the trial Judge's award of 12 months salaries as he considered the correct principles. It is not for the Judge to adduce evidence but to follow the law, which he did.

Regarding the order that the 12 months be paid with all *'taxable allowances'* we would state by way of clarity, that the payable allowances are those the respondent was entitled to during his employment and as appear on his last payslip. This means partial success of ground four to that extent only.

The appeal having substantially failed, is dismissed for lack of merit. Costs in this Court and below to the respondent to be taxed, if not agreed.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J. CHASHI
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE