IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 194 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FIRST QUANTUM MINING AND

OPERATIONS LIMITED **APPELLANT**

AND

MOSES BANDA **RESPONDENT**

CORAM: Chashi, Mulongoti and Lengalenga, JJA

ON: 25th September and 28th November 2019

For the Appellant: *H. Pasi, Messrs Mando and Pasi Advocates*

For the Respondent: *J. Mataliro, Messrs Mumba Malila and Partners*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Zambia National Provident Fund v Chirwa (1986) ZR 56**
2. **London Borough of Harrow v Cunningham (1996) IRLR, 256, EAT**
3. **Epstein v Royal Borough of Windsor and Maidenhead - UK EAT/0250/07**
4. **Zambia National Commercial Bank PLC v Joseph Kangwa - SCZ Appeal No. 54 of 2008**
5. **Newbound v Thames Water Utilities Limited (2015) EWCA Civ 677**
6. **First Quantum Mining and Operations Limited v Yendamoh – SCZ Appeal No. 307 of 2015**
7. **Nkhata and Four Others v The Attorney General of Zambia (1966) ZR, 147-Reprint**
8. **Getrude Chibesakunda Mwila Kayula v Family for Health International -SCZ Appeal No 145 of 2012**
9. **Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Zambia Plc - SCZ Appeal No. 209 of 2004**
10. **Engen Petroleum Zambia Limited v Willis Muhanga and Another - SCZ Appeal No. 117 of 2016**

11. **Zambia Telecommunications Company Limited and Mirriam Shabwanga and 5 Others - SCZ Appeal No. 78 of 2016 and Appeal No. 81 of 2016**

Legislation referred to:

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

Other works referred to:

1. **Employment Law in Zambia, cases and Materials (Lusaka, University of Zambia Press, 2004) – WS Mwenda**
2. **The New Oxford Companion to Law, by Peter Cane and Joanne Conaghan, Oxford University Press**
3. **Tolleys's Employment Handbook by Elizabeth A. Slade, 22nd edition (2008) Lexis Nexis, London**
4. **Norman Selwyn: Law Employment, 13th edition, Oxford University Press**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, Industrial and Labour Division delivered on 22nd October 2018 by Honourable Mr. Justice D. Mulenga.

1.2 In the said Judgment, the court found that the Respondent, who was the complainant in the court below was unfairly dismissed and awarded him damages and costs.

2.0 BACKGROUND TO THE CASE

2.1 The background to this case is that, the Respondent, commenced proceedings by way of a complaint claiming the following reliefs:

2.1.1 An Order for reinstatement

2.1.2 In the alternative, 24 months' salary as damages for wrongful and unfair and discriminatory dismissal

2.2 According to the Respondent, on 30th January 2017, whilst on duty as mine captain, five minutes before the blast, he was involved in an accident involving a Toyota Land Cruiser which he was driving and a Unimog truck, UM 02 which was being driven by Baldwin Ngosa (Ngosa).

2.3 The Respondent was charged with three (3) counts and asked to exculpate himself, which he did.

On 16th March 2017, he attended a disciplinary hearing and was found guilty on all the charges. As a consequence, he was summarily dismissed.

2.4 The Respondent then appealed to the project manager, who confirmed the dismissal.

2.5 The Respondent alleged that the dismissal was unfair and wrongful and was without sufficient evidence of wrong doing on his part as the accident was not fully and adequately investigated.

2.6 According to the Respondent, the inquiry of 30th January 2017 was frustrated and cut short by the production manager, Mr. Petrus Rawstone and no report of the accident was independently rendered as lawfully required before apportioning the blame.

2.7 The Respondent further alleged that, the appeal process violated the rules of natural justice as it was determined without him being accorded an opportunity to be heard.

2.8 On its part, the Appellant alleged that, investigations into the accident were instituted, evidence was gathered and a report

was compiled by the safety department. Subsequently, the Respondent was charged with the offence of failing to observe safety regulations, driving above the speed limit and causing damage to company property.

2.9 According to the Appellant, there was a disciplinary hearing and the Respondent was dismissed, which dismissal was confirmed on appeal.

It was the Appellant's position that the Respondent was not entitled to the reliefs being sought as the dismissal was in accordance with the law and laid down procedure as per the Appellant's code and schedule of offences (the Code) which formed part of the Respondent's conditions of employment.

3.0 FINDINGS OF THE LOWER COURT

3.1 After considering the pleadings, evidence and the arguments before him, the learned Judge made findings of fact and subsequently opined that the court was being called upon to make a determination on whether the Respondent's dismissal from employment was unfair, wrongful and discriminatory.

4.2 The issue of wrongful dismissal and discriminatory dismissal were dismissed by the learned Judge.

4.3 On the issue of unfair dismissal, the learned Judge found that the Respondent was unfairly treated in comparison to Ngosa, who like the Respondent, the investigation report found to have violated mine safety regulations and recommended that he be charged with a disciplinary offence, but nevertheless, the Appellant chose to treat him differently by not charging him.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge held that the Respondent was unfairly dismissed.

4.2 As a consequence, the learned Judge awarded the Respondent twelve (12) months salary inclusive of taxable allowances as damages for unfair dismissal from employment, together with interest on the amount to be found payable at short term deposit rate approved by Bank of Zambia from the date of complaint to full payment and costs.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the Judgment of the court below, the Appellant has appealed to this Court advancing three grounds

of appeal as per the amended memorandum of appeal as follows:

5.1.1 That the court below erred in law when it held that the Respondent was unfairly dismissed by the Appellant.

5.1.2 That the court's finding that the Respondent was similarly circumstanced with Ngosa was a misdirection at law as it was not supported and was contrary to the evidence on record.

5.1.3 That the court erred in law when it ordered the Appellant to pay the Respondent's costs when there was no unreasonable delay, improper, vexatious or unnecessary steps taken or other improper conduct by the Appellant in the court below.

3 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In arguing the first ground of appeal, Counsel for the Appellant submitted that, the holding by the court below that the Respondent was unfairly treated by the Appellant, only because the Appellant did not charge Ngosa who was equally in the wrong was a misdirection

6.1.1 Counsel drew our attention to the case of **Zambia National Provident Fund v Chirwa**[1] where the Supreme Court held that:

> *"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is dismissed, no injustice arises from failure to comply with the laid down procedure in the contract, and the employee has no claim on that ground for wrongful dismissal or declaration that the dismissal was a nullity."*

6.1.2 According to the Appellant, in this case, the Respondent committed the offence for which the appropriate punishment was dismissal and the procedure was followed.

6.1.3 Counsel submitted that the court below, did not find that the Respondent was wrongfully dismissed, but that he was unfairly treated simply because another person was not charged. That the court below failed to explain how failure by the Appellant to charge Ngosa disadvantaged the Respondent.

6.1.4 According to the Appellant, even assuming Ngosa had been charged and found wanting, that would not have changed the fate of the Respondent. That the court misdirected itself to base its holding of unfair dismissal on the fact that Ngosa was not charged. Reliance in that respect was placed on the learned author of **Employment Law in Zambia**[1] at page 68 where it is stated that, unlike wrongful dismissal, unfair dismissal has its origin in statutory law; it is a creature of statute. The primary goal of statutory law in this regard is the promotion of fair labour practices by requiring the employer to terminate contracts of employment only on specified grounds and also providing for the rare remedy of reinstatement.

6.1.5 It was argued that in this case, the evidence of the Respondent's wrong doing is overwhelming. The cause of the accident was investigated and a report was produced. The Respondent readily and voluntarily admitted the charges and asked for leniency in the sanction.

6.2 In arguing the second ground of appeal, Counsel submitted that the approach courts should take in cases where

employees were treated differently is to consider whether the differing treatment was so irrational that no reasonable employer could have taken the decision.

6.2.1 According to Counsel, in disciplinary cases, an employer is entitled to consider certain factors in deciding whether or not to charge an employee and when deciding the sanctions for proven cases of misconduct. Reliance was placed on the cases of **London Borough of Harrow v Cunningham**[2] and **Epstein v Royal Borough of Windsor and Maidenhead** [3] and submitted that the court's duty was to decide whether the disciplinary tribunal had valid disciplinary powers to dismiss the complaint and whether the powers were exercised in due form. That the court should therefore have confined itself to the issues which were before the tribunal.

6.3 As regards the third ground of appeal, it was Counsel's argument that the court below should not have awarded costs to the Respondent in the absence of unnecessary delay, improper, vexatious or unnecessary steps taken or other improper conduct by the Appellant.

6.3.1 Our attention was drawn to Rule 44 of **The Industrial Relations Court Rules**[2] and the case of **Zambia National Commercial Bank v Joseph Kangwa**[4] and submitted that there were no grounds upon which the court should have condemned the Appellant to pay costs as the court did not find any impropriety on the part of the Appellant in defending the matter.

7.0 ARGUMENTS IN OPPOSING THE GROUNDS OF APPEAL

7.1 In response to the first ground of appeal, Counsel submitted that Employment Law cannot be blind to unfair and differential treatment of employees by employers.

7.1.1 According to Counsel, the fact that there was no charge raised against Ngosa meant that the accident was a mere accident which should not have resulted into any disciplinary action whatsoever but was turned into a witch-hunt for the Respondent and used as a tool to get rid of him.

7.1.2 Counsel further submitted that, it was entirely within the power of the court below to make the finding of unfair dismissal since Ngosa and the Respondent were both allegedly blameworthy as suggested by the security report.

7.1.3 It was Counsel's contention that the actions of the Appellant were in contravention of its own Code which formed part of the contract between the Appellant and the Respondent and provides in clause 1.1 (2) (d) that "*Ensure overall uniformity and consistency in dealing with disciplinary matters with the company.*"

7.1.4 Our attention was drawn to the case of **Newbound v Thames Water Utilities Limited**[5] to show that unfair dismissal can be based on disparate treatment of the claimant and another employee. We were further referred to the case of **First Quantum Mining and Operations Limited v Obby Yendamoh**[6] on the same subject matter.

7.2 In response to the second ground of appeal, Counsel submitted that the ground is misconceived as strictly speaking there was no such finding by the lower court.

7.3 In response to the third ground of appeal, Counsel submitted that the record will show that the conduct of the Appellant was full of taking unnecessary steps as well as filing

voluminous documents even after the Respondent had testified and closed his case.

7.3.1 Counsel argued, in respect to **Rule 44** of **The Industrial Relations Court Rules**[2], that the Rules do not in any way limit the powers of the Industrial Relations Court to only order costs in the circumstances under Rule 44(1), but is in addition to the powers of the court as the court already exercises discretion to award costs even though the same discretion to award costs ought to be exercised judiciously.

8.0 DECISION OF THIS COURT

8.1 We have considered the Judgment being impugned and the arguments by the parties. The first ground of appeal attacks the holding of the learned Judge in the court below that the Respondent was unfairly dismissed.

8.1.1 From the onset, we note that, the first ground of appeal is essentially attacking a finding of fact that the Respondent was unfairly dismissed. In the case of **Nkhata and Four Others v The Attorney General of Zambia**[7], the Court of Appeal was

emphatic on when an appellate Court can overturn factual findings by a trial Judge when it stated as follows:

> *"A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the Judge erred in accepting evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account some thing which he should have considered or (3) the Judge did not take proper advantage of having seen and heard the witness (4) external evidence demonstrated that the Judge erred in assessing manner and demeanor of witness"*

8.1.2 Additionally, Section 97 of **The Industrial and Labour Relations Act**[2] provides that any person aggrieved by any award, declaration, decision or judgment of The Industrial Relations Court (now the Industrial Relations Division of the High Court) may appeal on any point of law or any point of mixed law and fact. Appeals against The Industrial Relations Division on findings of fact offend Section 97. Clearly, the finding of unfair dismissal is a finding of fact.

8.1.3 In the case of **Getrude Chibesakunda Mwila Kayula v Family Health International**[8], The Supreme Court had this to say in respect to Section 97:

> *"The above position of the law was confirmed by this Court in the case of* ***Zambia Consolidated Copper Mines v Matale (1996) ZR, 144*** *and many other cases. We note that this ground of appeal is against the lower court's finding of fact that the Appellant was declared redundant and not constructively dismissed. This is against the spirit of Section 97. Therefore, this ground fails for luck of merit."*

8.1.4 In ***casu***, the learned Judge in the court below considered the evidence and found as a fact that the Respondent was unfairly dismissed. The first ground of appeal therefore, not only offends Section 97, but also the law.

8.1.5 The foregoing notwithstanding, we note that at page 23, line 14 of the record, the learned Judge stated as follows:

> *"There is no dispute that the complainant's position is that the offence he was charged with by the Respondent did*

not call for punishment or sanction of summary dismissal from employment, but minor sanctions. On the other hand, the Respondent's position is that the sanction of summary dismissal was reached because the complainant was still serving a written warning for six months and the same was still valid and in force when the complainant was found guilty of the offence subject of the matter herein."

8.1.6 Despite stating this, the learned Judge did not address and determine the issue in controversy over the sanctions. Had the learned Judge addressed the issue, he would have found that all the three offences the Respondent was charged with were minor offences which only attracted the sanction of warnings.

8.1.7 The schedule of offences appear at pages 84 - 87 of the record. In accordance with the said schedule, the Respondent at pages 145 - 147 of the record confirmed that for the offence of failure to observe safety regulations under clause 6.2 at first instance, the penalty is written warning. Second instance is final warning and third instance is dismissal.

8.1.8 That for the second offence of driving above the speed limit under clause 6.4, the penalty at first instance is a recorded warning. The second is final warning and the third is dismissal.

8.1.9 For the third offence that of causing damage to company property, the penalty at first instance is written warning. The second is final warning and the third is dismissal.

8.1.10 The evidence on record shows that the Respondent committed these offences at first instance and therefore none of the offences warranted a dismissal.

8.1.11 At the time of the disciplinary hearing of the offences, the Respondent, according to the Appellant, was on a written warning having been found guilty of the offence of being absent without official leave (AWOL).

8.1.12 We note that the Code at page 81 of the record under clause 7.5 provides as follows:

"7.5 Dismissal

1. Dismissal is the final sanction for an employee and should be effected in all proven cases where dismissal is mandatory. Including cases where an employee on ***Final Warning*** *commits any offence"*

8.1.13 A perusal of the record shows at page 66 that the Respondent was found guilty of being AWOL and was given a recorded warning in accordance with clause 1.3 at page 84 of the record. This was confirmed by Bruce Yawela, RW1, the Appellant's witness at page 185 of the record.

8.1.14 There is therefore no evidence on record, to show that the Respondent was on final warning for the offence he was charged with, to attract the sanction of dismissal for the three offences the Respondent was subsequently charged with.

8.1.15 In our view, had the learned Judge in the court below applied his mind and addressed the issue at hand, he would have found that the sanction which was imposed was too severe and contrary to the Appellant's Code. Be that as it may, he would have reached the same conclusion that the Respondent

was unfairly dismissed which as aforestated is a finding supported by the evidence and we cannot overturn it.

8.1.16 In the view that we have taken, the **Zambia National Provident Fund**[1] case is inapplicable.

8.1.17 As stated by the learned authors of **The New Oxford Companion To Law**[2] at page 1203, the dismissal of an employee will usually be unfair if the employer fails to follow its own disciplinary procedure, whether that procedure is contractually binding or not.

8.1.18 According to the learned author of **Selwyn's law on Employment:**

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

8.1.19 The learned authors of **Tolley's Employment Handbook**[3] at page 1050 goes on to state as follows:

"An employer who dismisses an employee without good reason or without following a fair procedure, lays itself open to a claim of unfair dismissal. When such a claim is brought the employer has to establish the reason for the dismissal. The employment tribunal will then consider whether the dismissal was in all the circumstances unfair; neither party having evidential burden in the inquiry."

8.1.20 The circumstances of this case from the evidence on record is that Ngosa contributed to the cause of the accident, and by not charging him together with the Respondent, the Respondent was unfairly treated and therefore his dismissal was unfair. In respect to the complaint by the Respondent that he was unfairly dismissed from employment, the learned Judge referred to the findings in the investigation report that both the Respondent and Ngosa failed to make their driving safe, as Ngosa should not have u-turned on the hump, while the Respondent should have communicated or made sure that it was safe to overtake. We are in agreement with the learned Judge that the Respondent was unfairly treated, in

total and contumelious disregard of clause 1.1 (2) (d) that placed an obligation on the Appellant to ensure overall uniformity and consistency in dealing with disciplinary matters.

8.1.21 It was recommended in the report that since both the Respondent and Ngosa were found to have violated the safety regulations, disciplinary action should be taken against both. The learned Judge observed from the evidence that, however, the Appellant only charged the Respondent and not Ngosa.

8.1.22 On the allegation that the court below found that the Respondent was similarly circumstanced with Ngosa, we have canvassed the Judgment of the court and we do not find any such finding by the learned Judge.

8.1.23 The following is what the learned Judge said in his Judgment at page 36 of the record:

> *"However, as far as the complainant's complaint stands against the Respondent that he was treated unfairly in comparison to Ngosa, who like him, the accident investigation report found to have violated mine*

regulations and recommended that he be charged with a disciplinary offence, nonetheless, the respondent chose to treat him differently by not charging him. I have come to the inescapable conclusion that the complainant has proved his case on a balance of probabilities that he was unfairly dismissed by the Respondent."

We do not find anywhere where the learned Judge made a finding that the Respondent and Ngosa were similarly circumstanced.

8.1.24 The second ground of appeal is therefore misconceived.

8.1.25 We now turn to the last ground of appeal which attacks the learned Judge's award of costs to the Respondent.

8.2.1 We note from the outset that there are now a number of cases on this subject matter which the learned Judges of the High Court, Industrial and Labour Division need to follow in order to avoid unnecessary appeals on costs.

8.2.2 In the earlier case of **Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Zambia Plc**[7] in

following Rule 44(1) of **The Industrial and Labour Relations Act**[2] which states as follows:

> *"Where it appears to the court that any person has been guilty of unreasonable delay or of taking improper, vexatious, or unnecessary steps in any proceedings, or of other unreasonable conduct, the court may make an order for costs or expenses against him."*

8.2.2 The Supreme Court opined that the awarding of costs in the Industrial Relations Court is very sparingly done. The appeal for costs by the Appellant was dismissed and the Supreme Court ordered each party to bear its own costs in both the Industrial Relations Court and the Supreme Court.

8.2.3 In the recent case of **Engen Petroleum Zambia Limited v Willis Muhanga and Another**[8] delivered on 2nd August, 2019, the Supreme Court again, took the opportunity to address the issue of costs in the Industrial Relations Court in accordance with Rule 44(1) of the Act.

8.2.3 The Supreme Court took the view that the effect of the rule is that the Industrial Relations Court can only make an Order

for costs against a litigant if he/she has been guilty of unreasonable delay or has taken improper, vexatious or unnecessary steps in the proceedings or is guilty of other unreasonable conduct. The Supreme Court referred to their earlier decision in the case of **Zambia Telecommunications Company Limited and Mirriam Shabwanga and 5 Others**[9] where they explained the rationale behind Rule 44 (1) and said that the rule restricts the discretion of the IRC in the award of costs to instances specified in the Rule. Having found none of the parties to be guilty of the restrictions, the Supreme Court opined that there was no basis on which the court below should have awarded costs to the Respondent. The Supreme Court in the **Engen Petroleum Zambia Limited**[8] case ordered each party to bear its own costs in the court below and the Supreme Court.

8.2.4 In ***casu***, the learned Judge in the court below did not explain why he awarded costs to the Respondent in total disregard of Rule 44 (1). Our perusal of the pleadings and the proceedings in the court below does not show any improper, vexatious or

unnecessary steps taken by the Appellant to unreasonably delay the matter or any unreasonable conduct on its part.

8.2.5 In the view that we have taken the learned Judge in the court below erred in awarding the Respondent costs. The award is accordingly set aside.

9.0 **CONCLUSION**

9.1 The net result of this appeal is that grounds one and two are dismissed for lack of merit and the third ground succeeds.

9.1.1 Each party will bear its own costs both in the court below and in this Court.

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE