IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 88/2014**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

MOPANI COPPER MINES PLC **APPELLANT**

AND

MOFFAT BANDA **RESPONDENT**

Coram: Mambilima, CJ, Hamaundu and Wood, JJS
On 1st November, 2016 and 24th November, 2016

For the Appellant : Mr H. Pasi, Legal Counsel

For the Respondent: No appearance

JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Richard Jackson Phiri [1988 – 1989] ZR 121**
2. **Zesco v Muyambango [2006] ZR 22**

Legislation referred to:

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia , Sections 85(5) and 97

This is an appeal against a judgment of the Industrial Relations Court which upheld the respondent's complaint and awarded him damages for wrongful dismissal.

The brief history of this matter is thus:

On the 18th September, 2010, Dominic Lombe, a Mechanical Foreman with the appellant company, raised, manually, a quotation for the purchase of one bowl for a McCulley Crusher. The requisition was sent to Phacious Muzembo, a subordinate of the respondent, who raised a requisition on the appellant's computer system. Phacious Muzembo listed a number of potential suppliers and sent the requisition to the respondent for approval. The respondent approved it, after adding a further list of potential suppliers. The requisition went through the various stages of approval and implementation. During that process, a supplier named Transley Enterprises, who was not on the initial list of potential suppliers, was selected. The said Transley Enterprises supplied wrong items and could not, immediately, replace them with the correct item. At about that time, the cost of the purchase was assigned to the User-Department as a cost centre. The User-Department queried the unusually high cost for the bowl. It was at that stage that it was discovered that what was raised on the computer system and paid for were two bowls, instead of one.

The appellant launched investigations during which all employees who handled the purchase, including the respondent,

were interviewed by the Security Department. The appellant maintained that he had approved a requisition for the purchase of only one bowl. He went on to suggest that his subordinate, Phacious Muzembo, may have altered the requisition after he had approved it. Phacious Muzembo, on the other hand, told the appellant, on the 17th June, 2011, that he had erroneously entered the purchase of two bowls instead of one. Subsequently, however, Phacious Muzembo, on the 8th August, 2011, changed his statement and said that he was instructed by the respondent to enter in the system a requisition for two bowls, instead of one.

The appellant charged the respondent, Phacious Muzembo and other employees who handled the purchase with various disciplinary offences. In the case of the respondent, a disciplinary hearing was held, after which he was dismissed from employment. The respondent challenged the dismissal in the Industrial Relations Court.

The court below observed that it was not in a position to see how the disciplinary committee arrived at the decision to dismiss the appellant since the parties had not produced the minutes of the disciplinary hearing. However, the court assumed that the following evidence was available to the disciplinary committee; the

respondent's letter of exculpation; statements recorded from the employees; a report titled **"Irregular Purchase of McCully Crusher Bowl"**; a report known as the **"Document Comments Review Report"**; and, a copy of the electronic requisition created by Phacious Muzembo.

The court decided to pay no attention to the report titled **"Irregular Purchase of McCully Crusher Bowl"** because, in its view, the report comprised very prejudicial opinions of the author and was based on hearsay statements from employees whom the respondent may have had no opportunity to face. With regard to the other evidence, the court below held Phacious Muzembo in very low esteem for having given two conflicting statements. The court then held that the other evidence that was before the disciplinary committee did not support Phacious Muzembo's assertion in his second statement that the respondent instructed him to enter a requisition for two bowls, instead of one. Consequently, the court found; that the respondent never instructed Muzembo to raise a requisition to purchase two bowls; that Muzembo acted on his own accord; and, that the allegation in Muzembo's second statement was an afterthought on his part.

With those findings, the court came to the conclusion that the disciplinary committees decision to dismiss the respondent was

unreasonable. The court, therefore, entered judgment for wrongful dismissal.

As regards compensation, the court noted that the allegation of fraud on which the appellant was wrongly dismissed carried a serious stigma. Consequently, the court departed from the normal measure of damages and awarded the respondent compensation equivalent to six months' salary.

The said decision gave rise to the appeal before us. The appellant filed eight grounds of appeal. The grounds read as follows:

1. **The court below erred in law not to pay attention to the appellant's security report entitled 'Irregular Purchase of McCully Crusher Bowl' when in fact the said security report and exhibits were before the disciplinary committee and the said exhibits were referred to by witnesses and considered by the court below.**
2. **The court below misapprehended the evidence and therefore had a wrong view of the facts to err at law when the court said "the complainant stated that after a process known as commercial adjudication he had learnt about the inclusion of a supplier known as Transley" and thus showed grave misdirection by the court on what the complainant and witnesses said about what was involved in commercial adjudication.**
3. **The court below misapprehended the evidence and therefore had a wrong view of fact when it said that "significant about the [Document Comments Review Report] is the fact that it shows the complainant giving the initial approval and a subsequent approval after the document was reverted to him following what Mr. Nyanoka referred to as the commercial adjudication."**

4. **The court below erred in law and fact when it found that the "Documents Review Report" and Request for Quotation generated on 11th October, 2010 were the basis upon which the disciplinary committee found the complainant guilty of the offence of unethical business conduct.**
5. **The court had a wrong view of the facts and erred in law and fact when it excluded the evidence of RW2 Mr. Josphat Sinkala, the Business Systems Analyst who was the administrator of the e-workflow as contained in the "Document Review Report" which was before the disciplinary committee.**
6. **The court erred in law and fact when it found that there was no evidence to corroborate the statement of Phacious Muzembo that the complainant instructed him to purchase 2 bowls.**
7. **The honourable court below erred in law and fact when it found that the disciplinary committee's decision to dismiss the complainant was unreasonable.**
8. **The honourable court below erred in law to award the complainant 6 months' salary.**

Section 97 of the *Industrial and Labour Relations Court Act, Chapter 269* of the *Laws of Zambia* provides:

> **"Any person aggrieved by any award, declaration, decision or judgment of the court may appeal to the Supreme Court on any point of law or any point of mixed law and fact."**

It follows that a person will not be permitted to appeal on a point of fact alone. We find the following grounds of appeal; the second, third, fourth and fifth; to be appeals entirely against points of fact. Consequently, we declare them incompetent and dismiss them for that reason.

As for the grounds that have survived, Mr. Pasi, learned counsel for the appellant, argued them together. The underlying argument in Mr Pasi's submissions was that the appellant had reasonable grounds for dismissing the respondent and that, therefore, the court below misdirected itself in awarding the respondent damages for wrongful and unfair dismissal. We were referred to our decision in the case of *Attorney General v Richard Jackson Phiri*[1] and particularly to the holding which states:

> **"Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same."**

Relying on that holding, learned counsel submitted that there was no dispute that the correct procedure was followed and that the court below, rightly, so held. Counsel submitted, however, that there was a substratum of facts which supported the disciplinary measures which were taken against the respondent. Counsel took issue with the lower court's rejection of the security report titled **"Irregular Purchase of McCully Crusher Bowl"** and argued that, by so doing, the lower court interposed itself as an appellate court, contrary to our decision in *Attorney General v Richard Jackson*

Phiri[1], repeated in the case of *ZESCO v Muyambango*[2]. When it was pointed out to counsel that the court below had observed that the minutes of the disciplinary proceedings had not been produced in court in order to enable it determine how the disciplinary committee resolved Phacious Muzembo's conflicting statements, counsel argued that the burden of proving the case lay with the respondent who was the complainant in the court below. We take that argument to mean that the respondent bore the burden of presenting those minutes before the court.

With those submissions counsel urged us to allow the appeal.

The respondent did not file any heads of argument. Neither he nor his counsel appeared at the hearing.

We have considered the appellant's arguments in this appeal. First, we concur with the appellant's argument that the court below erred when it chose to pay no attention to the appellants' security report titled **"Irregular Purchase of McCully Crusher Bowl,"** for the following reasons: The court below found that the report was one of the pieces of evidence that must have been before the disciplinary committee and upon which the committee made the decision to dismiss the respondent. Going by the approach we set out in the case of *Attorney General V Richard Jackson Phiri*[1], namely; that the

court should be concerned with whether or not the facts that were before a tribunal supported the decision taken, it follows that the court must consider every piece of evidence or document that may have influenced the tribunal in arriving at its decision. If the court rejects some piece of evidence or document that was before the tribunal, then how will it be able see how a tribunal arrived at its decision? Therefore, the court below was indeed in error when it ignored the appellant's report.

However, we have examined the report and we have failed to see the manner in which the report may have been prejudicial to the respondent, as stated by the court below. In most respects the report just sets out what the employees who were interviewed said. In fact the report's version of what the employees stated in their statements does not depart materially from what is contained in the statements which were recorded. Those statements were accepted by the court below and were found not to incriminate the respondent. Further, the report did not include Phacious Muzembo's statement which was prejudicial to the respondent, since it was compiled before that statement.

In our view, therefore, even if the court below had considered that report, it would not have found anything that would have

supported the disciplinary committee's dismissal. Therefore, the court below was on firm ground when it found that the only evidence which could render support to the appellant's dismissal was Phacious Muzembo's second statement. The court, however, observed that Phacious Muzembo had given two conflicting statements on the issue and guided itself correctly, in our view, when it said that it needed to see how the disciplinary committee had arrived at its decision. Unfortunately, no minutes of the disciplinary proceedings were produced so that the decision-making process could be revealed.

Mr Pasi, learned counsel, has argued that the failure to produce the minutes of the disciplinary proceedings should react against the respondent because, being the one who lodged the complainant, he bore the burden of proving it.

Our response to Mr Pasi's argument is thus: The argument which Mr Pasi has put forward is based on a rule of evidence in civil actions in the High Court. The Industrial Relations Court, on the other hand, is designed to do substantial justice. That purpose is established in *Section 85(5)* of the *Industrial and Labour Relations*

Act which provides as follows:

> **"The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the court shall be to do substantial justice between the parties before it."**

It is obvious from that provision that, once a complaint has been set in motion, it becomes the duty of all the parties thereto to produce to the court all the evidence they have pertaining to the complaint so that the court may arrive at a just decision. It is wrong, therefore, for the appellant to place the burden of producing the minutes of the disciplinary proceedings on the respondent. In any case, we doubt if the respondent would have been privy to the recorded minutes.

In our view, therefore, the court below was on firm ground when it took the approach that in the face of Phacious Muzembo's two conflicting statements, the dismissal was unreasonable, given that there were no minutes of the proceedings to explain how the disciplinary committee resolved the conflicting statements. We, therefore, uphold the lower court's judgment and dismiss this appeal.

With regard to the ground of appeal against the award of compensation, we note that it was not argued. We take it that it was abandoned.

All in all, this appeal stands dismissed. We order the parties to bear their own costs.

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I.C. Mambilima
CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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A. M. Wood
SUPREME COURT JUDGE