

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA**

(Civil Jurisdiction)

**APPEAL NO. 234/2013
SCZ/8/166/2013**

BETWEEN:

ITAYI PATRICK MAGUWUDGE

APPELLANT

AND

MOPANI COPPER MINES PLC

RESPONDENT

Coram: Mwanamwambwa, DCJ, Kajimanga, and Musonda, JJS

On the 20th May, 2016 and 12th January, 2017

For the Appellant: N/A

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Zambia National Provident Fund -v- Y.M. Chirwa: [1986] Z.R. 70**
2. **National Breweries Limited -v- Phillip Mwenya: [2002] Z.R. 118**
3. **Simon Mukanzo -v- ZCCM: SCZ Appeal No. 133 of 1999**
4. **Batuke Imenda -v- Alex Luhila: SCZ Appeal No. 5 of 2008**
5. **Ethiopian Airlines Limited -v- Sunbird Safaris Limited & Sharma's Investment Holding Limited & Another (2007) Z.R. 235**

Legislation referred to:

1. **Employment Act, CAP. 268 of the Laws of Zambia.**

Other Works referred to:

- 1. Black's Law Dictionary**
- 2. Black's Online Dictionary**

This is an appeal by the Appellant against the whole of the Judgment of the Industrial Relations Court sitting at Ndola, whereby that Court dismissed the Appellant's search, against the Respondent, for a variety of reliefs, the principal or primary ones having been damages for unlawful/wrongful termination of employment; damages for loss of salary for an unserved period of his fixed term employment contract and for an order seeking to have him deemed to have completed his fixed employment contract and to be paid all his dues consequent upon the making of the said order.

For its part, the Respondent not only resisted the Appellant's claims but mounted a counter-claim of its own for a liquidated sum of US\$12,363.74 against the Appellant on account of mobile telephone bills which had arisen in respect of a mobile phone number which the Respondent had availed to the Appellant in accordance with the former's policy but, which had been the subject of proven misuse by the Appellant's spouse.

In this Judgment, we propose to continue referring to the Appellant and the Respondent as the duo is presently designated in this appeal.

The background to this appeal whose genesis had been of the nature of a complaint before the Court below is scarcely contestable and can be summarized as now follows:

By a written fixed term employment-contract dated 23rd March, 2006, the Appellant was employed as Manager, Information Technology, by the Respondent. The employment contract ("the Employment Contract") was effective from 15th April, 2006 and was to subsist for a fixed term of two years (that is, up to 14th April, 2008) unless the same was sooner terminated by either party thereto in accordance with its terms. Although the matter was not in issue and no evidence was deployed either way before the Court below, the Employment Contract appears to have been consensually renewed or extended beyond its original two-year tenure. Among the perquisites which the Appellant's employment carried was entitlement to two post-paid mobile phones to be used for official duties and subject to the Respondent's Information

Technology and Telecommunications policy. Among other terms, the Employment Contract provided that:

“1.4 The company will have the right ... to instantly dismiss the Employee without ... notice whatsoever in the event of the Employee [contravening] the policies, rules or regulations of the company or the Laws of Zambia.”

On 4th November, 2011, the Appellant received a letter from Mr. D. J. Callow, the Chief Executive Officer of the Respondent in terms of which the Appellant's Employment Contract with the Respondent was terminated. The letter read in part:

“Dear Mr. Maguwudze,

Following your admission after confrontation with proof of information this morning of misuse of company property, abuse of position and authorizing company payment of your wife's personal calls, it is with regret that the company invokes clause 1.4 of your employment contract dated 15th April, 2006.

Your last shift will be today, 4th November, 2011. All salary and accrued benefits will be paid up to this date, less any monies owed by you to the company...

In terms of clause 4.7 of your contract, the circumstances of termination dictate that you are responsible for your own repatriation costs.

.....

***Yours sincerely
Mopani Copper Mines PLC***

***(Signed)
D. J. CALLOW
Chief Executive Officer”***

Following the termination of his employment, the Appellant launched an action in the Court below, via a Notice of Complaint, in which he sought:

- “(a) damages for unlawful and wrongful dismissal and/or termination of employment;**
- (b) damages for loss of salary for (the) remainder of a fixed term of employment;**
- (c) an order that the complainant [now Appellant] be deemed to have completed his contract and be paid salaries and all allowances for the remaining period of his contract;**
- (d) Any other relief;**
- (e) Interest on all amounts found due;**
- (f) Costs.”**

The Appellant's Notice of Complaint was supported by an Affidavit. In addition, the Appellant gave oral testimony before the Court below while two other witnesses also testified on his behalf to buttress his complaint.

The gist of the Appellant's complaint before the trial Court, as distilled from the evidence which we have momentarily alluded to above, was that his dismissal was wrongful, unjustified, unfair and totally unwarranted.

For its part, the Respondent contended that the termination of the Appellant's employment was within its contractual rights given that the Appellant had allowed his wife to use the

Respondent's mobile phone for the purpose of her personal business and at the Respondent's expense; that the abuse of the Respondent's mobile phone in the aforesaid manner constituted a contravention of the Respondent's Information Technology and Telecommunications policy and; that the Appellant's abuse of the Respondent's phone not only entitled the latter to take the disciplinary measure which had been meted out against the Appellant but, also, to recover the money which the Respondent spent by way of settling the bills which had accrued on account of the Appellant's wife's misuse of the mobile phone number in question.

Following the trial of the matter, the Court below had no difficulty in arriving at the conclusion that, as the Appellant had committed a dismissible offence under the Respondent's disciplinary Rules which applied to him, the Respondent was entitled to discipline the Appellant in the manner he had been and that, under those circumstances, the Appellant's claim for damages for unlawful or wrongful dismissal and/or termination of employment could not possibly succeed.

In reaching this conclusion, the Court below relied on the oft-quoted principle which we laid down in **Zambia National Provident Fund -v- Y.M. Chirwa**¹ and which we have repeated in several subsequent decisions including **National Breweries Limited -v- Phillip Mwenya**².

For the removal of any doubt, the oft-quoted holding in **Zambia National Provident Fund -v- Y.M. Chirwa**¹ was couched in the following words:

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

As regards the Respondent's counter-claim, the trial Court reasoned that as the basis of the same had been proven without even the most feeble of resistances on the part of the Appellant, the Court had no option but to pronounce that relief in favour of the Respondent.

The Appellant has now appealed to this Court on the basis of the following grounds which are set out in the Memorandum of Appeal:

Ground No. 1

The Lower Court erred when, against the weight of evidence, it held against the Appellant.

Ground No. 2

The Lower Court erred when it upheld the Appellant's dismissal when [the] Appellant was in fact dismissed for a non-dismissible offence namely abuse of Company Property.

Ground No. 3

The Trial Court erred when it held that the Appellant could have been dismissed for an offence under Clause 2.3.1 Category 3 which offence the Appellant was neither charged nor questioned on as per evidence of RW1 and RW4.

Ground No. 4

The Trial Court erred in awarding the Respondent its counter-claim when evidence held had failed to prove the counter-claim in its entirety and to the required standard of proof.

Counsel for both the Appellant and the Respondent filed their respective Heads of Argument to buttress the positions they had respectively adopted in the appeal.

In his Heads of Argument, Counsel for the Appellant indicated that he was going to argue Grounds One and Two together. Given that the Appellant's Heads of Argument were not structured in the usual way of segregating the grounds as they appear in the Memorandum of Appeal and presenting, *seriatim*, the arguments relating thereon but were presented in a continuum, it was not apparent to us how Grounds Three and Four were argued (if at all).

It is also fairly plain and self-evident to us that what had been filed on behalf of the Appellant as his Heads of Argument were a virtual replication of what had been filed in the Court below by way of the then complainant's submissions as they appeared at pages 303 to 306 of the Record of Appeal.

Not surprisingly, even the language, nomenclature and style which were employed in the Appellant's Heads of Argument were reminiscent of a trial as opposed to an appellate setting adopted in the appeal.

Be that as it may, Counsel for the Appellant opened his Heads of Argument by contending that the Appellant did not commit any of the offences which were levelled against him and that, in any event, the decision to dismiss him was severe and malicious.

According to the Appellant's Counsel, when the Appellant was questioned by Penelope Dickson, the Respondent's Manager in charge of Administration, over the use of the Respondent's phone by his wife, he admitted what Counsel described as '*the misdemeanor*' and maintained that he was settling the bills which were arising as a result of his wife's use of the phone in question. The Appellant, however, noted that although he had been settling

his personal bills and even presented proof before the trial Court to support his assertion, delays had arisen vis-à-vis settlement of his personal bills as a result of MTN, the service provider's failure to present their bills in a timely manner.

Counsel for the Appellant complained that not only was the Appellant's dismissal severe and malicious but that the same arose in circumstances which pointed to a denial of natural justice and a violation of Section 26A of the Employment Act, Chapter 268 of the Laws of Zambia in relation to the Appellant. Counsel contended that the allegations which had formed the basis of the Appellant's dismissal did not warrant such a punishment, especially that he was an expatriate who was not even afforded an opportunity to exculpate himself.

According to the Appellant's Counsel, the decision of this Court in **National Breweries Ltd -v- Mwenya**² demonstrates that an employee can only be dismissed if they had been guilty of having committed a dismissible offence. It was the Appellant's Counsel's further contention that the Appellant had given a reasonable explanation in relation to the allegations which had been levelled against him and that the Respondent should have treated him

fairly. The Appellant's Counsel closed his arguments by maintaining that the Respondent acted rashly by metting out a 'traumatic' punishment against the Appellant when no conclusive evidence existed to warrant the same.

Counsel accordingly concluded by submitting that the Appellant was "... entitled to all [the] reliefs as claimed."

In response to the First Ground of Appeal, Counsel for the Respondent contended that Ground One revolved around the lower Court's findings of fact and that those findings of fact were adequately supported by the evidence which had been deployed before the Court below. Counsel argued that the Appellant did admit that his wife had been making unauthorised private telephone calls using the Respondent's mobile phone which had been availed to the Appellant for his use in connection with his work.

The Respondent's Counsel accordingly contended that the First Ground of Appeal lacked merit.

With regard to Ground Two, the Respondent's Counsel contended that the admitted and proven allegations against the Appellant clearly pointed to dishonest conduct on the part of the

Appellant. According to the Respondent's Counsel, the Respondent was entitled to treat the Appellant's conduct as constituting a serious breach of trust, particularly in the light of the seniority of the management position which the Appellant held in the company.

To reinforce his argument around Ground one, the Respondent's Counsel cited our Judgment in **Simon Mukanzo -v- Zambia Consolidated Copper Mines**³ in which we observed that:

"As long as it was established that the Appellant's conduct was one which his employer could not tolerate, the employer was at liberty to terminate the contract of employment regardless of the provisions of the Disciplinary Code."

We were accordingly invited to dismiss Ground Two for want of merit.

With respect to Ground Three, Counsel for the Respondent supported the lower Court's findings in relation to this ground and the Court's conclusion that what the Appellant had done in relation to the mobile phone which had been entrusted to him by the Respondent offended the Respondent's Disciplinary Code and that the Respondent had acted appropriately in dismissing the

Appellant on account of what the Court had concluded to have been a dismissible offence.

The Respondent's Counsel accordingly invited us to dismiss Ground Three as being devoid of merit.

With regard to the Fourth and final Ground of Appeal, Counsel for the Respondent argued that the Appellant had admitted that his wife had been using the phone in question for the purpose of making private calls and that, the Respondent's counter-claim was neither challenged in the Court below nor did the Appellant make any submissions in respect thereof. The Respondent's Counsel finally contended that, in any event, the appeal was incompetent on account of failure to comply with Section 97 of the Industrial and Labour Relations Act, CAP. 269 which enacts that an appeal to this Court from a Judgment of the former Industrial Relations Court can only lie on points of law or points of mixed law and fact.

Counsel for the Appellant accordingly urged us to dismiss the appeal with costs for lack of merit.

When the appeal came up for hearing Counsel for both parties did not appear as they had filed their respective Notices of Non-

Appearance in which they had also invited us to determine the appeal on the basis of their respective Heads of Argument.

We have keenly examined and considered the arguments which were deployed before us on behalf of the two parties to this appeal by their respective Counsel. We have also carefully considered the Judgment under appeal in relation to the competing arguments of Counsel involved and can only express our gratitude to both Counsel for their helpful exertions.

The First Ground of Appeal as it is presented in the Memorandum of Appeal attacks the lower Court's Judgment on the alleged basis that the entry of Judgment against the Appellant was "*against the weight of evidence.*"

Quite aside from our much diminished faith in the viability of this Ground as it was presented, we encountered real difficulties in having to decipher as to which aspects of the Appellant's Heads of Argument candidly or clearly speak to the First Ground of Appeal as we understand it. In order to put our difficulties in their proper perspective, we have explored the meaning or legal meaning which is associated with the expressions '*weight of evidence*' and '*against*

the weight of evidence.’ Black’s Law Dictionary defines the expression *‘weight of the evidence’* as:

“the persuasiveness of some evidence in comparison with other evidence.”

On the other hand, The Black’s Online Dictionary defines the same expression as:

“A term used for the preponderance of truth. The weight of evidence is what will convince a Judge one way or another.”

The Online Legal-Dictionary, the Free Dictionary.com defines the expression *‘weight of evidence’* as the -

“Measure of credible proof on one side of a dispute as compared with the credible proof on the other, particularly the probative evidence considered by a Judge during a trial. The weight of evidence is based on the believability or persuasiveness of evidence:

The Black’s Online Dictionary defines the expression *‘against the weight of evidence’* as:

“Contrary to the evidence as the verdict issued does not conform to the presented evidence.”

As we intimated earlier, we have been unable to appreciate how the general discourse in the Appellant’s Heads of Argument fits into the First Ground of Appeal as formulated. From what we have gleaned from the Record, the trial Court did direct itself properly and correctly when it considered and evaluated the

evidence which had been deployed before it by or on behalf of the complainant (now Appellant). Indeed, the Court below did make findings of fact which were adequately supported by the evidence which had been deployed before that Court.

For the removal of any doubt, the Court below noted that the Appellant had been serving the Respondent pursuant to a written contract of employment. Among other things, that written employment contract entitled the Respondent to *"instantly dismiss the [Appellant] without any notice... whatsoever in the event of any or [for] any act or omission... including ... improper conduct... or [contravention of] the policies, rules or regulations of the company..."*.

The Court further noted that the Appellant was also subject to the Respondent's Code of Conduct and Ethics for Employees.

The Court also noted that it was not in dispute that the Appellant's wife had been using the Respondent's mobile phone number for making personal or private calls and that by reason of such use, the mobile phone number in question had accumulated a bill of K71,818,709.40 or USD14,383.14.

According to the Court below, the facts which have been recounted above entitled the Respondent to dismiss the Appellant.

The trial Court noted that the use of the Respondent's mobile phone number in the circumstances explained above entailed causing willful loss of company property contrary to the Respondent's Disciplinary Code.

What clearly emerges from the preceding narrative is that, contrary to what the Appellant suggests via Ground One of his appeal, the Judgment of the Court below was consistent with the evidence which had been deployed before that Court. To drive the point home, the Judgment was not against the weight of the evidence which had been deployed before that Court as the Appellant had clearly misapprehended via his First Ground of Appeal.

As we suggested in **Batuke Imenda -v- Alex Luhila**⁴, we cannot possibly disturb a Judgment which is founded on findings which are well and amply supported by the evidence on record.

Ground One accordingly fails.

With regard to Grounds Two and Three, we note that these are related. Accordingly, we propose to address the two grounds holistically. Under Ground Two, the Appellant complained that the lower Court erred when it upheld his dismissal which dismissal,

according to the Appellant, was founded on a non-dismissible offence of abuse of company property. In relation to Ground Three, the Appellant contended that it was an error for the Court below to have upheld a dismissal which had been founded on an offence for which the Appellant had neither been charged nor questioned.

We have noted from the Record that the termination of the Appellant's employment was predicated on Clause 1.4 of the Appellant's Employment contract. That Clause provided as follows:

"1.4 The company will have the right, however, to instantly dismiss the Employee without any further notice whatsoever in the event of any breach of the provisions hereof or any act or omission which would in law justify such dismissal, including inebriety on duty, improper conduct, insubordination, theft or, without detracting from the generality of this provision, if the Employee should negligently or willfully cause damage to any property of the company ... or contravene the policies, rules or regulations of the company or the Laws of Zambia (Emphasis ours)."

The Court below reasoned that the conduct of the Appellant as earlier explained constituted a disciplinary offence of causing willful loss of the Respondent's property. The Court took the view that the Appellant's conduct was caught by Clause 2.3.1, in category 3 of the Respondent's Disciplinary Code to which the Appellant was amenable. That Clause read as follows:

"2.3.1 Willful loss/Damage to company property.

Any act whereby the employee willfully or deliberately loses or causes company property to be lost or damaged.”

The Court below also reasoned that a breach of Clause 2.3.1 warranted dismissal.

Counsel for the Appellant complained that the Appellant was not confronted with any allegations founded on Clause 2.3.1.

We have intensely reflected on the two Grounds, namely, Grounds Two and Three which, as we earlier pointed out, we consider related and which, in our view, raise the common issue of whether or not the Appellant's dismissal was warranted by the circumstances which had surrounded the same as revealed earlier in this Judgment.

In the view that we have taken, the Appellant was firmly caught by what we said in **Zambia National Provident Fund -v- Y. M. Chirwa¹**.

Indeed, the trial Court was right in having drawn inspiration from that decision.

For the avoidance of doubt, the offence which the Appellant committed was dismissible both under his contract of Employment and the Disciplinary Code which applied to him. Ground Two fails.

With regard to Ground Three, our decision in **Zambia National Provident Fund -v- Chirwa**¹ sufficiently addresses the Appellant's complaint as packaged in this Ground. The meaning and effect of our holding in **Zambia National Provident Fund -v- Chirwa**¹ is that a failure to comply with any laid down disciplinary procedure would not negative the dismissal of an employee who has committed an offence for which such dismissal represents the appropriate punishment. Ground Three accordingly fails.

As to the Fourth and final ground of appeal, we note from the Appellant's Heads of Argument that the same do not address this particular ground. Consequently, Ground Four is deemed to have been abandoned. In any event, we do note from the Record and from the Respondent's Heads of Argument that the Respondent's counter-claim was not challenged in the Court below. In **Ethiopian Airlines Limited -v- Sunbird Safaris Limited & Sharma's Investment Holding Limited & Vijay Babulal Sharma's Investment Holding Limited & Another**⁵, we made the

following observations in relation to matters in pleadings and evidence which are not controverted:

"There are a number of facts that were pleaded in the petition which the 3rd Respondent did not challenge... [These] should and are deemed accepted ..." (at page 239-240).


Turning to the present appeal, we agree with Counsel for the Respondent that the counter-claim which the Respondent had mounted was neither challenged nor controverted. It stands to reason, therefore, that the Respondent's counter-claim remains unassailed.

In sum, this appeal was completely without merit and is accordingly dismissed.

As to the issue of costs, we confirm that we have anxiously pondered over this issue and have come to the conclusion that, in spite of the outcome of the appeal, each party should bear its own costs.



M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



C. KAJIMANGA
SUPREME COURT JUDGE



M. MUSONDA, SC
SUPREME COURT JUDGE