

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2012/HP/090

BETWEEN:

SHARON GLASS

AND

G4S SECURITY SERVICES (ZAMBIA) LIMITED

Before Honourable Mr. Justice M.M. Kondolo, SC

For The Plaintiff : Mr. M.J. Kawana - Messrs D. Findlay Advocates

For The Defendant : Mr. P. Tembo-Messrs Mwenye & Mwitwa Advocates



PLAINTIFF

DEFENDANT

J U D G M E N T

STATUTES & TEXT

1. *Halsbury's Laws 4th Edition, Volume 16.*
2. *Halsbury's Laws of England. 5th Edition. Volume 40.*

CASES

1. *Attorney General v John Tembo (2012) 1 Z.R. 1*
2. *Byrne v Kinematograph Renters Society Lt. (1958) 1 W.L.R. 762, 784*
3. *Zambia China Mulungushi Textiles (Joint Venture) Limited vs Gabriel Mwami (2004) Z.R. 253*
4. *Zambia Oxygen Limited and ZPA v Chisekula and Others (2000) Z.R. 28*
5. *Newton Siulanda and others v Foodcorp Products Limited (2002) Z.R. 36*

6. *Zambia Revenue Authority v Mwanza and others* (2010) 2 Z.R. 191
7. *Kitwe City Council v William Ng'uni* (2005) Z.R. 57
8. *Kabwe v BP (Zambia) Limited* (1996-1997) Z.R. 218
9. *Chilanga Cement PLC v Kasote Singongo* (2009) Z.R. 122
10. *Chintofwa v Ndola Lime Company Limited* (1999) Z.R. 172
11. *Barclays Bank Zambia Plc v Weston Lwui Suzgo Ngulube*
SCZ/8/260/2011
12. *ZESCO v David Lubasi Muyumbango, S.C.Z. Judgment No. 7 of*
2006
13. *Supermarkets Limited (T/A Shoprite Checkers) v Mhone Appeal No.*
162 of 2001
14. *Chimanga Changa Limited v Stephen Chipango Ngombe S.C.Z. 5*
of 2010
15. *Swarf Spinning Mills v Sebastian Chileshe and Others S.C.Z.*
Judgment no 6 of 2002
16. *Mulungushi Investments Limited v Gradwell Mafumba S.C.Z.*
Appeal No. 141 of 1997
17. *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*
(1986) Z.R.70.

The Plaintiff was initially employed as Administrative Controller by Saftech International Limited Zambia from 1st August, 2004 until 2007 when the company was acquired and/or merged with the Defendant. The Plaintiff was retained as an employee in the same position and on the same conditions of service but she was not provided with a Job description. The Defendant dismissed the Plaintiff on grounds of non-compliance with its disciplinary code of conduct but later, following the Plaintiffs appeal to the Defendant against her dismissal, the Defendant notified the Plaintiff that she would be re-instated on demotion with a reduced salary package.

The Plaintiff alleges that the dismissal was unfair and wrongful and therefore, she should have been re-instated on the same conditions and provided with a job description or that the Defendant's action amounted to repudiatory breach of her employment contract and she advanced the following as the particulars of repudiatory breach as follows:

- a) *The Defendant's decision on the appeal hearing clearly exonerated the Plaintiff on the original charges levied against the Plaintiff and found the Plaintiff not guilty on the original charges but nevertheless substituted the old charges with new charges with new charges to justify its decision to demote the Plaintiff and dealt with the Plaintiff in a manner contrary to the Disciplinary Code.*
- b) *On 9th June 2011, the Plaintiff received a letter reinstatement under the position of Procurement Officer being an inferior position to National Logistics Officer. Although the Defendant alleged that there would be no reduction in pay but a portion of the Plaintiff's salary was to be apportioned to a qualifying productivity allowance to ensure that performance was objectively measured, the Plaintiff's salary structure was reduced.*
- c) *On or about the 13th June, 2011 the Defendant reiterated its position and notified the Plaintiff in writing that the Defendant's decision to demote the Plaintiff was based on the Plaintiff's performance.*

The Plaintiff now seeks the following reliefs:

1. *Damages and compensation for wrongful repudiation of employment contract and/or constructive dismissal.*

2. *In the alternative damages for breach of contract.*
3. *Damages for loss of opportunity of employment and enhanced reputation.*
4. *Leave days accrued to date and days worked for in the month of May and June 2011.*
5. *Interest on the amount due.*
6. *Further and or other relief as the Court may deem fit.*
7. *Costs and incidentals to this action.*

The Defendant denied having retained the Plaintiff in the same position, with similar conditions of service and without a job description. They averred that she was employed on or about 1st May, 2007 as National Logistics Officer effective 1st July, 2007 by virtue of the fact that her experience as Administrative Manager was an added advantage and she accepted the position unconditionally as well assumed all responsibilities of the position. They stated that her position evolved and her contract stipulated that she would perform such duties as the Director would direct from time to time. The Defendant further stated that the Plaintiff had the responsibility of issuing and receiving figures of stocks and was generally in charge of the stores department. With regard to the appeal, the Defendant stated that the Plaintiff was, on 1st April, 2007, informed of her right to appeal against the decision of the Operations Director and she exercised this right. It was their contention that the dismissal was neither unfair nor discriminatory because the people who worked with her in the department were equally dismissed.

The Defendant, in its Defence stated that the Plaintiff appealed and was reinstated on demotion with a reduced package but this was not based on her failure and breach of responsibilities and duties as alleged.

PW1-Sharon Glass

PW1 was Sharon Glass who stated that the Defendant Company merged with her original employer safetech in 2007. She joined safetech in 2004 and after the merger she was verbally assigned as executive assistant to the Managing Director (MD) even though her contract dated 2007, but only executed in March 2011, showed that she was the National Logistics Officer. PW1 said she reported to the MD as well as followed the instructions of various departments. Her responsibilities included the procurement of uniforms, stationery and other items both locally and internationally.

She testified that on 29th March, 2011 she was served a disciplinary letter of which the notice indicated her job description as National Logistics Manager whilst the charge described her job as National Stores Logistics Manager. She said she was only the National Logistics Officer and the charge against her was in relation to stock losses, which were alleged to have occurred between 2009 and 2011 but no details of the stock losses were provided and the charge did not mention whose instructions she failed to follow. She responded with an exculpatory letter and the hearing was held after which she was summarily dismissed on reasons that she failed to comply with instructions which led to the stock loss.

PW1 appealed against the decision to dismiss her and the appeal was heard by the Operations Director of the Northern Region who found that the charge was wrong and she was subsequently re-instated on demotion¹. The re-instatement letter referred to a different charge which alleged that she had failed to ensure the smooth running of the stores department. In her view, the smooth running of the stores department related to the day to day management of that department and it was not her responsibility. She further told the court that the re-instatement letter informed her that her salary and allowances had been reduced and she rejected the demotion in a letter dated 11th May, 2011².

¹ Plaintiffs bundle of Documents, p.30

² Plaintiffs bundle of Documents, p.32

PW1 then explained that she received a second reinstatement letter dated 9th June, 2011³ to which she replied on 10th June, 2011⁴ expressing dissatisfaction with the terms of her reinstatement. Management replied on 13th June, 2011⁵ by a letter entitled "Case Review". PW1 stated that the matter was never reviewed and all that happened was an office conversation. She said that earlier on the 10th June she had been asked to sign a document entitled "Review Form" which was dated 6th July, 2011, and which indicated that the review would be conducted on 8th June, 2011. She reiterated that she was only give this document on 10th June, 2011 and was not given an opportunity to present submissions before the hearing date of the review.

PW1 testified that whilst the letter dated 13th June, 2011 entitled "case review" alleged that the review hearing was heard on 6th June, 2011, she was only notified of the review hearing on the 10th June and the review was dine the same day even though the company procedure for review specifies that she should have been given 2 days to prepare. She concluded her examination in chief by stating that after receipt of this letter dated 13th June, 2011, she resigned by a letter dated 15th June, 2011 because she felt she had no choice but to resign.

In cross examination she stated that whilst employed under Safetech her salary was approximately K2500 (USD 500) after tax which she continued to receive as executive assistant after the merger. She acknowledged that on 1st May 2007 she received a notice of a salary increment by which her salary increased to from K5,400 to K7,000 and the notice also moved her from the administration department to the finance department. Under further cross examination PW1 said that after the merger she was not formally appointed as National Logistics Officer but her salary changed because she had new responsibilities which included purchasing stock; monitoring the local

³ Plaintiffs bundle of Documents, p.33

⁴ Plaintiffs bundle of Documents, p.34

⁵ Plaintiffs bundle of Documents, p.35

purchase order register books; approving leave for staff in the administration department and; supervising the monthly stock take.

In further cross examination, PW1 testified that the Defendant Company had a stock department with 2 stores controllers who reported to her and whose role was to input into the system and distribute the stock PW1 gave them and to ensure that there were no stock variances. She denied the assertion that she was in charge of the stocks department and added that the stores controllers only reported to her on items needed in the stores but they also reported to the financial analyst. She was then referred to an email in which she stated that she would take responsibility as head of the stores department and she replied that she was the head of department with regards to staff only and not in charge of stock variances. She explained that the stores controllers reported to the financial analyst with regard to the input and output of the data on the computer system (SAP) and this data referred to stock which she was responsible for procuring. PW1 further testified that she was not answerable to the financial analyst and was not obliged to help her but she provided assistance when requested by the financial analyst and accordingly reported her findings to her.

When pressed as to whether it was her evidence that as national logistics officer she was not required to ensure that there were no stock variances and she replied saying that she would have declined such a request because the stock variances could only be established by using the computer system (SAP) and her knowledge of it was limited. When pressed further PW1 said she hadn't brought this fact to their attention and insisted that it was not her duty to ensure that there were no stock variances but was obliged to help when requested. When asked if she submitted audit reports to the finance department she said that she submitted physical count audit reports whose aim was to show what was in stock and wasn't in stock. When pressed further

on this point PW1 agreed that one of the reasons for submitting the physical count was to ensure that there was a stock balance and no variance.

When questioned further, PW1 said she reported to the MD and she also agreed that at some point in time, the MD asked her to find out about the stock variances but she couldn't remember if she ever reported back to him. When asked to describe the kind of help the Financial Analyst needed, PW1 said that she had on several occasions asked PW1 to help her find variances. PW1 was then referred to an e-mail⁶ which assigned her and three others to undertake a stock taking exercise and PW1 agreed that the four addressee's had to report back to the Financial Analyst and that the purpose of the exercise was to ensure that there were no stock variances and PW1 further agreed that the exercise had nothing to do with procurement of stock.

PW1 was shown two other Emails⁷ and she said neither of them were with reference to stock variances and explained that the one dated 20th July from Patricia was with respect to an employee who was leaving employment and that as regards the Email dated 20th January, 2010 there was a problem with a bin card and Rowena requested her to find out what the problem was. She said she was not sure if she reported back to her. At this point it was put to her that she seemed to have a problem with reporting back to her superiors as she had earlier said that she forgot if she had reported back to her MD on the stock variances and she also didn't report back to Patricia and PW1 said that she had no problem reporting to her superiors.

The prosecution was relentless but PW1 insisted that it was not her but the stock controllers who were responsible for ensuring that there were no variances in the stock department and that the store controllers only reported to her on certain aspects. When referred to the charge she was given PW1 agreed that despite her limited knowledge of SAP, management had a

⁶ Email dated 29th July, 2009, Defendants Bundle of Documents p. 93

⁷ Email dated 20th July, 2009, Defendants Bundle of Documents p95; and
Email dated 20th January, 2010, Defendants Bundle of Documents p99

reasonable expectation that she would help them with regard to stock differences. PW1 further said that there was no position called national logistics stores manager and she was appointed as national logistics manager because they felt she was capable. PW1 then explained that after the disciplinary process she was reinstated in the lower position of national logistics officer but she refused to accept the demotion and decided to resign.

Under further cross examination PW1 agreed that the Defendant gave her several opportunities to report back for work after she resigned and she agreed that even though she wasn't reporting for work after she was charged she continued receiving her salary from 29th March to 11th June, 2011 and that she was paid her leave days when she resigned.

The Defendant was unable to call any witnesses and decided to proceed by relying on the Defence filed herein and on the written submissions to be filed in support of its position. The Plaintiff likewise indicated that it would file written submissions.

In his submissions, Counsel for the Plaintiff recalled that the Plaintiff was initially found guilty of failing to comply with instructions leading to stock losses the Plaintiff was consequently dismissed. He further recalled that she appealed against the dismissal and the decision on appeal was that the charge against the Plaintiff was wrong against the background of the facts reviewed and further found that the Plaintiff was ignorant of her position/responsibilities and was found to have broken trust which, in counsel's view, was a clear deviation from the original charge and that contrary to the disciplinary code was not given an opportunity to exculpate herself on these new charges. He cited the case of **Attorney General v John Tembo**⁸ where the Supreme Court held that, failure to give an employee an opportunity to exculpate himself on charges and allegations is blatant

⁸Attorney General v John Tembo (2012) 1 Z.R. 1

disregard of natural justice and dismissing a worker under those circumstances is wrongful.

He added that the new charges against his client which resulted in her demotion and reduction in salary were serious and the Defendants failure to hear her on them was wrongful and contrary to the Disciplinary Code and the rules of natural justice. In support of this he cited the case of **Byrne v Kinematograph Renters Society Lt.**⁹ which stated that natural justice requires that a person must know the accusations against him and be heard and that the tribunal should act in good faith. Counsel further submitted that the disciplinary procedure was not followed as the Plaintiff was not accorded two clear days prior to the hearing and he pointed out that the letters dated 9th and 13th June, 2011 confirmed this position.

It was further argued that the Plaintiffs demotion was the result of an unfair process which included wrong charges and he cited the case of **Zambia China Mulungushi Textiles (Joint Venture) Limited vs Gabriel Mwami**¹⁰ where it was stated that if the reason for demotion turns out to be false or cannot be sustained, it follows that the termination or demotion is unfair and/or wrongful. Counsel further argued, in the alternative that the demotion and consequent reduction of salary was a unilateral variation of the Plaintiffs conditions of service and amounted to constructive dismissal and that an employee, as did the Plaintiff herein, who resigned under such circumstances was entitled to a separation/redundancy package and several cases were cited in support of this.¹¹

⁹*Byrne v Kinematograph Renters Society Lt. (1958) 1 W.L.R. 762, 784*

¹⁰*Zambia China Mulungushi Textiles (Joint Venture) Limited v Gabriel Mwami (2004) Z.R. 253*

¹¹*Zambia Oxygen Limited and ZPA v Chisekula and Others (2000) Z.R. 28*

Newton Siulanda and others v Foodcorp Products Limited (2002) Z.R. 36

Zambia Revenue Authority v Mwanza and others (2010) 2 Z.R. 191 Kitwe City Council v William Ng'uni (2005) Z.R.

Chilanga Cement PLC v Kasote Singongo (2009) Z.R. 122

Halsbury's Laws 4th Edition, Volume 16 para 321 page 33157

On the claim for damages counsel for the Plaintiff urged the Court to go beyond the "Notice Period" by awarding damages in line with the cases of **Joseph Chintofwa v Ndola Lime Company Limited**¹² and in **Barclays Bank Zambia Plc v Weston Lwui Suzgo Ngulube**¹³ 24 month's salary was awarded and in the case of **Kabwe v BP (Zambia) Limited**¹⁴ where after citing of the case of Oxford and District Co-operative Society Limited (1970) 1 Q.B. 186 the Plaintiff was awarded a redundancy payment. The claim for embarrassment and mental anguish was buttressed with the cases of **Chilanga Cement PLC v Kasote Singongo**¹⁵ and **Barclays Bank Zambia PLC v Weston Lwui Suzgo Ngulube**¹⁶.

Learned Counsel for the Defendant submitted that the Plaintiff was found guilty after the Defendant followed the procedure provided in the disciplinary code. She was allowed to appeal and after a case review was conducted and she was reinstated to a lower position, which offer she declined. Counsel denied that any charges were substituted and insisted that there was no breach of conditions of service. It was contended that as evidenced by a letter dated 9th June, 2012 the Plaintiff's remuneration was not reduced but only that part of her salary would be apportioned to a qualifying productivity allowance.

Counsel sated that as per **Halsbury's Laws of England**¹⁷, the disciplinary procedures adopted by the Defendant gave due regard to the tenets of natural justice and abiding by the holding in the case of **ZESCO v David Lubasi Muyumbango**¹⁸ the Plaintiffs disciplinary committee had the necessary disciplinary power to take the steps it did and the power was exercised fairly. It

¹²*Chintofwa v Ndola Lime Company Limited* (1999) Z.R. 172

¹³*Barclays Bank Zambia Plc v Weston Lwui Suzgo Ngulube* SCZ/8/260/2011

¹⁴*Kabwe v BP (Zambia) Limited* (1996-1997) Z.R. 218

¹⁵*Chilanga Cement PLC v Kasote Singongo* (2009) Z.R. 122

¹⁶*Barclays Bank Zambia Plc v Weston Lwui Suzgo Ngulube* SCZ/8/260/2011

¹⁷*Halsbury's Laws of England*, 4th Edition, Volume 40. Page 375, para 407

¹⁸*ZESCO v David Lubasi Muyumbango*, S.C.Z. Judgment No. 7 of 2006

was further pointed out that the Plaintiffs exculpatory letter demonstrated that she was aware of the nature of the charges laid against her.¹⁹

The Defendant denied constructive dismissal and argued that the Defendant did not breach any of the Plaintiffs conditions of service and did nothing to warrant the Plaintiffs resignation. They further argued that as stated in the case of **Africa Supermarkets Limited (T/A Shoprite Checkers) v Mhone**²⁰ it was trite law that the rules of natural justice need not be applied in an employer/employee relationship where it is not in dispute that an employee has committed an offence. It was further argued that redundancy only takes place when a position occupied by an employee is abolished which not the case here, meaning that the claim for damages should be dismissed. They further cited the case of **ZESCO v David Lubasi Muyumbango**²¹ in which it was stated that:

“Where it is not dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is so 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 a declaration that the dismissal was a nullity.”

Counsel for the Defendant further stated that in any event the trust between the parties had eroded and cited the case of **Chimanga Changa Limited v Stephen Chipango Ngombe**²² in which the Supreme Court stated that an employee and employer relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens. Counsel further argued that in the event that the court found that the Plaintiff was wrongfully dismissed only minimal damages should be awarded because the Plaintiff had

¹⁹ As per requirement set out in *Byrne v Kinematograph Renters Society Lt.* (1958) 1 W.L.R. 762, 784

²⁰ *Supermarkets Limited (T/A Shoprite Checkers) v Mhone* Appeal No. 162 of 2001

²¹ *ZESCO v David Lubasi Muyumbango*, S.C.Z. Judgment No. 7 of 2006

²² *Chimanga Changa Limited v Stephen Chipango Ngombe* S.C.Z. 5 of 2010

not shown that she suffered inconvenience, discomfort or distress, embarrassment, trauma, shock and humiliation caused by an abrupt termination of employment. It was submitted that the court considers applying the applying the standard set out in the case of **Swarp Spinning Mills v Sebastian Chileshe and Others**²³ that the measure of damages was the length of notice which in this instance, was 1 month and that the measure should only be exceeded in exceptional circumstances²⁴. it was finally submitted that the Plaintiff should not be awarded any leave days as she did not work during the period for which she was claiming leave pay.

I have considered the evidence on record and the spirited arguments submitted by Counsel for both parties.

A summary of the Plaintiffs claim and evidence is that she dismissed as National Logistics Officer on a charge relating to stock losses and that her exculpatory letter was not accepted and she was consequently summarily dismissed. Her evidence that after appealing she was reinstated on the ground that the charges proffered against her was wrong, was not denied by the Defendant. She further told the court that a new charge was proffered against her and her remuneration was reduced forcing her to resign for that reason.

The Plaintiff was cross examined at length and denied being responsible for the stock variances because whilst she was in charge of the staff in her department, she was not in charge of stocks and that she had minimal knowledge of the computer system called SAP, which managed the stock. The Plaintiffs argument was that she was provided an opportunity to defend herself on the original charge but that the Defendants reference to broken trust was a clear deviation from the original charge.

The Defendants position was that the Plaintiffs dismissal was neither unfair nor discriminatory because the people whom she worked with in her department were equally dismissed. It was further argued that the Defendant complied with the disciplinary procedure.

²³*Swarp Spinning Mills v Sebastian Chileshe and Others S.C.Z. Judgment no 6 of 2002*

²⁴*Chilanga Cement PLC v Kasote Singongo (2009) Z.R. 122*

The record shows that the Notice of Disciplinary Enquiry/Hearing to the Plaintiff was issued pursuant to code M 2b which reads as follows:

“Failing to comply with Site instructions/policies/procedures of the company leading to the loss of company/customer property.”

The Defendant in the said Notice stated that as the manager, the Plaintiff was the custodian of all stock items which entailed keeping proper records of stock movements and ensuring that the physical stock count agreed with the record. It was further alleged that she did not reconcile and resolve stock differences which led to the losses.

In her exculpatory letter the Plaintiff stated that her duties were, namely: to purchase stock and consumption items; ensure goods meet the criteria as ordered; ensure handing over of the stock to regional stores and; maintain used and unused local purchase order books. She also mentioned therein, that she assisted in issues arising in stores and ensured stock takes were conducted every month but that the physical count was done by two individuals and she took the view that none of these duties meant that she was the custodian of stock. She further stated the Financial Analyst requested her to assist with reconciliation of discrepancies arising from stock takes but this was difficult for her to do for she had no knowledge of the SAP. She stated that she carried out her responsibilities in all her different capacities.

The minutes of the meeting show that the Plaintiff accepted that she was responsible for the Stores Department excluding the SAP component. Her testimony in court was to the effect that the two stores controller used to report to her and her exculpatory letter indicated that the two stores controllers carried out the physical count during stock take. In my view, the sum total of

the evidence is that the Plaintiff understood that she was in charge of the stores department with 2 stores controllers under her supervision.

The dispute however, seems to revolve around the extent of the Plaintiffs responsibilities which excluded use of the SAP to which she neither had access nor the operational skills required to operate it. The evidence on record shows that the correct disciplinary procedure was applied and that she appealed against dismissal. The minutes of the said appeal dated 28th April, 2011, are on record and she was reinstated.

The Plaintiff has determinedly argued that the review procedure was not followed. I have considered the discrepancy in the dates with respect to the review hearing and find as a fact that the review procedure was complied with because the minutes show that the Plaintiff was in attendance at the review hearing on 10th June, 2011 about 3 days after being notified of the meeting, meaning that in terms of clause 3.12.1 of the disciplinary code the Plaintiff could have submitted her written submissions vis-à-vis the review.

Learned Counsel for the Plaintiff advanced the alternative argument that demotion and lowering of the Plaintiffs salary was a unilateral variation of the Plaintiffs conditions of service which amounted to constructive dismissal and entitled the Plaintiff to treat it as a breach and repudiation of the contract entitling an employee to a separation/redundancy package. In support of this he cited the cases of **Zambia Oxygen Limited and ZPA v Chisekula and Others**²⁵, **Newton Siulanda and others v Foodcorp Products Limited**²⁶ and **Zambia Revenue Authority v Mwanza and others**²⁷.

The test for constructive dismissal was set out by the Supreme Court in the case of **Kitwe City Council v William Ng'uni**²⁸ when it approved the holding

²⁵Zambia Oxygen Limited and ZPA v Chisekula and Others (2000) Z.R. 28

²⁶Newton Siulanda and others v Foodcorp Products Limited (2002) Z.R. 36

²⁷Zambia Revenue Authority v Mwanza and others (2010) 2 Z.R. 191

²⁸Kitwe City Council v William Ng'uni (2005) Z.R. 57 (S.C.)

in the English case of **Western Excavating Limited v Sharp**²⁹ where it was said that the test must address the following question; *“Did the employer's conduct amount to a breach of contract which entitled the employee to resign?”* In the more recent case of **Chilanga Cement, PLC v Kasote Singogo**³⁰ the Supreme Court stated as follows;

“The notion of constructive dismissal is anchored on the concept that an employer must treat his employee fairly and should not act in a manner that will compel the employee to flee his job”.

The Court discussed the issue at great length and cited the case of **Courtland's Northern Textiles Ltd v Andrew** in which the Employment Appeal Tribunal held as follows;

“An employer must not, without reasonable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee”

The Supreme Court concluded that resignation by an employee on account of an employer's unlawful conduct was a fundamental breach of the contract of employment. In casu, following a disciplinary hearing, the Plaintiff was demoted and her salary adjusted downwards. (I have reviewed the letter and in the same letter the Defendant not only was the Plaintiff demoted but she was also informed that, due to the fact that her position was a lower position, she would not be awarded any salary reviews until positions at this level are at par.)

As earlier stated, the learned Counsel for the Defendants argued that the Defendant at no time breached the contract of employment nor acted in a

²⁹ Western Excavating Limited v Sharp [1978]Q.B. 761

³⁰ Chilanga Cement, Plc v Kasote Singogo (S.C.Z Judgment No. 13 Of 2009).

manner that warranted the Plaintiffs resignation. It was submitted that there was no constructive dismissal because the Plaintiff proceeded to resign even upon being offered reinstatement. It was further submitted that in an employer/employee relationship, where there is no dispute that an employee has committed an offence for which the sanction is dismissal, it was not necessary to observe the rules of natural justice.

According to page 4 of the Minutes dated 1st April, 2011³¹ the Plaintiff was dismissed only because she neglected her responsibility as supervisor of the staff in stores leading to the loss. The evidence shows that physical counting of the stock was conducted by the 2 stores controllers. The stock records were inputted in a computer system called SAP which was a preserve of the Finance department and to which the Plaintiff had limited knowledge. Further, the disciplinary tribunal did not make and comment on the fact that the Plaintiff stated that she had no knowledge of what transpired in the department during the 2 year period of the loss. None of these items were taken into consideration and the decision taken by the Defendant was based purely on the fact that the Plaintiff was the store's manager. As indicated by the Plaintiff, the stock losses could have resulted from many things such as theft, posts or shortages.

It appears to me, and I am quite certain, that the stock losses occurred as a result of things done or not done but quite outside the Plaintiffs responsibility.

In the case of **ZESCO v David Lubasi Muyumbango**³² it was held that *"It is not the function of the Court to interpose itself as an appellate Tribunal within the domestic disciplinary procedures to review what others have done. The duty of the court is to examine if there was the necessary disciplinary power and if it was exercise properly."*

³¹ Plaintiff's Bundle of Documents, P 52

³²ZESCO v David Lubasi Muyumbango, S.C.Z. Judgment No. 7 of 2006

The proper exercise of disciplinary power requires making reasoned decisions and the exercise of that power should only be interfered with where the decisions or conclusions arrived at by a disciplinary tribunal are so manifestly at variance with an employee's conditions of service and the facts of a particular case, that to not interfere would result in a miscarriage of justice.

In casu, the Plaintiff was dismissed after being charged with a disciplinary offence but she appealed and was reinstated. This is what the chairman of the Appeals Committee said during the course of the appeals hearing;

*"it was wrong for the company not to have given you a job description. This does not mean that you should neglect your work.... you broke the trust as you are not innocent. Are you going to go around saying that you have won the case, what message I will be sending out ... The charge is the only thing I can look at that was wrong and as such I will reverse the decision. Having said this, I still have to discipline you. The verdict is that you will be issued with a final written warning and that you will not go back in the same position. The MD will take you out of Finance and your salary will be adjusted accordingly."*³³

The Defendant accepted that the Plaintiff had been wrongly charged and it therefore follows that dismissing her on that charge was wrong and I presume that is why she was reinstated. The Defendant however, felt that she was responsible for some wrong doing which warranted some measure of punishment. The Defendant then informed her that she had neglected her work and broken the trust and proceeded to demote her without referring to any particular clause in her conditions of service.

³³ *Defendants Bundle of Documents, Case Hearing Minutes, p80-81*

In my view, it was within the Defendant's power to transfer her to a department where she could be more effective but interfering with her emoluments was a breach of her conditions of service. After the appeal decision was reviewed the Defendant informed the Plaintiff that it had been decided that her salary would remain the same but would be recast to the effect that part of it would only be paid if key performance indicators were met and that the recasting did not only affect the Plaintiff her as it was new policy introduced by the Defendant. This so called recasting was a unilateral change to the conditions of service by the Defendant and therefore a breach of the employment contract.

In the premises, it is clear that the Defendant breached the Plaintiff's conditions of service and behaved in such a manner that the Plaintiff was forced to either resign or accept the Defendants unilateral reduction of her salary. I therefore find that the Defendant wrongfully dismissed the Plaintiff from employment.

It is trite law that the measure of damages in matters relating to wrongful dismissal is the period of notice to terminate in a particular contract. This principle was reinforced in the case of **Barclays Bank Zambia Plc v Weston Lyuwi** and **Suzgo Ngulube**³⁴ and in delivering the Judgment of the Court, Mwanamwamba J as he then was, went further and stated that the Court should only depart from the normal measure of damages where the circumstances and justice of the case demand. In the case of **Joseph Chintomfwa v Ndola Lime Company Limited**³⁵ after considering the peculiar circumstances of the case, the Court saw it fit to award 24 months' salary as compensatory damages of for loss of employment.

The circumstances of this case are aggravated by the fact that despite finding her not guilty of the offence for which she was charged, the Defendant felt the

³⁴ SCZ/8/260/2011 delivered on 25th May 2015

³⁵ Joseph Chintomfwa v Ndola Lime Company Limited (1999) Z.R. 172

need to impose some measure of punishment on the Plaintiff for what it described as breaking the trust. This was a totally unwarranted action and a blatant exercise of hegemony by the Defendant and for that reason I have decided to depart from the norm of limiting damages to the notice period and I award the following reliefs;

1. The Defendant shall pay the Plaintiff damages equivalent to 24 months of her last salary before the demotion plus interest thereon at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the rate of 6% per annum.

**2. The Costs are awarded to the Plaintiff
Leave to Appeal is granted.**

Dated at Lusaka this 16th day of January, 2017


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**M.M. KONDOLO, SC
JUDGE**