IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 83/2014**

HOLDEN AT KABWE

(Civil Jurisdiction)

B E T W E E N:

JOHN MUMBA **APPELLANT**

AND

MAJORU INVESTMENT LIMITED **RESPONDENT**

Coram: **Mwanamwambwa DCJ, Kaoma, Musonda, J.J.S**

On 1st November 2016 and 28th March 2017

For the Appellant: *In Person*

For the Respondent: *Mr. Sakwiba Sikota, SC of Central Chambers*

J U D G M E N T

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **Lazarous H. Chota V. Patrick Mucheleka Appeal No. 18/2015 SCZ/8/83/2013**
2. **Attorney-General V. Marcus Kampamba Achiume (1983) ZR 1**
3. **Nkhata and 4 others V. Attorney-General (1966) ZR 124 (CA)**
4. **Robson Banda (Suing as administrator of the estate of the late Rosemary Phiri) V. Evaristo Mulenga (Sued as administrator of the estate of the late Steven Kabamba) SCZ No. 16 of 2003**
5. **National Breweries Limited V. Phillip Mwenya (2002) Z.R. 18.**
6. **Zambia National Provident Fund V. Yekwina Mbiniwa Chirwa (1986) Z.R. 70**

Legislation referred to:

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

This is an appeal from the Judgment of the Industrial Relations Court wherein the Appellant's complaint against the Respondent, for wrongful dismissal, was dismissed.

The background to this case is that on the 17th July 2001, the Appellant was employed by the Respondent in the deboning and slaughtering department. He rose through the ranks. In 2009, he was appointed supervisor of the same department. He was dismissed on the 18th April 2011.

The facts leading to his dismissal were that on one afternoon, the Appellant was informed, by his supervisor that a truck load of meat would arrive at about 22:00 hours and that until the truck arrived, he should not knock off. He was also told to mobilize workers for purposes of offloading the meat. The Appellant mobilised the workers accordingly. The workers were going to be paid an overtime allowance in form of beef bones. While waiting for the truck to arrive, the Appellant went to his house which was within the premises of the Respondent Company. The truck arrived at 21:00 hours, earlier than

expected. When the truck arrived, the Appellant was not around. The workers proceeded to offload the meat in the absence of the Appellant. When he went back to the plant, he found that all the workers had knocked off.

The Appellant included his name on the list of people who had worked. He also included the names of two other people who did not work. According to the Appellant, he prepared the list before the work was done. Further, one person worked but he was omitted on the list. Two days later, the person who was omitted from the list complained that he had worked but was not paid his agreed overtime yet someone who did not work was paid overtime. The two people who did not work refused to receive the overtime wages. According to the Appellant, he did not countercheck the list before submitting it. It was discovered that the Appellant got paid despite not working. His supervisor charged him. The charge did not indicate that the Appellant should exculpate himself.

A disciplinary committee meeting was held, which constituted representatives from the Union. The committee recommended that the Appellant should be dismissed. The committee informed the Appellant of his right to appeal and he

appealed to the General Manager. The General Manager upheld the dismissal.

The Appellant then took out a complaint in the Industrial Relations Court claiming the following:

1. An order and declaration that the dismissal was wrongful, illegal, irrational and unfair;
2. Damages or compensation for loss of employment equivalent to (2) or more years, salary and other allowances;
3. General damages for mental trauma, stress, anguish, mental torture, inconvenience, loss and damages occasioned to the complainant herein as a result of the dismissal;
4. Payment of salary arrears from date of dismissal;
5. Reinstatement;
6. A declaration that the complainant be deemed to have been retired or declared redundant;
7. An order for payment of terminal benefits for the period he served the Respondent;
8. Interest; and
9. Any other award the Court may deem fit.

After hearing the matter the Court below was satisfied that the procedure was followed and the Appellant exhausted the appeal procedure. The Appellant argued, in the Court below that although he was not present at work, he could not be held not to have worked because firstly, he organised the employees to remain at work. Secondly, that he worked until after 17:00 hours when he went to his house.

The Respondent on the other hand contended that the Appellant should have been present when the meat was being offloaded and that he should not have accepted payment for overtime because he left the work place.

The court agreed with the Respondent's decision to dismiss the Appellant on grounds that:-

1. when the Appellant left the place of work, he had no permission from his supervisor;
2. He received payment for the entire period of overtime as though he had worked for the whole period;
3. When he authored the list of employees who worked overtime, he did not verify it to ascertain whether or not all the people whose names were on that list were entitled to overtime payment. As a result of this failure to verify the list by the Complainant, the list contained two names of people who did not work and omitted one name of a person who worked;
4. The Court was satisfied that the procedure leading to the dismissal was followed. That he appeared before the disciplinary committee attended by a representative from

the union and was accorded an opportunity to appeal which he did but lost the appeal; and

5. Lastly that the offence was dismissible.

The lower Court stated that an employee who commits a dismissible offence cannot ask to be retired or declared redundant as the Appellant had requested. That this is because dismissal arises from a breach of duty of care at one's place of work. It is not synonymous with redundancy or retirement. The court found that the Appellant had failed to prove his case.

The Appellant appealed against the above decision by the Industrial Relations Court. There are four grounds of appeal. These are:-

Ground one

> **The learned trial Judge and the honourable Members erred in fact and misdirected themselves when they neglected to consider the fact that the Appellant was informed very late in the afternoon at or around 17:00 hours when the Appellant was about to knock off by the Respondent that, a truck load of meat would arrive late at 22:00 hours and that the Appellant was to mobilize workers to off load the meat when the truck arrived.**

Ground two

The learned trial Judge and the Honourable members misdirected themselves and erred in fact when they found for a fact that the Appellant was instructed not to knock off until the truck arrived at 22:00 hours by the Respondent, when in fact no such argument or evidence was brought by the Respondent at the trial or at all.

Ground three

The learned trial Judge and honourable members misdirected themselves and erred in fact when they found for a fact that the list of names of workers who were mobilized by the Appellant was prepared and presented to the Respondent the following day, after the assignment was completed, when in fact all the evidence from the Appellant and the Respondent was that the list on which the alleged dishonest conduct was couched was prepared, presented and handed to the Respondent on the same day that assignment was given to the Appellant and only after he had contacted everyone on the said list.

Ground four

The learned trial Judge and honourable members erred in fact and misdirected themselves when they found that the Appellant was not entitled to overtime payment, when in fact he was, as he had worked beyond his normal working hours, mobilizing workers to off load the meat off the truck when it was to arrive at 22:00 hours, checking on them from time to time until the meat was offloaded off the truck, when it

arrived earlier than expected to no loss, damage or disadvantage or at all to the Respondent.

We shall deal with all the 4 grounds of appeal together, because they are interrelated.

In ground one of the appeal, the Appellant argued that the failure by the lower Court to consider the time at which the Appellant was given the assignment of mobilizing the workers to offload the meat off the truck which was to arrive late was unjust and unfair on the Appellant, as it went against **section 85(5) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.**

He stated that he was given the assignment to mobilise the workers a few minutes before 17 hours. That at that time, a number of workers had knocked off and he needed to contact them. That those who confirmed availability were put on a list which was given to the supervisor the very day. That the lower Court failed to appreciate this fact that the workers on the list had already confirmed availability and that the task of mobilizing the workers was done after 17:00 hours.

Mr Sikota filed heads of argument on behalf of the Respondent. He submitted, on this ground, that an appellate

Court, which has not had the advantage of seeing and hearing the witnesses, will not interfere with the findings of fact made by the trial Judge, unless it is clearly shown that he has fallen into error. He relied on **Lazarous H. Chota V. Patrick Mucheleka**[1] **and Attorney-General V. Marcus Kampamba Achiume** [2] to support his argument.

Counsel stated that the Appellants argument that the Court did not consider the time at which the Appellant was given the assignment is not tenable, as it was clearly given to him within the working hours. That even assuming the assignment was given to the Appellant after hours, there is a finding that the Appellant was in fact paid overtime allowance for the task which he did not perform. Mr Sikota added that there is no evidence from the Judgment or proceedings in the Court below that the Appellant raised the issue that the assignment was given to him outside working hours. Therefore, the Appellant was canvassing an issue that was not raised in the Court below.

In ground two, the Appellant submitted that the initial charge sheet that was prepared by the Appellant's supervisor did not have any allegation that the Appellant was instructed not to knock off. The Appellant stated that only his supervisor would

know if he had permission to leave. That, therefore, the fact that this issue was not included on the charge sheet shows that the issue of knocking off early was not an issue at all. That he was exercising his supervisory role through constant check-ups on the subordinate employees using his mobile phone.

Mr Sikota responded that it is not in dispute that the Appellant knocked off without permission. That the charge was also clear in that it gave the particulars of the offence as **"to work in the night and help offload beef carcasses from the truck that arrived at 21:00 hours."** That therefore, the argument by the Appellant that it is only his supervisor who could tell the Court whether the Appellant had permission to knock off is untenable because the Appellant himself admitted that he was not given permission to knock off except to argue that going home to rest of his own volition was not knocking off.

In ground three, the Appellant argued that the court erred when it held that the list of workers was handed over the following day, instead of recording that it was handed over the very day the work was done.

On behalf of the Respondent, Mr Sikota submitted that the Appellant could have corrected the information the next day before the list was acted upon. That it is clear that the Appellant took no steps to correct the information and that he was only exposed when two employees confessed that they had not been on duty on the material night. Therefore, the court below was on firm ground in finding that the Appellant dishonestly defrauded the Respondent.

In reply to the Respondent's arguments, the Appellant urged this Court not to entertain the "confession" attributed to the two employees who are said to have confessed because they did not testify anywhere.

In ground four, the Appellant submitted that the finding of the lower Court that he was not entitled to overtime was a misdirection and an injustice because he had worked beyond the normal working hours, as he was mobilizing the workers and continued to supervise them via mobile phones from time to time.

The Appellant invited this Court to overturn the findings of fact made by the lower Court as the lower Court neglected to consider some of the evidence. He cited **Nkhata and 4 others V.**

Attorney-General[3] and **Robson Banda (Suing as administrator of the estate of the late Rosemary Phiri) V. Evaristo Mulenga (Sued as administrator of the estate of the late Steven Kabamba)** [4] to support his argument.

In responding to the above arguments, Mr Sikota stated that the fact that the Appellant endorsed the names of two employees on the overtime claim, who had not worked and omitted the name of one employee who had worked, vindicates the findings made by the lower Court. That it also showed that the Appellant had no clue as to who worked and who did not.

We have looked at the evidence on record, the authorities cited and considered the submissions by both parties.

In ground one of the appeal, the Appellant alleges that the lower Court breached section 85 of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia. We agree with the argument by the Appellant that the major objective of the Industrial Relations Court is substantial justice and it is not bound by rules of evidence or procedures. We wish to stress that substantial justice and applies to both a complainant and a respondent in every case. It is not meant for a complainant only.

We do not see how this objective was breached by the Court below as suggested by the Appellant. The Appellant was instructed to mobilize employees to offload a truckload of meat that was due to arrive at 22:00 hours. It was agreed that the Appellant should supervise the offloading. It was also agreed that the employees, including the Appellant, would be paid overtime for the work. The Appellant went home after 17:00 hours and was not present to supervise the offloading of the meat from the truck which arrived earlier than scheduled. He still went ahead and included himself on the list of those who had worked and received the overtime payment. With the above facts, we do not see how being told that the truck would arrive at 21:00 hours instead of 22:00 hours or being given the instructions just before or slightly after 17:00 hours, changes anything. The fact remains that the Appellant was given that instruction which he begun to carry out by mobilizing the other employees. But he was not there to supervise the offloading. The fact also remains that he received payment which he ought not to have received. This shows dishonest conduct for which the Appellant was dismissed.

In addition, the Appellant stated the following in his evidence:

> **"I was supposed to be counselled as opposed to dismissal. I was wrong but the punishment was too severe. The disciplinary committee should have sat me down to help me change unless or until they fail. This was the first breach. I was not warned. Not even a verbal warning..."**

After saying the above, we do no blame the trial Court for making the findings it made. Even assuming that the Appellant was given the instructions a few minutes before 17:00 hours and that the truck would arrive at 22:00 hours instead of 21:00 hours, the above evidence clearly shows an admission to wrong doing by the Appellant.

Further, it is not in dispute that the list prepared by the Appellant included two people who did not work and omitted the name of one person who worked. The argument by the Appellant was that he prepared the list before he left and that is why some people who did not work were on the list. However, if indeed the Appellant intended to tell the truth, he could have, at the earliest opportunity and before payment, informed the supervisor that two of the people on the list did not work and should be removed together with himself from the list. This is because the overtime

payment was not paid the same day the work was done. In the case of the Appellant, he claimed overtime of having worked up to 22:00 hours. This was not true. The Appellant himself stated that he had gone home hoping to return at 22:00 hours to supervise the offloading of the truck but when he returned, he found that the work had been done.

The Appellant in his submissions also argued that he was monitoring the workers through mobile phone. If indeed he was doing so, he would have known who worked and who did not work. The fact that the list had errors just shows that he did not supervise the workers, either physically or by mobile phone.

Further, the evidence on record shows that the Appellant was guilty of dishonest conduct by including himself on the list of people who had worked from 17:00 hours up to 22:00 hours, when in fact he did not work. He received overtime payment like the other workers when he did not work up to 22:00 hours. This Court has pronounced itself on numerous occasions that where an employee has committed an offence, the dismissal that may arise from the commission of that offence is good despite procedure not having being followed. **See:**

1. **National Breweries Limited V. Phillip Mwenya** [5].
2. **Zambia National Provident Fund V. Yekwina Mbiniwa Chirwa** [6]

Notwithstanding what we have said above, we note that this Appeal is challenging the lower court's findings of fact. The law is well settled that a party to an appeal from the Industrial Relations Court can only appeal on points of law or on points of mixed law and fact. A person cannot appeal on facts alone: **See Section 97 of the Industrial Relations Act, Cap 269 of the laws of Zambia**.

For the reasons we have given above, we uphold the decision of the lower Court and dismiss this appeal for lack of merit.

We order that each party bears its own costs.

M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

R.M.C KAOMA
SUPREME COURT JUDGE

M.C MUSONDA
SUPREME COURT JUDGE