IN THE HIGH COURT FOR ZAMBIA 2012/HK/248

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

ENOCK SAMETA 1ST PLAINTIFF

MATHEWS MPHARO 2ND PLAINTIFF

AND

MOPANI COPPER MINES PLC DEFENDANT

Before; Hon. Mrs. Justice C. B. Maka-Phiri on 1st June, 2017

For the Plaintiff: Mr. C. Kaela of Messrs GM Legal Practitioners

For the Defendant: Mr. A. Gondwe, Senior Legal Officer

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# J U D G M E N T

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Legislation referred to:

1. The Employment Act Cap. 268 of the Laws of Zambia

Works Referred to:

1. W. S. Mwenda, Employment Law in Zambia: Cases and Materials (Lusaka, University of Zambia Press, 2004).

Cases referred to:

1. Zambia Airways Corporation Ltd v Gershom Mubanga B. B. (1992) S.J. 24 S.C
2. Barclays Bank PLC. v Zambia Union of Financial Institutions and Allied Workers (2007) Z. R. 106.
3. The Attorney General v Richard Jackson Phiri (1988/89) Z. R. 121.
4. The Attorney General v John Tembo (2012) Z. R. 1 vol. 1.

This matter was commenced by way of writ of summons on 24th May, 2012. The claims were as follows;

a. *In respect of the 1st plaintiff claims*
   i) *Dues from pension scheme*
   ii) *ZCCM trust fund $6,562.16(ZMK equivalent)*
   iii) *Accrued leave days*
   iv) *Damages for wrongful termination of employment.*
b. *In respect of the 2nd plaintiff claims*
   i) *Damages for wrongful termination of employment*
   ii) *Interest on awards above.*
   iii) *Legal costs.*

The 1st plaintiff, Enock Sameta, discontinued his claims against the defendant leaving the 2nd plaintiff as the only party to this action. The 2nd plaintiff is herein referred to as plaintiff.

**Plaintiff's case**

The plaintiff, Mathews Mpharo, testified that he was employed by the defendant as Foreman- Electrical from 1997 to 2007 when he was dismissed. The events that led to his dismissal started in March 2007 when he procured two **Newelec Motor Protection Monitors,** CT ration: 500:1. Soon after making the requisition he proceeded on sick leave having been involved in an accident. The two **Newelec Motor Protection Monitors** that he had ordered were delivered to the defendant company whilst he was on leave and were received by Enock Sameta who kept them in a container. The

Receiving Report for the two **Newelec Motor Protection Monitors** was shown at page 61 in the defendant's bundle of document.

When the plaintiff reported back for work, he inquired about the two **Newelec Motor Protection Monitors** that he had requisitioned prior to his sick leave and Enock Sameta, the custodian of the key to the container showed him the items. Upon seeing the items, PW1 confirmed that the supplied items were the correct spares and the container was locked.

On 18th June 2007, Mopani security summoned the plaintiff and showed him a **Newelec Motor Protection Monitor** which item was said to be missing from stores. Mopani Security then handed over the plaintiff to his immediate supervisor, the Sectional Engineer Electrical, by the name of James Saidi.

On 19th June,2007, the plaintiff's supervisor, Mr. James Saidi wrote to the plaintiff asking him to show cause within two working days from 19th June,2007 to 20th June 2007 why the charges of Failing to Account for Company Property should not be laid against him. The letter dated 19th June, 2007 is shown at pages 46-47 of the defendant's bundle of document. The plaintiff wrote an exculpatory letter on the same day wherein he gave a detailed explanation as to why he should not be charged. The plaintiff's exculpatory letter is shown at pages 44 – 45 of the defendant's bundle of documents. It was the plaintiff's testimony that his supervisor was not satisfied with his exculpatory letter and as such he proceeded to charge him for Failing to Account for Company

Property. The charge letter dated 19th June, 2007 is shown at page 48 of the defendants bundle of documents which the plaintiff acknowledged receipt. It was the plaintiff's evidence that just upon being charged; one Ben Mumba (DW1) verbally informed him that he was summarily dismissed without conducting a formal case hearing. The plaintiff testified that he was handed over to the police on 20th June, 2007 where he was subsequently arrested and was taken to court on a charge of Theft by Servant. The plaintiff was later acquitted. The plaintiff denied receiving the letter of dismissal dated 19th June, 2007 and shown at page 49 of the defendant's bundle of document.

The plaintiff explained that he also requested for one Electronic Overload Relay, CT ration 500:1 which is a different item from the Newelec Motor Protection Monitor. The Receiving Report dated 18th June 2007 for the Electronic Overload Relay, CT ration 500:1 is shown at page 62 of the defendant's bundle of documents. He further explained that he never went back to the container to collect the two Newelec Motor Protection Monitor as he was yet to plan for their use.

When cross examined, the plaintiff testified that there was urgent need for one Newelec Motor Protection Monitor, while one was to be kept as a spare. PW1 conceded that according to clause 2.9 of the Disciplinary Code, once the matter was in court, no disciplinary action was to take place. PW1 insisted that there was no formal

case hearing as he was just told that he had been fired. He admitted that he did not appeal against his dismissal.

**The Defendant's case**

DW1, Benjamin Mumba, is the Senior Employee Relations Advisor (SERA) at the defendant mining firm. His evidence was that on 19th June, 2007, he received a charge letter against the plaintiff and Enock Sameta from the Sectional Engineer Electrical, Mr. James Saidi who was the supervisor to both. He also received an exculpatory letter from the plaintiff. DW1 testified that he arranged for a case hearing and it took place on the same day around 15:00 hours. The hearing was administered by Mr. Emmanuel Lukamba, the Sectional Engineer and the plaintiff was in attendance. According to DW1, the plaintiff was given an opportunity to explain what had transpired after the charge was explained to him by the administering official but he was found guilty of the charge and was summarily dismissed. Thereafter, the summary dismissal letter shown at page 49 of the defendant's bundle of documents was written and signed by the administering official. DW1 told the court that the plaintiff did not appeal against his dismissal. DW1 confirmed that according to section 3.3. (f) of the disciplinary code, the penalty for the charge of Failing to Account for Company Property is summary dismissal. DW1 concluded by stating that the procedure as contained in the disciplinary code was followed in dealing with the plaintiff's case.

When cross examined, DW1 admitted that he was not aware of the date when the security department recorded a written statement from the plaintiff. DW1 was however familiar with the statement that the plaintiff gave the security shown at pages 36 - 39 of the defendant's bundle of documents. The statement is dated 18th July, 2007. DW1 was further aware that Mopani had reported the matter to the police but he did not know the date on which the report was made.

DW1 admitted that when he received the plaintiff's charge letter on 19th June, 2015, he never carried out further investigations as he simply arranged for a case hearing which took place around 15:00 hours. DW1 conceded that there were no Minutes before court of the said case hearing but explained that not all disciplinary case hearing were Minuted though in the plaintiff's case, the Minutes were recorded. When referred to the report prepared by the security department on the case and dated 28th August, 2007, DW1 told the court that there was no need to wait for the report because there was evidence to support the charge.

DW1 further conceded that according to clause 2.9.1 of the Disciplinary Code, once a matter was in court, all disciplinary proceedings against the employee are stopped. DW1 was however not aware of when the plaintiff was charged and taken to court. DW1 further confirmed that according to the Certificate of Acquittal shown at page 15 of the plaintiff's bundle of document, the date of the charge is 18th June, 2007. DW1 insisted that the plaintiff

attended the case hearing and received his letter of dismissal though there was no proof of acknowledgement of receipt.

In re-examination, DW1 testified that the plaintiff was given an opportunity to respond to the charge letter and he wrote an exculpatory letter. DW1 further told the court that there was no strict requirement that Minutes for every case hearing must be recorded. According to DW1, it was during the appeal stage that Minutes are taken. Further that the report from the security department was not part of the dossier that was submitted to his office for the disciplinary case hearing. DW1 further explained that the practice at the defendant firm was that if a criminal offence was alleged to have been committed, the disciplinary case hearing will be conducted and thereafter security will determine whether or not to take the case to court. That in this case the disciplinary proceedings were not halted because at that time, there was no mention that the matter will be taken to court. DW1 reiterated that if the plaintiff was not satisfied with the summary dismissal, he was supposed to appeal which he never did.

DW2, Emmanuel Lukamba, was the Sectional Mechanical Engineer, at the defendant mining firm. He testified that the plaintiff was taken before him by the Senior Employee Relations Advisor, Mr. Benjamin Mumba (DW1) for a case hearing on a charge of Failing to Account for Company Property. He was also given a file comprising of the plaintiffs charge letter, the plaintiff's exculpatory letter, a letter from plaintiffs co-accused and a letter from the Mine Police.

DW2 looked at the documents that were presented to him and observed that there were conflicting statements by the plaintiff and his co-accused, Enock Sameta. DW2 testified that he did not meet the plaintiff but made a decision to dismiss him and advised him to appeal. According to DW2, he decided to dismiss the plaintiff because he had no power to dismiss the case because of its gravity and that looking at the conflicting statements; he was convinced that the plaintiff had committed the offence.

When cross examined, DW2 admitted that he came up with the decision to summarily dismiss the plaintiff just by looking at his file. DW2 however in a contradictory manner told the court that the plaintiff was present before him and that his earlier answer was because he did not understand the context in which he was asked whether he had met the plaintiff. DW2 could however not remember calling the plaintiff for the case hearing, he could also not remember whether the hearing took place in the morning or afternoon and that in fact it was not his duty to call the charged officer for the hearing. It was DW2's further evidence that according to the procedure followed at Mopani in dealing with disciplinary issues, the plaintiff was not to be called.

In re-examination, DW2 testified that the plaintiff was called to the disciplinary hearing by the SERA. That as an administering official it was not his duty to call any officer who was scheduled to appear before him. DW2 testified that in fact a case hearing did take place and present were himself, the plaintiff and SERA (DW1).

DW3, James Saidi, was the Sectional Engineer Electrical at the defendant's mining firm. He was also the immediate supervisor to the plaintiff. He testified that in 2007, he received a report from the Security Department that a **Newelec Electronic Relay for Monitor Protection** that was previously supplied to the defendant had been intercepted. DW3 inspected the item and identified it as belonging to his section. He also inspected the stock items in the buffet store and found that one relay was not accounted for. DW3 then asked the plaintiff to show cause why he should not be charged of Failing to Account for Company Property and he failed to do so. According to DW3, one **Relay spare** went missing from the buffet stock and coincidentally the plaintiff initiated a request to buy another **Relay**. This was not withstanding that there was another spare in the buffet store. Consequently the security suspected that the plaintiff could have removed that Relay from stock and given the supplier because it was earlier supplied to Mopani. DW3 testified that he was not satisfied with the plaintiff's exculpatory letter and he formally charged him with a case of Failing to Account for Company Property and thereafter forwarded the charge letter to the SERA (DW1) who proceeded with a case hearing. He was later informed that the plaintiff was dismissed.

When cross examined, DW3 testified that the plaintiff did not give an explanation as to why he did not notice that the item was missing in stock. DW3 further confirmed that the container where the items were stored was under the custody of the Materials

Coordinator who did not technically know what was in stock. DW3 further told the court that the description of the item on page 61 and the one on page 62 of the defendant's bundle of documents was the same. He explained that the only difference was the abbreviation used to describe the items. He insisted that the two items were one and the same thing and physically what was supplied was the same.

In re-examination, DW3 insisted that the items that the plaintiff ordered and which was delivered on 18th June, 2007 was the Relay, being the same item that he had ordered in March, 2007. Further that the plaintiff was charged for failing to account for what was missing in stock and for making a request of an item which was in stock. According to DW3, the request was in bad faith.

**Plaintiff's submissions**

On the law pertaining to wrongful dismissal, Counsel for the plaintiff quoted W.S. Mwenda in her revised edition on Employment Law in Zambia, cases and materials 2011, page 105 which states that;

**"Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether the dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was affected."**

The plaintiff cited the case of **Zambia Airways Corporation Ltd v Gershom Mubanga**[1], where the Supreme Court held that:

**"Since the appellant (employer) failed to comply with the correct procedure in the purported dismissal of the respondent(employee) the dismissal was wrongful."**

The plaintiff also relied on section 26A of the Employment Act which enacts that;

**"An employer shall not terminate the employment of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him."**

Suffice to note that section 26A is found in Part IV of the Employment Act under the heading "oral contracts of service". It goes without saying that the section only applies to oral contracts and not those serving written contracts such as the plaintiff. See case of **Barclays Bank PLC. v Zambia Union of Financial Institutions and Allied Workers**[2]

On the law on unfair dismissal, counsel cited W.S. Mwenda (supra) at page 105 where she states that,

**"Unlike wrongful dismissal, which looks at the form, unfair dismissal looks at the merit of the dismissal and the form is only supportive of the whole merit of the dismissal. In other words, under unfair dismissal, the courts will look at the reasons for the dismissal to determine whether the dismissal was justified or not."**

The plaintiff further relied on the case of **Attorney General v Richard Jackson Phiri**[3] where it was held that **"Once the correct procedures have been followed the only question which can arise for consideration of the court, based on the facts of the case,would be whether there were facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of that fact to support the same."**

Counsel contended that the plaintiff was not given an opportunity to be heard which was contrary to clause 2.6.2 of the defendants Disciplinary Code and Grievance Procedure shown at page 73 of the defendants bundle of documents. The clause reads as follows;

**"the official concerned will whenever possible hear the case within two working days of completion of investigations".**

It should be noted that though the plaintiff's counsel made submission on unfair dismissal, the plaintiff as can be seen from the endorsement on the writ of summons did not plead unfair dismissal.

**Findings of Facts**

I have considered the evidence adduced by both parties and the plaintiff's submissions. I find the following as facts of this case.

1. The plaintiff was employed by the defendant as Foreman – Electrical in the Concentrator Department in 2000.
2. The plaintiff requisitioned for two **Newelec Motor Protection Monitors** CT ration, 500:1 Aux-volts 110 AC in March, 2007 prior to his sick leave. The two **Newelec Motor Protection Monitors** where received by Enock Sameta on 28th March, 2007

whilst the plaintiff was on sick leave. The Receiving Report is shown at page 61 of the defendant's bundle of document.

3. The two **Newelec Motor Protection Monitors** were kept in a container and when the plaintiff reported for work, he was shown the two items. The keys to the container were kept by Enock Sameta and the Materials Co-ordinator one Alex Bulawayo.
4. On unknown date but in June, 2007, the plaintiff requisitioned for an **Electronic overload CT 500/1** and it was delivered on 18th June, 2007. Though the plaintiff made frantic attempts to distinguish the Electronic overload CT 500:1 from the **Newelec Motor Protection Monitor CT** ration 500:1 Volts 110 AC, the evidence has established that they are one and the same equipment. DW3, the plaintiff's immediate supervisor clearly explained that the Newelec Motor Protection Monitor CT ration 500:1 and the Electronic overload CT 500:1 was one and the same item. This explains why despite the plaintiff describing the equipment as Electronic OverLoad CT 500/1 what was delivered on 18th June 2007 was a Newelec Motor Protection Monitor CT ratio 500:1. I am satisfied that the delivery of a Newelec Motor Protection Monitor CT ratio 500:1 on 18th June 2007 was in response to the requisition that the plaintiff had earlier made in the month. This is evident by document shown at page 62 of the defendant's bundle of document, the Receiving Report, which clearly shows that it was for the attention of the plaintiff.
5. The Electronic overload CT 500/1 and or the Newelec Motor Protection Monitor CT Ration 500 1 that was received by the

defendant was in fact a re-supply. The item had earlier been supplied to the defendant company and was marked with Mopani Austguard markings which enabled the security officers to identify the item when it was being delivered on 18th June, 2007.

6. The security notified DW3, James Saidi, the plaintiff's supervisor about the item that they had intercepted. DW3 inspected the item and confirmed that it belonged to his section. This was on 18th June, 2007.
7. On 19th June, 2007, DW3, James Saidi wrote an exculpatory letter to the plaintiff asking him to show cause within two working days from 19th June, 2007 to 20th June, 2007 why the charge of Failing to Account for Company Property should not be preferred on him.
8. The plaintiff responded to DW3's letter in his exculpatory letter dated the 19th June, 2007.
9. On the same day, the 19th June, 2007, DW3 James Saidi formally charged the plaintiff for Failing to Account for Company Property being a Newelec Motor Protection Monitor CT Ratio 500 – 1. In the letter the plaintiff was notified that the SERA would proceed to arrange for his formal case hearing.
10. On the same day, the 19th June, 2007 at around 15:00 hours the SERA took additional statement from the plaintiff. See pages 40 - 43 of the defendant's bundle of documents
11. On the same day, the 19th June, 2007, the plaintiff was summarily dismissed from employment. The plaintiff was notified in the dismissal letter of his right of appeal against the

decision within two working days from 20th June, 2007 - 21st June, 2007.

12. The plaintiff was charged with a criminal offence of Theft by Servant and he was acquitted. The plaintiff's assertion is that he was charged on 18th June, 2007 and he relies on the Certificate of Acquittal shown at page 15 of the plaintiffs of documents. It is my finding of fact however that the plaintiff was not charged on 18th June, 2007. This is because according to his own testimony, he was handed over to the police on 20th June 2007. This was after he was given the dismissal letter. The plaintiff's reliance on the Certificate of Acquittal to ascertain the date that he first appeared in court is therefore misleading. The most appropriate document in my considered view would have been the charge sheet itself which could have shown when the plaintiff first appeared in court and took plea.

**Issues for determination**

The issues for determination following my findings of fact are as follows;

1. Whether or not the plaintiff attended a formal case hearing on the charge of Failing to Account for Company Property.
2. Whether the plaintiff's termination of employment was wrongful.

**The law**

**Wrongful dismissal**

Wrongful termination of employment is synonymous with wrongful dismissal. It is a settled principle of law that a claim for wrongful

dismissal is in essence a claim for a Breach of Contract of employment. The onus on the plaintiff in a claim for wrongful dismissal is to prove that his terms and conditions of service as contained in the contract of employment which includes the Disciplinary Code and Grievance Procedure was breached by the employer when his employment was terminated. The plaintiff must show that the defendant did not follow the Disciplinary Code and as such faulted the procedure in effecting the termination. I therefore entirely agree with the plaintiff's submissions quoting the learned Author W.S Mwenda that

**"Wrongful dismissal is one at the instance of the employer that is contrary to the terms of employment. When considering whether the dismissal is wrongful or not, the form rather than the merits of the dismissal must be examined. The question is not why but how the dismissal was affected."**

**Unfair dismissal**

Unfair dismissal refers to when employment is terminated by means of unfair labour practices by the employer. Unfair dismissal looks at the merit of the dismissal and as such the court will look at the reasons for the dismissal to determine whether the dismissal was justified or not. I again agree in total with what the learned author W.S Mwenda had to say on this subject.

As stated earlier in my Judgment though the plaintiff adduced evidence touching on the merit of his termination of employment, the claim for unfair dismissal was not pleaded. I have thereof no

basis upon which to determine the question of whether or not the termination was unfair.

**Application of the law to the facts**

In the case in casu, the findings of fact clearly show that the plaintiff was charged for the offence of Failing to Account for Company Property contrary to clause 3.3 (f) of the Disciplinary Code and Grievance Procedure. The plaintiff was charged by DW1, James Saidi, being the immediate supervisor and the proper officer in that regard. The plaintiff was given chance or opportunity to exculpate himself prior to the formal charge as evidenced by his exculpatory letter. Up until this time everything was okay in terms of procedure.

The controversy is on whether or not the plaintiff was heard by a Disciplinary Committee properly constituted and with the necessary powers to conduct a case hearing. The plaintiff' contention is that the case hearing was never conducted and as such he was not heard. The defendant's contention on the other hand is that a case hearing was held on the 19th June, 2007 being the same date that the plaintiff was formally charged.

The defendant's evidence was contradictory on the issue of whether or not a case hearing was conducted. DW1, the SERA, insisted that a case hearing was conducted and Minutes were taken but were not available before court. DW2, the purported administering officer on the other hand told the court that the case hearing was not conducted. That he in fact just looked at the documents and made a decision to dismiss the plaintiff. It should be noted that there was

an attempt by DW2 to concoct a lie that the hearing was in fact held at which DW1, the plaintiff and himself were present. This however failed as he had clearly testified that no hearing was held.

I am therefore satisfied that no case hearing was held which was contrary to clause 2.6 of the disciplinary code. This explains why there were no Minutes for such case hearing before Court. DW1 did not given any explanation as to why the Minutes were not before court if at all they were recorded. His explanation that it was not in every case hearing that Minutes are recorded is unacceptable. Good labour practices require that the full proceedings of a disciplinary hearing must be recorded in writing in Minutes. I must state that it is appalling for DW1, the officer tasked to fairly deal with the affairs of employees could come before court and tell a lie that a hearing was held when in fact no such hearing was held. I find DW1 to be an untruthful witness whose conduct in this matter leaves much to be desired as he acted in blatant disregard of the disciplinary code and the rules of natural justice which includes the plaintiff's right to a fair hearing.

It should be noted as a matter of emphasis that even if a case hearing was held as claimed by DW1 and in the circumstances as shown by the facts of this case, it would still have been found to be procedurally unfair. This is on account that the plaintiff would not have been given sufficient time to prepare for his case. It should be noted that it is an employee's right to prepare for a disciplinary case and I do not see how that would have been possible in view of the

fact that the whole disciplinary process was effected in one day. DW1 failed to give a satisfactory answer when asked how possible it was that his office took additional statements from the plaintiff at 15:06 hours and for the hearing to take place within the same hour.

It is clear that the Employee Relations Department did not conduct any investigations in the plaintiff's case which conduct was contrary to clause 2.5 of the Disciplinary code. The code allows a maximum of four working days for the department to investigate a case and once investigations are done, the administering officer will hear the case within two working days. I am aware that these provisions are not couched in mandatory terms and as such the time frame given can be reduced. I am also aware that one of the basic principles of the disciplinary code is that disciplinary action should be prompt, firm and fair. To however do the entire disciplinary process within a day can not guarantee a fair hearing on the part of the employee due to insufficient time to make preparations. It is my considered view that it would be grossly unfair to have the disciplinary hearing take place within a few hours after the employee has been informed of the charges against him or her. This is because the employee will not been given enough opportunity to prepare and understand the charges. The right to be heard entails that fair procedure must be applied.

With the foregoing, it is my considered view that the plaintiff was not heard on the charge of failing to account for company property because no case hearing was conducted and if it was, it was

procedurally unfair to be sustained. On this basis, I am satisfied that the plaintiff's termination of employment was wrongful as it was in breach of clause 2.6 of the disciplinary code. The plaintiff is therefore entitled to an award of damages.

**Award of damages**

The facts in this case show that there was abrupt loss of employment on the part of the plaintiff. The plaintiff was not heard and was not given time to prepare for the adverse decision that was likely to befall him. My considered view is that the plaintiff was treated in a harsh manner with blatant disregard of his conditions of service and the rules of natural justice. It is the responsibility of the court to protect employees who are in a weaker position from powerful supervisors in large corporations as the defendant who might be tempted to use their position to the detriment of employees. With the foregoing, I hereby award the plaintiff 24 months' salary plus prerequisites as damages for wrongful dismissal. In making this award I am alive to the fact that at the time of hearing, the plaintiff was in employment at Barrick Lumawana. I am also guided by the case of **The Attorney General vs. John Tembo**[4] where the Supreme Court upheld an award of 24 months' salary with all the prerequisites as damages upon confirming the lower court's decision that the dismissal was wrongful as there was blatant disregard of the respondent's conditions of service and the rules of natural justice.

The damages shall attract interest at short term deposit rate from date of writ to date of judgment and thereafter at the current Bank of Zambia lending rate until full settlement. Costs are for the plaintiff in any event to be taxed in default of agreement.

Leave to appeal granted.

Delivered at Kitwe; this 1st day of June, 2017.

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**C. B. Maka-Phiri (Mrs.)**
**Judge**