J. T

IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.20/2017**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

DAVID ROSS **APPELLANT**

AND

G4 SECURITY SOLUTIONS ZAMBIA LIMITED **RESPONDENT**

Coram: **C.K Makungu, J. Chashi, D.L.Y. Sichinga J.J.A**
On 9th June, 2017 and 28th September, 2017.

For the Appellant: Ms. J. Mutemi, Theotis Mataka and Sampa Legal Practitioners
For the Respondent: Mr. J. Kabwe, Mwenye and Mwitwa Advocates

---

JUDGMENT

C.K. MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Mopani Copper Mines Plc v Moffat Banda - Appeal No. 88 of 2014*
2. *Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba (2008) ZR 287 Vol 1*
3. *Barclays Bank Zambia Limited v Mando Chola & Ignatius Mubanga (1997) S.J 35 (SC)*

4. *Zambia Consolidated Copper Mines v James Matale (1995-1997) Z.R 145*
5. *Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2008) ZR 22*
6. *Bank of Zambia v Peter Kambaniya SCZ Appeal No. 87 of 1997*
7. *Whitbread & Co plc v Mills (1988) 1 CR 776*
8. *Zambia Radiological & Imaging Co. Ltd and Others v Development Bank of Zambia - Appeal No.28 of 2016*
9. *Attorney General v Marcus Kampumba Achiume (1983) ZR 1*
10. *Zulu v Avondale Housing Project Ltd (1981) ZR 172*
11. *The Attorney General v Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)*

Legislation referred to:

1. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia – Sections 97, 108*

Other authorities referred to:

1. *Halsbury's Laws of England, 4th edition, volume 1 (1) paragraph 94*
2. *Employment Law in Zambia by Marjorie Mwenda (2004) Unza press; Lusaka – pages 48 and 68*

This is an appeal against a Judgment of the Industrial Relations Court delivered on 12th August, 2016. The material facts are that the appellant was employed on 17th January, 2009 as Director - Cash Solutions by the respondent Company. On 11th November,

2011, he was charged with falsifying information contrary to Section E(5) (a) of the respondent's Disciplinary Code which he denied in writing on 12th December, 2011. Consequently, a hearing was held and he was dismissed from employment on 24th December, 2011. He appealed on 6th January, 2012 and his appeal was upheld by the respondent's Human Resource Director. Later, the respondent issued fresh charges of *'making a false report either verbally or in writing pursuant to section E (4) of the respondent's Disciplinary Code.'* He denied the charges on the ground that he had already been subjected to a disciplinary hearing. The second hearing took place in his absence on 21st February, 2012. The appellant had through his advocates refused to attend the hearing because as far as he was concerned, he had been cleared. The respondent issued him with a second dismissal letter on 21st February, 2012. He appealed in accordance with the Grievance Procedure Code. On 7th August, 2012 his appeal was dismissed. In the Lower Court, the appellant claimed the following reliefs:

i. *A declaration that his dismissal was unlawful and unfair since it was not done in accordance with the respondent's disciplinary code.*
ii. *A declaration that the dismissal was done contrary to the rules of natural justice.*
iii. *Damages for unlawful and unfair dismissal.*
iv. *Interest and*
v. *Costs.*

In his judgment, the learned trial judge found that due process was followed and there was no violation of the appellant's terms and conditions of employment. The lower court was of the view that the respondent exercised its disciplinary powers against the appellant properly in the sense that there were facts established to support the disciplinary measures taken against him and this was as a result of the failure on his part as Head of the Cash Solutions to ensure that the security of the branch was maintained to the expected standards of the respondent. The Court further found that the appellant conducted himself in a manner inconsistent with his duties. Further, that the appellant being the overall supervisor had more responsibilities and obligations to the company than his subordinates. The appellant's claims were therefore dismissed.

This appeal is based on four grounds couched as follows:

1. *That the learned trial Judge erred in fact and law when she failed to take into account that no evidence had been adduced to show that the appellant was guilty of the offence charged.*

2. *The learned Judge in the Court below erred in law when she totally failed to address the fact that the report in which the appellant was alleged to have lied, was actually not prepared by him but by another employee and that he had not had knowledge or sight of the same before the charge.*

3. *The trial Judge erred when she failed to take into account the fact that the company had no procedural guidelines to guide staff on specific expectations of security.*

4. *The learned trial Judge erred when she failed to take into account the fact that the respondent proceeded with the disciplinary hearing in the appellant's absence without informing him of their decision to do so.*

The respondent raised a preliminary issue to the effect that this appeal should be dismissed for incompetence in view of Section 97 of the **Industrial and Labour Relations Act** [1] which provides as follows:

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

The parties hereto agreed that the preliminary application be dealt with together with the main appeal. We shall therefore handle the preliminary issue first. The respondent's argument in this respect are that an appeal must be anchored on a point of law or mixed law and fact in accordance with Section 97 above. That the grounds of appeal advanced by the appellant are all only based on fact. Reliance was placed on the case of **Mopani Copper Mines PLC v Moffat Banda**[1] where the Supreme Court discussed Section 97 of the Industrial Relations Act Cap 269 of

the Laws of Zambia and dismissed certain grounds of appeal that were based on points of fact alone. We were therefore urged to dismiss this appeal.

The appellant's advocate argued that the appeal is based on points of mixed facts and law. With respect to the first and second grounds, she submitted that the findings by the Court below were in breach of the principle that he who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable. She in this regard referred us to the case of **Zambia Railways Limited v Pauline S Mundia, Brian Siaulumba** [2]**.** As regards ground three, it was her submission that the principle of law that arises therein is that a breach of a provision in the work rules will only justify summary dismissal if it is expressly brought to the attention of the employee. Further that, ground 4 raises both issues of fact and law as the lower court did not take into consideration the principles of natural justice *(Audi Alteram Partem)*.

In addressing the application before us, we shall focus mainly on two cases. Firstly, **Barclays Bank Zambia Limited v Mando Chola and Ignatius Mubanga** [3] wherein the Supreme Court held *inter alia* as follows:

> **"Parties can only appeal to this court (in terms of S.97 of the Act) on points of law or any point of mixed law and fact. There was evidence to support the finding complained of so that we cannot say that it was a finding which was unsupported or which was made on a**

view of the facts which could not reasonably be entertained. In short, no question of law or of mixed fact and law arose in the ground of appeal advanced. We reject this aspect also."

Secondly, the case of **Zambia Consolidated Copper Mines Limited v James Matale** [4] where the Supreme Court dealt with the question whether a finding of fact can be considered as a question of law and this is what the court said:

"There is ample precedent for answering this question in the affirmative. In dealing with a similar problem under the criminal law where the D.P.P. has a similarly restricted right of appeal, we said in D.P.P. v Bwalya Ng'andu and Others S.C.Z. Judgment No. 50 of 1975, that a finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view of the facts which cannot reasonably be entertained.

In *casu*, the grounds of appeal appear to be based on findings of fact. A closer look at the same grounds in light of the aforementioned authorities, shows that in essence the appellant wants this Court to examine whether some of the findings referred to were not supported by the evidence while others were made on a view of the facts which cannot reasonably be entertained. That can only be done upon hearing the appeal. Therefore in our view the said findings have become questions of

law. Accordingly, we dismiss the preliminary application and will proceed to determine the main appeal.

Learned counsel for the appellant Ms. Mutemi relied on the heads of argument filed herein on 31st December, 2016. In support of ground 1, she submitted that the lower court was in error when it held in favour of the respondent because there was failure on the part of the respondent to adduce real and/or factual evidence that indeed the appellant was falsifying information. She referred us to the letter dismissing the appellant reflected on page 46 of the record of appeal which reads in part as follows:

> ***"Furthermore, kindly be informed that at the said hearing, you were found guilty of the offence of making false report either verbally or in writing pursuant to clause E (4) of the G4S Secure Solutions Disciplinary Code. Your dismissal is with immediate effect."***

From the above quotation, she submitted that the need to have evidence before disciplinary action is taken is vital as set out in clause 3.7 of the respondent's Disciplinary and Grievance Handling Code shown on page 61 of the record of appeal which provides as follows:

> ***"All persons in supervisory and managerial positions must make thorough investigations of all disciplinary as well as dismissal cases before a decision is made regarding the guilt or innocence of an employee.***

Disciplinary action should only be taken once sufficient substantive evidence exists that a transgression of the company rules has indeed been committed ... accused failure or refusal to submit a statement will leave no alternative but to hear the case and decide on the strength of the available evidence."

In developing her arguments, she referred us to a letter from the respondent advising the appellant of the outcome of the appeal shown on pages 66 and 67 of the record of appeal. In the said letter, the respondent was responding to some of the issues that were raised by the appellant in his letter of 6th January, 2012. One of which relates to the procedural unfairness and/or failure by both parties at the first hearing to call the auditors who had conducted the security audit, Mr. Jim Anderson and Mr. Tony Smillie to testify so that they could be cross examined.

She added that the proceedings of the ex-parte disciplinary hearing contained on pages 71-78 of the record of appeal clearly show that three witnesses were called. However, the evidence that was led by those witnesses was not tested by the appellant through cross-examination. She therefore submitted that the lower Court erred when it held that the respondent had discharged its burden of proof.

In response to ground one, counsel for the respondent, Mr. Kabwe argued that the appellant is in essence challenging the

merits of the dismissal. He submitted that the appellant is inviting this honourable court to review the case that was before the disciplinary tribunal which would not be lawful. To fortify this argument, he referred us to the case of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango** [5] wherein the Supreme Court held *inter alia* as follows:

> **"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 exercised properly."**

He submitted that on page 10 of the Judgment the lower Court found that the respondent had the necessary disciplinary powers and that the said powers were exercised properly. The Court further found that there was no violation of the appellant's terms of employment. He stated that the appellant has not appealed against these findings and urged us to decline to interpose ourselves as an appellate tribunal. He also referred us to the case of **Bank of Zambia v Peter Kambaniya** [6] wherein the Supreme Court held as follows:

> **"In the case before us, the evidence on record is that the procedures set out in the Disciplinary Code were followed and the only function of the trial court was to determine whether or not the appellant acted fairly and justly in arriving at its decisions."**

On this basis, he submitted that ground 1 must fail. In the alternative, he argued that there was sufficient evidence to show that the appellant was indeed guilty of the offence he was charged with. Further, that the rehearing of the appellant's case was to enable witnesses with knowledge of the matter to testify. He stated that in particular, the evidence of Mr. J. Anderson on page 73 of the record confirms that the appellant was guilty of making a false report either verbally or in writing contrary to section E (4) of the respondent's Disciplinary Code. This was from the audit conducted by Mr. Anderson. Further, the appellant was not consistent with his stories.

He went on to state that the lower Court took into account all the evidence that was presented before it in arriving at its Judgment. He referred us to page 14 of the Judgment where the court observed the following:

> **"Similarly in *casu*, it is our observation that the respondent exercised its disciplinary power properly in that there were in fact facts established to support the disciplinary measures taken against the complainant. It is quite clear from the evidence on record that the reviewers were misinformed with regard to the keys controls and the access control of the defendant's Lusaka branch. It is further apparent that the defendant as head of cash solutions department failed to ensure that the security of the branch was maintained to the expected standard of the respondent."**

He therefore submitted that the lower Court cannot be faulted for concluding that the respondent's actions were justified in view of the evidence on record. He urged us to dismiss ground one for want of merit.

In considering the 1st ground, we are of the view that the learned trial judge was on firm ground when she held as she did on pages 13 and 14 of the judgment having based the decision on the authorities of **Attorney General v. Richard Jackson Phiri** [11] **and Zambia Electricity Corporation Limited v. Lubasi Muyambango.**[5]

The appellant in his own evidence stated that the auditors did discover a number of unmitigated deficiencies and the integrity of the entire Cash Solutions department was questioned. It was in evidence that the overall supervisor i.e. the appellant himself was responsible for the preparations of the mandatory safety procedures of the respondent's department. This was confirmed by the respondent's witness Stewart Scott. Therefore we cannot fault the lower Court for its findings. As rightly stated by the respondent's counsel, the appellant is asking us to review what the respondent had done, which is untenable as the case of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango**[5] applies.

We shall deal with grounds two, three and four together for they are in essence linked. Under ground two, it was submitted by the appellant's advocate that the evidence on record clearly shows

that the appellant was charged with the offence of falsifying information pursuant to clause E (5a) of the Disciplinary Code as well as wilful failure to perform work satisfactorily over an extended period despite warning and counselling by management. Further that, the evidence on falsification was in respect of an audit report on outstanding issues on security measures and whether or not the same were complied with. She in this regard referred us to pages 81 and 97 of the record of appeal. She went on to submit that the evidence on record is to the effect that the report in issue was made by a General Manager, Mr. Warren Kondolo and not the appellant. She argued further that the lower Court found that the appellant as the supervisor ought to be blamed for all the problems arising from his department. It was her submission that on the basis of the respondent's unreasonable decision, one is made to believe that the appellant was dismissed for something that he did not do and this makes the dismissal unfair and unlawful. In support of this she referred us to the case of **Whitbread & Co PCL v Mills**[7] wherein the Court stated as follows:

> **"To be unreasonable, the employers conduct would have to be outside the band of unreasonable responses of any reasonable employer. Roughly speaking, the conduct is reasonable if some decent employer would have handled it similarly."**

In applying the above case, she submitted that the decision by the respondent to dismiss the appellant for falsifying a report

prepared by somebody else and which he had no knowledge of was unreasonable and as such the Judge erred in both fact and law by holding that the dismissal was fair.

In responding to ground two, Mr. Kabwe reiterated the principle laid down in the Muyambango case. He went on to submit that the record shows that the respondent's contract was terminated because of the falsehood or untruthfulness in his response to the issues that were raised by the auditors and that his dismissal had nothing to do with the contents of the report that was written by his subordinate, Mr. Warren Kondolo. This is confirmed from the charges that were levelled against him reflected on page 125 of the record of appeal as follows:

> **"In the month of November, 2011, while attending to the Group Cash Audit Review (27th October 2011) officials it is alleged that:**
>
> **1. On two occasions you mislead (sic) the auditors and gave false reports/information to the reviewers as follows:**
>
> **a). That the recommended security measures at the branch were in place when in actual fact not. Refer to item 34 of the report on outstanding issues and recommendation.**
>
> **b). Contrary to the MSP self-assessment for Zambia that you were instrumental in submitting where controls were described as fully compliant in every**

respect. Refer to item 34 of the report on outstanding issues and recommendations.

As such given that integrity is on G4S' core, you conducted yourself in breach of the disciplinary provisions and are hereby charged with the offence "making a false report either verbally or in writing" pursuant to section E (4) of the G4S Secure Solutions Disciplinary Code."

He clarified that the appellant was dismissed on the basis of the verbal reports given during the audit. The appellant's admission was further confirmed by the first two witnesses at the disciplinary hearing and that this is reflected on pages 70 to 76 of the record of appeal. That evidence was confirmed by the appellant himself in his evidence in chief at pages 279 to 281 of the record of appeal. Lupapa Kabezya Lewis also confirmed it in his evidence reflected on page 288 and 298 under cross-examination.

Counsel submitted further that the lower Court had properly directed itself in arriving at its Judgment. He argued that there was no need for the Court to consider the allegation that the report was prepared by another employee. To fortify this he referred us to the case of **Zambia Radiological and Imaging Co. Ltd and others v Development Bank of Zambia**[8] wherein the Supreme Court held:

"In our view it is not a question of the judge revealing his mind on all matters regardless of their relevance to the issue requiring determination."

Counsel argued in the alternative that the appellant as the head of Cash Solutions was responsible for the flaws arising from the department including the flaws arising from the report prepared by his subordinate. The trial judge was therefore on firm ground when she held that there was failure on the part of the appellant as overall supervisor to ensure that the security of the branch was maintained.

He went on to state that the appellant's contention that the dismissal was wrongful is untenable as there was no breach of the laid down disciplinary procedures by the respondent. He added that the appellant's claim for unfair dismissal must fail because it does not fall within the provisions of section 108 of the Industrial and Labour Relations Act [1] and he implored us to dismiss the second ground of appeal.

As regards ground three, the appellant's advocate submitted that the respondent's witness Mrs. Louise, admitted during cross-examination that the appellant did not undergo induction training before and/or after commencement of his duties. She drew the Court's attention to pages 105 and 106 of the record of appeal. That at page 106, the initial findings were that there was no falsification but an element of negligence and it was recommended that the appellant be warned. In addition, the

record of appeal at pages 17-30 shows the respondent's position thus:

> **"Ambiguity ITO the allocation of responsibility in the department; it must be noted that the individuals concerned have all gained experience in cash 'on the job' so to speak and as such their interpretation of the need and the extent of the need is blurred at best. The need for training and development/exposure to working operations cannot be understated."**

She therefore contended that the appellant was required to undergo training to enable him carry out his duties efficiently. The fact that he did not go through any training makes his dismissal unfair and that the lower Court overlooked that fact.

Mr. Kabwe responded as follows; the audit review was carried out sometime in 2011 as a follow up to the previous security audit. This was supported by evidence on record led by Stewart Scott shown on pages 71 and 73 of the record of appeal. The same was supported by the appellant's own evidence on page 279 of the record of appeal as follows:

> **"... In November 2011 we received the security Manager from London to Cash Solutions department. This was a follow up visit from 2010 ..."**

It was therefore counsel's submission that it was incumbent upon the appellant as Director of Cash Solutions to put in place procedural guidelines for members of staff regarding security and operational compliance but he failed.

In support of ground 4, Ms. Mutemi submitted that the evidence on record shows that the appellant was subjected to a fresh charge which was communicated to him on 24th January, 2012. Subsequently, on 24th January, 2012 the appellant through his advocates advised the respondent that he would not attend the hearing that was scheduled for 25th January, 2012, on the same day the appellant was never informed by the respondent whether they would proceed in his absence or not. The appellant received a letter from the respondent dated 20th February, 2012 advising him that there was a hearing and that he was found guilty of the offence of making a false report. She went on to submit that the same was in breach of the rules of natural justice. She relied on Halsbury's Laws of England,[1] 4th edition vol 1, paragraph 14 which reads:

> **"*Audi alteram Partem* –the rule that 'no man shall be condemned unless he has been given prior notice of the allegation against him or a fair opportunity to be heard is a cardinal principal of justice".**

She concluded that there was an unbalanced evaluation of evidence by the Court below where only the flaws of the appellant and not those of the respondent were considered. She directed

our attention to the case of **Attorney General v Marcus Kampumpa Achiume** [9] where it was held as follows:

> **"An unbalanced evaluation of evidence where only the flaws of one side but not of the other are considered is a misdirection which no trial Court should reasonably take and entitles the appeal Court to interfere."**

She also referred us to the case of **Zulu v Avondale Housing Project Limited** [10] where the Supreme Court stated *inter alia* that:

> **"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."**

She therefore urged us to uphold the appeal.

In response to ground 4, it was argued that the appellant relied on his own default to claim that he was not afforded an opportunity to be heard. The first hearing had a number of irregularities and was later set aside. The second hearing was

done in accordance with clause 3.12.1 of the respondent's disciplinary code. The appellant refused to exculpate himself verbally or in writing and refused to attend the hearing on 20th February, 2012 despite being called upon to do so. This evidence is on pages 137 and 141 of the record of appeal. Instead of attending the hearing, the appellant decided to institute legal proceedings to restrain the respondent from proceeding with the hearing which action was dismissed.

On the issue of whether the appellant was rightly charged, we cannot agree more with the trial Court that the appellant being in charge of his department, it was his responsibility to ensure that the security of the branch was not compromised.

We are satisfied that the appellant was given sufficient time within which to avail himself for the hearing by letter dated 20th January, 2012 but he freely and voluntarily on his legal counsel's advice decided not to attend. Subsequently, by letters dated 15th and 18th February, 2012 he was informed of the rescheduled date of hearing and he still without reasonable cause opted not to attend the hearing. We therefore hold that the rules of natural justice were complied with.

We reject the appellant's evidence that he could not attend the disciplinary hearing because there was an initial hearing that was conducted because the terms and conditions under which he was serving clearly state under clause 3.12.1 that;

"In reaching a decision on the review ... Where a review of a disciplinary enquiry is lodged, the representative of the Human Resource Department will be entitled to order that a new disciplinary enquiry be convened should it be deemed necessary to do so."

It is clear that the respondent complied with the foregoing procedures.

We will now address the issue of whether or not the dismissal was wrongful, unlawful or unfair. In the text book; **Employment Law in Zambia**[2] the learned author has defined wrongful and unfair dismissal and distinguished the two as follows:

"The concept of wrongful dismissal is the product of common law ... when considering whether a 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 effected."

"Unlike wrongful dismissal which looks at the form, unfair dismissal looks at the merits 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."

It is trite law that unlawful dismissal occurs when a statute affecting the employment contract is breached. In the present case the question of unlawful dismissal is neither here nor there.

In the case of **The Attorney-General v Richard Jackson Phiri**[11] the Supreme Court held as follows:

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

In *casu*, the sequence of events leading to the dismissal of the appellant was that he was afforded an opportunity to exculpate himself as established in the earlier part of this Judgment which opportunity he voluntarily refused to undertake. The respondent conducted itself in accordance with the Disciplinary Code. The respondent's decision to dismiss the appellant was based on reasonable grounds. Taking into account the case of **Whitbread & Co. Plc v. Mills** [7] we hold that the respondent's conduct was reasonable for that is what any decent employer would have done under the circumstances. We are satisfied that the respondent had the necessary disciplinary power which it exercised fairly.

We have considered the issue of the appellant having not been trained for the job. The view we take is that he held himself out as a competent person as he had accepted his appointment as head of department. The lower Court properly evaluated the evidence before it in a balanced manner. As a matter of fact he

knew the security measures that were supposed to be taken from the previous audit of 2010 but overlooked them. The excuse that he was untrained is quite lame under the circumstances. Clearly the appellant made serious omissions warranting his dismissal.

For the reasons given herein, the appeal fails entirely and we hereby dismiss it with costs which may be agreed upon or taxed.

Dated at Lusaka this 28th day of Sept 2017.

.....

C. K. MAKUNGU
COURT OF APPEAL JUDGE

....

J. CHASHI
COURT OF APPEAL JUDGE

.....

D.L.Y SICHINGA
COURT OF APPEAL JUDGE