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IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 211/2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SONKANI MBEWE

APPELLANT

AND

INTERNATIONAL SCHOOL OF LUSAKA

RESPONDENT

CORAM: CHASHI, NGULUBE, JJA.

On 25th March, 2021 and 11th May, 2021.

For the Appellant: L.C. Ngonga and R. Chipeta, P.M. Kamanga Advocates

For the Respondent: I. E Suba and G. Lubasi, Suba, Tafeni and Associates

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *AEL Zambia Plc vs Swift Simwinwa, SCZ Appeal Number 223 of 2015*
2. *Amiran Limited vs Bones, SCZ Appeal Number 42 of 2010*
3. *Charles Kajimanga vs Mathew Chilemya, SCZ Appeal Number 50 of 2014*
4. *Zambia Airways vs B.B. Mubanga (1990/1992) ZR 149*
5. *Pamodzi Hotel vs Godwin Mbewe (1987) ZR 56*
6. *Attorney-General vs Phiri (1988-1989) ZR 121*

7. *E.C. Mining Limited vs Brian Mwamba and 13 others, CAZ Appeal Number 004/2018*
8. *Sikombe vs Access Bank Zambia Limited, SCZ Appeal Number 240/230*
9. *Zambia National Provident Fund vs Yekweniya Mbiniya Chirwa (1986) Z.R.70*
10. *Kitwe City Council vs Nguni (2005) Z.R. 57*

Other works referred to:

1. *Halsbury's Laws of England, 4th Edition, Volume 1, Paragraph 95*

INTRODUCTION

1. At the time of hearing this appeal, Lengalenga, JA sat with us. She has since retired. This is therefore a Judgment of the majority
2. This appeal emanates from a Judgment of the High Court, Industrial Relations Division delivered by Musona, J. on 27th August, 2019. By that Judgment, the appellant's claim against the respondent was for reinstatement and that he be paid his due emoluments. Alternatively, the appellant sought damages for unlawful or unfair dismissal, damages for loss of employment, damages for loss of earnings, and inconvenience caused.
3. The appellant, in the alternative sought to be declared redundant and that he be paid his full benefits. The lower court found that

the appellant's dismissal was neither wrongful nor unfair and declined to award damages for unlawful termination of employment. The claim for reinstatement was also dismissed for lack of merit.

BACKGROUND TO THE APPEAL

4. The appellant was employed by the respondent on 11th July, 1994 as an electrician and subsequently rose to the position of maintenance manager, a position he held until he was dismissed on 8th February, 2005. He averred that he was frustrated by the respondent's managers who victimised him for having been involved in industrial action due to conditions of employment that he and other employees were unhappy with.
5. The appellant averred that he was suspended for gross negligence and dishonest conduct. He further stated that the disciplinary hearing that was subsequently held by the respondent was a mockery and a sham with a predetermined verdict as the allegations against him were not proved but he was dismissed from employment.
6. The respondent filed an Answer in which it stated that the appellant's employment was lawfully terminated on 7th February,

2005 and that prior to that, the correct and lawful disciplinary procedure was followed. The respondent went on to state that the appellant was charged with gross negligence of duty, dishonest conduct of defrauding or attempting to defraud the respondent, and that the charges were proved by the respondent. Regarding the class action, the respondent stated that the allegations by the appellant that he was victimised were unnecessary as the matter was still in court.

7. The primary principal at the respondent, Michael Richmond averred that the appellant was suspended from employment on 16th December, 2004, as a consequence of him being charged with gross negligence on duty resulting in loss of funds by the respondent and dishonest conduct of defrauding or attempting to defraud the respondent.
8. Mr. Richmond went on to aver that the appellant secured a contract from an independent contractor, SD Engineering Services which amounted to K6,960,000.00 (unrebased) for the repair and service of four lawn mowers belonging to the respondent. According to the principal, they were inadequately repaired by the contractor but the appellant facilitated the payment. When an

expert from Honda Zambia Limited inspected the lawn mowers, he found anomalies on the quotation that SD Engineering Services issued to the respondent.

9. The principal primary averred that in December, 2003, the appellant was assigned to supervise the repair of leakages through louvres which required metal awnings to be added to the roof, amounting to K9,385,370.00. He allegedly failed to monitor and examine the works which were not completed to the required standard but made the respondent pay for the said substandard work. Mr Richmond averred that between June and August, 2004, the head of the respondent, a Mr Lindoe contracted a former employee to paint the school logo onto the school gates and other school signs. He averred that the appellant attempted to extort money from the said contractor who eventually wrote a letter of complaint to the respondent.
10. Mr Richmond averred that on 7th February, 2005, the respondent conducted a hearing which the appellant attended with a union representative. The committee found that the appellant failed to exculpate himself on the charges and he was summarily dismissed with effect from 7th February, 2005. He stated that the appellant's

dismissal was procedurally correct and lawful and that he was not entitled to damages for unlawful or unfair dismissal.

DETERMINATION OF THE MATTER BY THE HIGH COURT

11. At the hearing of the matter, on 8th July, 2019, both parties elected to proceed by way of affidavit evidence. The matter was determined on the basis of the appellant's affidavit in support of complaint, respondent's answer to the notice of complaint and the respondent's affidavit as well as submissions.
12. In its submissions, the respondent stated that the appellant was charged with gross negligence on duty resulting in loss of funds by the respondent, dishonest conduct of defrauding and attempting to defraud the respondent. The court considered the affidavit evidence, the notice of complaint and the submissions by the respondent.
13. On the claim for retirement, the court considered clause 30.0 of the collective agreement which showed that an employee can retire after serving for ten years or more and after attaining the age of fifty-five years. The court found that the appellant had been in the employ of the respondent for ten years, as he was employed

on 11th July, 1994 and that his employment was terminated on 8th February, 2005. The court further found that the appellant's age was forty-seven years at the time and that he failed to fulfil the condition of attaining the age of fifty-five years. The court concluded that the claim for retirement failed as the appellant could not meet the required conditions of having worked for ten years and attaining the age of fifty-five years.

14. On the claim for redundancy, the court opined that the appellant's position had not ceased nor had the respondent ceased operations. The claim for redundancy accordingly failed.
15. The court considered the claim for unlawful dismissal as well as the reasons for the dismissal of the appellant and concluded that the respondent proved the charges that were leveled against the appellant and the claim for unlawful and unfair dismissal were accordingly dismissed. The court found no basis for ordering the reinstatement of the appellant as all his claims had failed. The matter was dismissed for lack of merit.

GROUND OF APPEAL TO THIS COURT

16. Dissatisfied with the Judgment of the lower court, the appellant filed a memorandum of appeal and heads of argument couched as follows-

1. ***That the court below erred in law and fact by ignoring evidence on record to the effect that the appellant was dismissed on provisions that did not exist in the conditions of service, Disciplinary Code, 2002 as was shown by the appellant in his affidavit in support of complaint.***
2. ***That the court below erred in law and fact when it held that the complainant did not show evidence of unfair dismissal without analyzing the bulk of the evidence before it in the complainant's bundle of pleadings and documents, affidavit in support of claim and complainant's submissions which showed proof.***
3. ***That the court below misdirected itself in holding that the complainant did not file complainant's submissions and wholly relied on the respondent's submissions and affidavits when it was agreed at trial that the complainant would rely on documents on record which included the affidavit and submissions already before court filed on 8th March, 2005 and 5th March 2011, respectively and the respondent was directed to respond by filing submissions in opposition within 14 days latest 19th July, 2019 at 12:00 hours.***
4. ***Other grounds to be advanced upon full perusal of the record of appeal.***

ARGUMENTS BY THE APPELLANT IN THIS COURT

17. In arguing ground one, it was submitted that the appellant's evidence in his affidavit in support was that the charges that led to his dismissal were non-existent as they did not exist in the respondent's conditions of service or disciplinary code. The appellant further submitted that there were no specifications of the incidences, when, where and how the alleged negligence of duty or fraudulent acts occurred.
18. The court was referred to the case of ***AEL Zambia Plc vs Swift Simwinwa¹***, where the Supreme Court stated that-

“Where an employer fails to investigate an employee's complaint or grievance, malice on the part of the employer will be implied.”

According to Counsel, the trial Judge should have examined whether or not the provisions existed in the appellant's conditions of service and whether the disciplinary panel had valid powers and exercised the same validly.

19. It was contended that the charges referred to were non-existent in the appellant's conditions of service, which meant that the

disciplinary panel had no valid powers to exercise, thus rendering the whole process null and void. Counsel argued that the hearing of the appellant by the disciplinary committee was a mere travesty with a predicted outcome.

20. Turning to ground two, it was submitted that the appellant's conditions of service were contained in his new conditions of service as mentioned in the new letter of offer. On the allegations relating to the repair of the roof, counsel contended that it was done in December, 2003, a year after the allegation that the work was not properly carried out.
21. The appellant contended that the appellant's first letter of complaint, about Mr Michael Richmond's behaviour on 1st June, 2004 was not attended to by the Head of School. On the allegation relating to the repair of the lawn mowers, it was submitted that this was done in August, 2004, four months before a report was conducted on the mowers which were already in use. The appellant's counsel submitted that the appellant's contract of employment was terminated and that he was therefore entitled to be paid his benefits.

22. Counsel contended that the lower court was under a duty to examine all the evidence before it as the appellant strongly challenged the charge and procedure prior to the alleged dismissal. The court was referred to the case of **Amiran Limited vs Bones²**, where it was held that-

“. . . the Industrial Relations Court being a court of substantial justice, has power to examine critically all the circumstances surrounding that termination and where the application of the termination clause was made in bad faith, it may make a finding under section 85A that the complaint is justified and reasonable, whereupon it shall select and grant, any of the remedies available under that section.”

23. It was submitted that the appellant complained about intimidating remarks that were made by Mr Michael Richmond who referred to the court case, the industrial action that the appellant and other employees commenced against the respondent. According to the appellant's counsel, the head of school paid a blind eye to the matter and as such, breached the trust and confidence between the school and the appellant.

24. The court was referred to the case of **Charles Kajimanga vs Mathew Chilemya³**, where the court held that-

“We therefore, are of the view that the lower court was not precluded from taking into account the documents contained in the respondent’s bundle of documents.”

Counsel argued that the lower court should have taken into account the respondent’s bundle of pleadings and documents as well as affidavit and submissions. According to Counsel, the court ought to have seen all the evidence showing the unfair treatment and constant threats that were issued by Mr. Michael Richmond to the appellant.

25. On the composition of the disciplinary panel, it is submitted that Mr. Richmond, the person that the appellant complained against formed part of the disciplinary panel, thus showing the bias of the committee. This court was referred to the case of ***Zambia Airways vs B.B. Mubanga⁴***, where the Supreme Court held that-

“We find that the learned trial Judge did not misdirect himself in this respect at all or was he wrong in finding that the inclusion of two interested parties in the disciplinary committee showed that the principles of natural justice were not followed.”

26. The court was further referred to the case of ***AEL Zambia Plc vs Swift Simwinwa (supra)***, where the Supreme Court stated that-

“The claim by the appellant that DW1 and DW2 did not participate in making the decision to dismiss the respondent is untenable because it is clear from the evidence on record that the two played a major role in the decision to dismiss the respondent. We accordingly agree with the lower court's finding of fact, the case hearing panel was unfairly constituted.”

It was submitted that the disciplinary panel was unfairly constituted as the two acted as Judges in their own cause.

27. The court was referred to the case of ***Pamodzi Hotel vs Godwin Mbewe***⁵ where the Supreme Court stated that-

“Where there is a collective agreement in place which provides for a certain procedure to be followed before dismissal, any breach of such dismissal is null and void.”

Counsel contended that the lower court should have found the charges null and void and the aggravating factor was that the respondent did not even attempt to follow the correct procedure.

28. The court was referred to the case of ***Attorney-General vs Phiri***⁶ where the court observed that:

“We agree that once 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 facts established to support

disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same.”

Counsel argued that the charges against the appellant were non-existent and the disciplinary panel was biased, meaning the charges against him were not proved.

29. It was submitted that allegations against the appellant that he was fraudulent are serious and require a higher standard of proof. It is contended that there was sufficient evidence of unfair treatment which the lower court should have considered.
30. On ground three, it is submitted that the lower court should have critically examined all the evidence before it, even if it did not consider the appellant's submission. According to counsel, the appellant did not commit any dismissible offence and that he should have been declared retired as he had attained the ten year requirement of having been in the employ of the respondent.
31. On unfair dismissal, it was submitted that the appellant was dismissed without a fair hearing and that the charges were non-existent. Counsel argued that the charges against the appellant were an afterthought meant to get rid of him because of the earlier industrial action.

32. Counsel submitted that the appellant was entitled to damages for loss of employment and that the lower court should have awarded him damages. It was further submitted that there are aggravating circumstances because the procedure was not followed and the charges were not proved against the appellant. It was argued that the lower court should have awarded the appellant damages for loss of earnings and inconvenience. We were urged to allow the appeal with costs to the appellant.

RESPONDENT'S HEADS OF ARGUMENTS

33. The respondent filed heads of argument and submitted that the lower court was on firm ground when it dismissed the appellant's claims as the offences that the appellant was charged with did exist under the Disciplinary Code of 2002.

34. Responding to ground one, it was submitted that the charges that were levelled against the appellant in the letter dated 28th January, 2005 existed in the Disciplinary Code of 2002. It was further submitted that any misconduct committed by an employee which is so grave that it would call for summary dismissal will not go unprescribed on account of a defective procedure.

35. The court was referred to the case of ***E.C. Mining Limited vs Brian Mwamba and 13 others***⁷, where this Court held that-

“Looking at the Disciplinary Code which was produced by the Appellant, although the specific clauses were not mentioned in the charges, the offences they were charged with fell in line with clauses 3.8.1(a) (d) and (e) and 4.4.9(a) of the Disciplinary Code. In the view we have taken, the respondents were not wrongly charged.”

36. The court was further referred to the case of ***Sikombe vs Access Bank Zambia Limited***⁸, where the court was faced with the issue of determining whether a charge of gross misconduct fell under clause 11.3.1 of the staff handbook or not. The court held that-

“. . . as long as it can be shown that the employee engaged in discreditable conduct warranting dismissal, the employer will be entitled to invoke the power to dismiss the employee. In the present case therefore, it matters not whether the charge against the employee was misstated or not provided the charge warranted the exercise by the employer of the power to summarily dismiss the employee, the employer will be entitled to take the action taken.”

37. It was submitted that even if the charge may have been misquoted, the respondent was well within its right to summarily dismiss the appellant for gross negligence and for defrauding the school.

38. Responding to ground three, it was submitted that this ground of appeal is misplaced as the lower court did in fact critically analyse and take into consideration all the evidence before it and it was submitted that the lower court analysed the totality of the evidence before it and arrived at the conclusion that it did. It was argued that the court analysed the evidence relating to each claim and made a finding relevant to each head within the claim.
39. It was submitted that, the fact that, the allegations relating to the appellant defrauding the school were made one year later was immaterial as investigations were conducted until December, 2004 and the appellant was then formally charged on 28th January, 2005.
40. Regarding the issue of the appellant's complaint against Mr Richmond's behaviour not being attended to by the Head of School, it was submitted that the Head of School held a meeting on 7th December, 2004 to discuss the complaints against Mr Richmond.
41. Responding to the issue of the repair of the lawn mowers, it was submitted that it was only in October, 2004 that the respondent noticed that the lawn mowers were defective. There was also

another complaint regarding the lawn mowers in November, 2004 and thereafter, the appellant was charged.

42. According to the respondent, the appellant justified information relating to the servicing of the lawn mowers and the respondent then authorized a payment to S.D Electrical Engineering, thus losing money on a job that was not properly done. It was submitted that the charges that were preferred against the appellant were administrative and it was up to the respondent to decide whether, they would end up in criminal proceedings.
43. It was submitted that the appellant's employment was terminated after the disciplinary hearing, which meant that he was summarily dismissed. According to counsel the court meticulously analysed the appellants claims and was thorough in analyzing the evidence. The court was referred to the case of ***ACL Zambia Plc vs Swift Simwinwa (supra)*** and the respondent's counsel submitted that this case is distinguishable from the one in casu as there was no substratum of facts to justify the charges.
44. It was submitted that in casu, the substratum of facts supports the dismissal of the appellant. The court was further referred to

the *Halsbury's Laws of England*¹, 4th Edition, volume 1, paragraph 95, which states that-

“Natural justice comprises two basic rules first, that no man is to be a judge in his own cause.”

It was submitted that Mr. Richmond and Mr Lindoe were not judges in their own cause and that there was no danger of bias against the appellant when they were involved in the disciplinary process as they were merely performing their duties. Counsel called in aid the case of *Zambia National Provident Fund vs Yekweniya Mbiniya Chirwa*⁹, where the court held that-

“Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure and he has no claim on that ground either for wrongful dismissal and for a declaration that the dismissal was a nullity.”

45. According to Counsel, there was sufficient evidence proving that the appellant's conduct was fraudulent, and that investigations that were carried by the school, the report from Honda Zambia, witness statements and a report from Mr. Chilokola indicate that

there was substratum upon which the appellant was summarily dismissed. The evidence on record is that the appellant refused to exculpate himself. We were urged to dismiss the appeal in its entirety for lack of merit with costs to the respondent.

DETERMINATION OF THE APPEAL BY THIS COURT

46. We have considered the evidence on record, the arguments by the parties and the Judgment appealed against. Ground one is that the lower court ignored evidence on record to the effect that the complainant was dismissed on provisions that did not exist in his conditions of service, Disciplinary Code of 2002 as was shown by the appellant in his affidavit in support of the complaint. A perusal of the record of appeal shows that the appellant was charged with:

1. Gross negligence of duty resulting in loss of school funds and property. Clause 36.1.4(3) of the ISL Disciplinary Code of the Condition of Service for support staff provides for dishonest conduct of defrauding or attempting to defraud the school. In the letter, the Human Resources Manager wrote to the appellant, he highlighted the following incidences:

- I. That the servicing of lawn mowers by SD electrical Engineers, and that when an inspection was done, it was discovered that no servicing job took place.
- II. That the appellant solicited for the payment from a painter who was contracted to paint the perimeter wall because he facilitated the verbal contract.
- III. That the appellant failed to monitor and examine the construction work of the repairs to the roof resulting in poor quality work on the said roof.

47. We have perused the respondent's Disciplinary code. In the schedule of offences and penalties, the offense of negligence on duty falls under 36.1.2, unsatisfactory work performance. Further, the offence of dishonest conduct of defrauding or attempting to defraud falls under clause 36.1.4. The fraud charge that the appellant was charged with, of failing to monitor and examine the construction work of the roof, resulting in poor work being done falls under clause 36.1.2, under the head for unsatisfactory work performance.

48. Having looked at the disciplinary code we note that the specific clauses the appellant was charged with were not referred to in the

letter that itemized the charges. Notwithstanding that, we are of the view that the appellant was correctly charged under the Disciplinary Code for the offences of gross negligence on duty, dishonest conduct of defrauding or attempting to defraud and failing to monitor construction works of the repairs to the roof.

49. We also note that after the appellant was charged, he went through the disciplinary process and was subsequently dismissed as provided for under the Code. We therefore do not find merit in ground one of the appeal and we accordingly dismiss it.
50. The second ground of appeal relates to the lower court finding that the appellant did not show evidence of unfair dismissal. A perusal of the judgment from the lower court shows that the lower court properly guided itself on the laws regarding the appellant's dismissal. The lower court elaborated the various scenarios in which the appellant's employment could be terminated such as redundancy, unlawful and unfair dismissal and whether the appellant could, in the circumstances be reinstated with all his emoluments.
51. A perusal of the proceedings of the disciplinary committee that sat on 7th February, 2005 shows that after the charges were read

to the appellant and he was asked to exculpate himself, he said that there was nothing he would say to defend himself. The committee then went on to find the appellant accountable and terminated his employment with immediate effect. We are of the view that the lower court properly guided itself on the law of termination of the appellant's contract of employment.

52. The lower court gave reasons for each of the findings that it made. We have also considered the composition of the disciplinary committee which heard the appellant's matter and we do not find anything that shows that there was bias against the appellant. We find it inconsequential to say that the appellant had differences with Mr Richmond who was therefore allegedly biased against the appellant because independent investigations that were conducted by the school revealed that the appellant was guilty of the charges that were levelled against him. We therefore do not find merit in ground two of the appeal and it is dismissed.

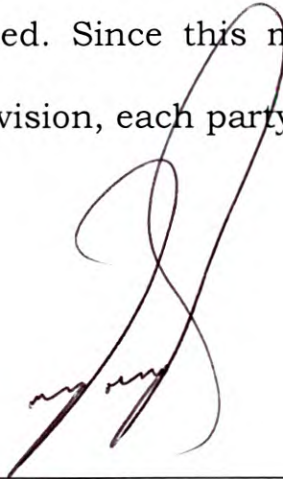
53. Ground three is that the lower court did not consider the appellant's submissions and wholly relied on the respondent's submissions and affidavit. In the case of ***Kitwe City Council vs Nguni¹⁰***, the Supreme Court held that the learned Judge was not bound to consider counsel's submissions as they were meant only

to assist the court in shaping up it's Judgment. We are of the view that the lower court considered the evidence before it and made findings of fact and applied the law to the facts. Therefore, ground three lacks merit and we dismiss it.

54. All in all, we are of the view that the lower court was on firm ground when it dismissed all the appellant's claims as they lacked merit.

CONCLUSION

55. We are of the view that there was substratum that was proved by the respondent and showed the appellant's wrong doing which warranted his dismissal. We do not find merit in this appeal and it is accordingly dismissed. Since this matter emanated from the Industrial Relations Division, each party shall bear it's costs of the action.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE