IN THE COURT OF APPEAL **CAZ APPEAL NO. 33/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

LUSAKA WEST SCHOOL LIMITED **APPELLANT**

AND

BEDSON KATYAMBA **RESPONDENT**

CORAM: KONDOLO SC, SICHINGA, NGULUBE JJA
On 19th November, 2019 and on 7th February, 2022

For the Appellant : Mr. R. Mainza of Messrs Mainza and Company
For the Respondent : Ms. S. Siansumo of Messrs Malambo and Company

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J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Agholor v Cheeseborough Ponds (Zambia) Limited (1976) ZR 1**
2. **Gloryson Laki v Zambia Sugar SCZ/153/2007**
3. **National milling Corporation Limited v Derrick Sibamba CAZ/81/2017**
4. **Patrick Makumbi and 25 others v Greytown Breweries Limited and 3 Others SCZ/108/2016**
5. **Chief Chanje v Zulu SCZ/73/2008**

6. **The Attorney General v Marcus Kapumba Achiume (1983) ZR 1**
7. **Banda v Chief Immigration officer & The Attorney General 1993-1994) ZR 80**

LEGISLATION REFERRED TO:

1. **The Employment Act, Chapter 268, Laws of Zambia**,

1. INTRODUCTION

1.1. This is an Appeal against the Judgment of the High Court in which the Appellant was ordered to pay the Respondent his full gratuity without any unwarranted deductions.

2. BACKGROUND

2.1. The Respondent was employed by the Appellant on a three (3) year Contract from 15th January, 2007 to 15th January, 2010. The Respondent was entitled to gratuity under the contract but when it came to an end, the Appellant informed him that it was unable to pay him his gratuity amounting to K32,734.00 and would do so when funds were available.

2.2. The Respondent accepted a new contract to run for a further three year period from 16th January 2010 to 16th January 2013. His gratuity under the contract was calculated at K46,267.00.

2.3. When the second contract came to an end the computation included the gratuity due from both contracts together with his leave days.

However, the final package paid out to him was less K50,082 and he was only given a cheque in the sum of K24,707.80. Piqued by this deduction, the Respondent sued the Appellant for K79,001 as gratuity including claims for K5,000 and K400 for unpaid travel, holiday and tuition allowance respectively.

2.4. The Appellants position was that the deduction was justified and due to the fact that the school had suffered loss on account of the Respondents incompetence when he failed to submit pupils' names to the University of Cambridge for School Leaving (Grade X11) examinations, within the stipulated period. As a consequence of the delay, the school was penalized the sum of GBP 6,000 and the school board decided that the Respondent would bear the cost.

2.5. At trial, the Respondent testified that he was not aware of the deduction before his contract expired on 16th January, 2013 and only became aware of it when it was deducted from his dues. He was informed that the penalty was due to late submission of pupils' names to the University of Cambridge. In his defence, he stated that he was on leave from 7th to 28th August, 2011 and before he left, he handed over to his deputy, Mr. Aidoo. On his return, the submissions were not done on time by Mr. Aidoo and the IT Teacher, Mr. Nsululu. He called them both to his office and the IT Teacher indicated that the late submission was due to lack of internet connection while Mr.

Aidoo stated that he had mixed up the dates for submission. The IT Teacher submitted a report dated 1st November, 2011 after which Directors agreed to fire him but he opted to resign.

2.6. The Director, Mr. Lamisa, informed the Respondent and Mr. Aidoo that no one would be charged because the matter was complicated. From January, 2012 until the end of contract in 2013, there was no further communication on the issue except a letter dated 5th January, 2012 with regard to the late submission and he responded to the letter providing an explanation.

He was shown a letter dated 6th February 2012 exhibited as "JL4" in the affidavit in opposition filed by the Appellant in the lower Court. The said letter stated that he had not responded to the earlier letter dated 5th January informing him that the penalty of K50,082. 20 imposed on the school by Cambridge Examination Authority, had been passed to him. According to him, he never received the letter dated 6th February.

2.7. With regard to the travel allowance, the Respondent indicated that he had travelled to South Africa with the pupils on a school trip which was founded on the standing Parent Teacher Association (PTA) conditions which entitled him to payment of K5,000. The holiday tuition on the other hand, arose from his involvement in teaching during school holidays in 2011.

2.8. The Appellant's evidence was that after receiving a statement from the University of Cambridge penalizing them for late entries, the Director, Josephine Lemisa called the Respondent to her office to enquire on the late submissions. She directed him to submit a Report and this was followed by the letter dated 5th January, 2012 to which he adhered and submitted his undated report. In the Report he alleged that he was away on leave, which leave, she intimated, had not been approved by herself. Further, she stated that neither were there any handovers of duties and responsibilities nor internet interruption as claimed by the Respondent.

2.9. It was her evidence that after studying the Respondent's report, she wrote the letter "JL4" informing him that the Board had decided to pass the penalty of K50,082.20 onto him. The reason given for not deducting from his salary over the remainder of his contract, was that it was too low to meet the deductions. Lastly, she denied having convened a meeting with the Respondent, Mr. Aidoo and Mr. Nsululu to discuss liability.

3. DECISION OF THE LOWER COURT

3.1. In the course of determining whether or not the deduction was unfair, the trial Court noted that the rules of natural justice required that an accused person must be heard and should have been given adequate notice of his hearing.

3.2. The trial Court noted that the Respondent had disputed the Appellants claim that the Respondent was made aware of the deduction by the letter dated 6th February, 2012 marked "JL4" exhibited in Appellant's affidavit in opposition.

3.3. The lower Court, however, found it rather odd that deductions were not commenced while the Respondent was in employment and it was thus imperative for the Appellant to have furnished him with a reason as to why the deductions were not deducted from his monthly salaries.

3.4. The Court found that the burden of proving that deductions over time were not tenable fell on the Appellant and held that the Appellant had failed to do so and the deduction from his terminal benefits amounted to an ambush.

3.5. The lower Court further found that the surcharge was not brought to the Respondent's attention while he was in office and as though not enough, he was not even given an opportunity to make representations nor was he provided with an avenue of appeal.

3.6. The Court stated at paragraph 38 on page J18 that the tipping point to determine fairness in this matter was the determination of whether or not the Respondent received the letter "JL4" and the court found that the said letter was not delivered to the Respondent.

3.7. The Court then ordered the Appellant to pay the Respondent K79,001 with interest from 22nd November, 2013 the date of the Notice of Complaint to date of Judgment. With regard to the allowances claimed, the Lower Court found that they were unsupported by any evidence and were accordingly dismissed.

4. GROUNDS OF APPEAL

4.1. In assailing the Judgment of the Lower Court, the Appellant advanced three (3) grounds of Appeal as follows:

i) **The Court below misdirected itself in law and in fact when it held that the Respondent 'ambushed' the Complainant by making the deductions from his terminal benefits at separation and further that the letter marked "JL4" was not received by the Complainant.**

ii) **The Court below misdirected itself in law and in fact when it held that the evidence on record did not disclose that the Respondent brought the issue of surcharge to the Complainant's attention while in office.**

iii) **The Court below misdirected itself in law and in fact when it ordered the Respondent to pay the Complainant full gratuity of K79,001.00 without deduction.**

5. APPELLANTS ARGUMENTS

5.1. The Appellant filed arguments, which addressed all the grounds of appeal in one argument. The gist of the argument was that the holding by the Court that the Respondent was ambushed by the surcharge on his terminal benefits at separation, that the said decision was not brought to the Respondent's attention whilst in office and that he did not receive the letter marked "JL4' were at variance with the Respondent's evidence in chief.

5.2. The Respondent admitted, at page 186 of the Record, that he received the letter dated 5th January, 2012 and responded to it, as seen by the undated Report, explaining his position with regard to the late examination submission. This, it was argued, clearly showed that the issue of the surcharge was brought to the Respondent's attention whilst in employment and not after separation. Therefore, the Court erred.

5.3. It was contended that it was inconceivable that the Appellant after demanding for a Report from the Respondent, as evidenced by the letter dated 5th January, 2012 in which he was informed that the penalty being slapped on the school was going to be paid by him, would have failed to communicate the surcharge of K50, 082.20.

5.4. It was submitted that the trial Court, having observed that the penalty of GBP 6,000 was brought to the attention of the Respondent and this

was also confirmed by the letter "JL4" dated 6th February, 2012, misdirected itself when it found at page 26 of the Record, that the Respondent did not receive the letter. We were urged to interfere with the findings of fact made by the trial Judge.

5.5. The Appellant further directed us to the letter of 5th January, 2012 in which the Respondent accepted to have received but failed to produce in Court.

5.6. Lastly, the Appellant argued that the trial Judge misconstrued the now repealed **Section 45 of the Employment Act** when it held that the deduction was prohibited. In his oral submissions, Mr. Mainza argued that it was not the position that the deduction could only be effected with consent of an employee. He submitted that the Section provided that an employer could deduct from wages with the written consent of the employee but gratuity which was payable at the end of the contract, did not require such consent.

6. RESPONDENTS ARGUMENTS

6.1 In response, the Respondent basically argued that his conditions of service provided for termination of employment for gross negligence or incompetence in the performance of his duties.

6.2 It was submitted that if he had indeed been negligent or incompetent he would have been charged accordingly and pointed out that in his

evidence, he clearly stated that the Director informed him that he would not be charged because the matter was complicated.

6.3 The Respondent called in aid the case of **Agholor v Cheeseborough Ponds (Zambia) Limited** [1] in which the Court stated that when incompetence has been condoned by an employer, it cannot be relied upon as a ground for dismissal. It was therefore opined that even if the Respondent was negligent in his duties, the Appellant cannot rely on the negligence after completion of the contract.

6.4 The Respondent likened the situation, *in casu*, to dismissal and cited other cases on the topic of dismissal from employment, namely, **Gloryson Laki v Zambia Sugar**[2] and **National milling Corporation Limited v Derrick Sibamba**[3].

6.5 It was submitted that the undated Report written by the Respondent, at page 63 of the Record, was acknowledged by the Appellant and the contents therein were not disputed to the extent that the Respondent was out on leave and handed over to the Deputy Registrar. In confirming this position, it was pointed out that the Report by the ICT- Teacher at page 65 of the record of appeal shows that he received material from the Deputy Registrar. What was pertinent for the Court to decide was whether there was evidence for the Respondent to suffer a deduction of his gratuity. The Respondent

submitted that there was no evidence to contradict his evidence that he was on leave at the time and he could thus not be liable.

6.6 It was submitted that the trial Court assessed the evidence presented by the parties and on that basis arrived at findings of fact which should not be disturbed by this Court. That a trial Court is empowered to analyse conflicting evidence and entitled to make findings of fact on that basis. Reference was made to the cases of **Patrick Makumbi and 25 others v Greytown Breweries Limited and 3 Others** [4]and **Chief Chanje v Zulu** [5]. We were on that basis, urged to not disturb the findings of fact made by the trial Court and dismiss the Appeal.

6.7 With regard to **Section 45** of the **Employment Act**, Ms. Siansumo submitted that the trial Court was on firm ground in the sense that the issue of the surcharge was deducted from the Respondent's gratuity without it having been brought to the Respondent's attention whilst he was in still in employment. She emphasized that he should have been heard on the issue before the decision to surcharge was made.

7. DECISION OF THE COURT

7.1 We have considered the record as well as the arguments advanced by both parties and shall consider the three grounds of appeal together. The main question for determination is whether the

Appellant was justified in finding the Respondent responsible and liable for the penalty of GBP 6,000 imposed on the Appellant by the Cambridge Examination Authority and pass the said sum onto the Respondent and ultimately deducting it from his terminal benefits.

7.3 The Respondent initially accepted receiving "JL4",the letter which outlined the charge, but later changed his position saying that he never received the letter[1]. Even though the Respondent at p.186 and 187 of the record claimed that he was never charged for the lapse, it appears to us that the Respondent was heard on the accusation cast against him and he responded by submitting his undated report marked "JL2". The Respondent's Report marked "JL2" provided an explanation as to what caused the delayed entry to the University of Cambridge. He basically apportioned blame on the ICT teacher and his deputy Mr. Aidoo and in that regard the Respondent submitted that an assessment of the evidence showed that there was no reason to surcharge him.

7.4 However, quite contrary to the Respondent's assertions, the evidence contained in the report of the ICT teacher, Mr. P.S. Nsululu, is that he did all he was supposed to do and if there was any delay it should be addressed by the Respondent who was the Examinations officer.

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[1] Record of Appeal p.13

7.5 The letter "JL4" which the Respondent denied receiving referred to his report "JL2" and rejected his excuse for delaying the entries stating as follows; *"The Board sat to review the case and it was decided that you being the Examination and controlling officer as well as head of the institution you should have made sure all names were submitted on time."*

7.6 On this aspect the lower Court stated as follows[2];

> ***"The evidence ... suggests and shows that the penalty fee of GBP 6,000 was brought to the attention of the Complainant. He was asked to write a report and explain what caused the delay in his capacity as Registrar. The Complainant exculpated himself in writing as per exhibit "JL2" sometime in 2011. The exculpatory report was not dated."***

7.7 The trial Court however, proceeded to find that the issue of the surcharge was not brought to the Respondent's attention while in office. The Court further found that the Respondent never received the letter "JL4" which purportedly informed him that the penalty had been passed to him. The lower Court described the manner in which this had been done as an ambush and unfair.

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[2] *Record of appeal p.23*

7.8 As earlier alluded, the Appellant directed us to the letter of 5th January, 2012 (see page 74 of the record of appeal) which the Respondent accepted to have received but failed to produce in Court and it reads as follows;

"5th January, 2012

The Registrar
Lusaka West School
P,O. Box 32936
Lusaka

Dear Sir,

SUB : PENALTY ON DELAYED EXAMINATION SUBMISSION TO CAMBRIDGE

The above subject is quite important and urgent.

This office has not been furnished with a report as what transpired except for Mr. Nsululu's report from ICT addressed to me and copied to you.

During our meeting held in my office you were reminded that the penalty fees slapped on the school were going to be paid by you be
ing the Examinations and controlling officer. [emphasis ours]

You should have seen to it all the names were submitted on time. The issue of the school being penalized by

Cambridge for late submission of names has come to the attention of Board members who have requested for an urgent meeting to be convened immediately.

We await for your response to this very important matter

Yours faithfully,
For Lusaka West School

J. Lemisa
Director"

7.9 The Respondent has, on the basis of this letter urged this Court to exercise its power to interfere with the lower Court's findings of fact with regard to the surcharge. We have also taken the Respondent's argument on this issue into consideration.

7.10 The said letter, which the Respondent admitted to have received, makes it abundantly clear that he was notified that a decision to surcharge him had been made.

7.11 It is well established by case law that an Appellate Court can interfere with a trial Court's findings of fact. The cases of **The Attorney General v Marcus Kapumba Achiume**[6] and **Banda v Chief Immigration officer & The Attorney General**[7] were cited. The cited cases basically state that an Appellate Court can interfere with

a trial court's findings of fact where, *inter alia*, the findings are perverse, based on a misapprehension of the facts and it is apparent that the trial court fell into error.

7.12 The trial Court stated as follows, at page 24 of the record of appeal;

> ***"The question we have to determine is whether or not Mr. Katyamba did or did not receive the letter in question. This is the tipping point to determine fairness in the case before us."***

7.13 The gravamen of the trial Court's finding that the Respondent was ambushed and treated unfairly arises from its misapprehension of the fact that the issue of the surcharge was actually brought to the Respondent's attention whilst he was still in office. The lower Court's finding flies in the teeth of the evidence on record and is therefore perverse. We consequently set aside the said findings and instead find that the Respondent was fully aware of the charge against him and that the Appellant intended to surcharge him. We further find that he responded to the allegations and his response was rejected by the Appellant.

7.14 The trial Court also found it odd that the deductions for the surcharge did not start immediately after the decision to surcharge him was made. RW1 on behalf of the Appellant explained that the

Appellant's salary could not support the deductions. We find the explanation as being satisfactory.

7.15 We find as misplaced, the Respondent's attempt to equate the circumstances of this case to cases involving dismissal from employment. This matter had nothing to do with dismissal. The allegation against the Respondent was akin to gross negligence and not aimed at dismissing him from employment but at recovering the loss attributed to him.

7.16 With regard to the trial Court's sentiments on **section 45 of the Employment Act, Chapter 268, Laws of Zambia**, Counsel for the Respondent, Ms. Siansumo, did not dispute that the section does not apply to deductions against gratuity as gratuity is quite different from wages. Her argument was that the Court referred to it in the sense that the surcharge on his gratuity was launched as an ambush and therefore unfair because it was never brought to the Respondents attention whilst he was still in office. Our finding that the Respondent was in fact aware, before he left employment, that he could be surcharged, renders this point mute.

8. CONCLUSION

8.1. In the premises, the deduction of the sum of K50,082.20 from the Respondents gratuity representing the GBP 6,000 loss occasioned

was not unfair and the appeal succeeds. It is ordered that each party will bear its own costs.

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

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D.L.Y SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE