IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 44/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

EMPORIUM FRESH FOODS LIMITED T/A FOOD LOVERS MARKET **1ST APPELLANT**

GOURMENT MARKET LIMITED **2ND APPELLANT**

AND

KAPYA CHISANGA **RESPONDENT**

REPUBLIC OF ZAMBIA COURT OF APPEAL 06 DEC 2022 CIVIL REGISTRY 1 LUSAKA

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO JJA

On 11th October and 6th December, 2022

FOR THE APPELLANTS: MR. LEMEKANI MTONGA OF MESSRS PHILSONG & PARTNERS

FOR THE RESPONDENT: MR. H.H NDHLOVU SC OF MESSRS HH LEGAL PRACTITIONERS

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court.

Cases referred to:

1. *Chilanga Cement PLC v Kasote Singogo (2009) ZR 122 (S.C)*
2. *Barclays Bank of Zambia PLC v Weston Lyuni and Suzyo Ngulube, SCZ Appeal No. 07/2012*

3. *Dennis Chansa v Barclays Banks Zambia Limited PLC, SCZ Appeal No. 111/2011.*
4. *Chilanga Cement PLC v Kasito (SCZ Appeal No. 86/2015 ZMSC 152*
5. *Victor Kampamba Mulenga v Zambia China Mulungushi Textiles Joint Venture Limited and Mutex Development Company Limited Appeal No. 219 of 2016.*
6. *Sikombe v Access Bank (Zambia) Limited (Appeal No. 240/2013) (2016) ZMSC 178 13 June 2016)*
7. *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) ZR 70.*
8. *Josephat Lupemba v First Quantum Mining Operations Limited, Appeal No. 20 of 2017*

Legislation referred to:

1. *The Employment Code Act, No. 2 of 2019*
2. *The Industrial and Labour Relations Act Chapter 269 of the Law of Zambia*
3. *The Evidence Act Chapter 43 of the Laws of Zambia*

Other Works

Summary Dismissal (Fair Procedure Guide) revised on 16th September 2022 @ davidsonmorris.com

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of the Honourable Mr. Justice D. C. Mumba of the Industrial Relations Division of the High Court dated 11th November 2020.

1.2 By the said Judgment, the learned Judge declared the Respondent's dismissal from employment, wrongful, unlawful and unfair. The learned Judge also awarded the Respondent

damages equivalent to 24 months of his last basic salary plus allowances, interest and costs.

2.0 BACKGROUND

2.1 The undisputed facts of the case are that the Appellants, who jointly trade as Food Lovers Market, employed the Respondent as a General Assistant in December, 2014.

2.2 In June, 2015, the Appellants confirmed the Respondent whilst working at Lusaka until he was transferred to the Kitwe branch where he worked as Assistant Shop Manager.

2.3 On 28th June, 2019, the Appellants summarily dismissed the Respondent for the offence of disclosure of information to persons without authority. He was informed of the dismissal by letter exhibited at page 44 of the Record of Appeal which also informed him of his right of appeal.

2.4 Aggrieved by the dismissal, the Respondent filed a Notice of Complaint in the Industrial Relations Division of the High Court Supported by an affidavit in August 2019.

2.5 Through the said complaint, the Respondent sought the following reliefs;

i. *An order that the dismissal was wrongful, unlawful and unfair.*

ii. Damages for wrongful, unlawful and unfair dismissal.

iii. Leave days accrued

iv. Gratuity

v. Repatriation allowance

vi. One month pay in lieu of notice

viii Interest as by law provided

viii Any other relief the court may deem fit

ix Costs.

2.6 According to paragraph 8 of the affidavit in Support of the Notice of Complaint deposed to by the Respondent, appearing at page 41 of the Record of Appeal, the Respondent's grievance was that he was neither charged nor heard before being summarily dismissed.

3.0 **DECISION OF THE COURT**

3.1 The learned Judge heard oral evidence from both parties and considered documentary evidence before him as well as final submissions and made the following finding of fact;

That the Respondent was not formally charged before dismissal, but that he was accorded an opportunity to be heard on appeal.

3.2 The learned Judge then formulated the following as the questions for his determination;

1. *Whether in terminating the complainant's contract of employment the Respondents did not comply with the Disciplinary and Grievance Procedure Code '1WIO' and the rules of natural justice.*

2. *Whether the complainant admitted committing the offence for which the Respondents properly dismissed him.*

3.3 After considering the relevant provisions of the Disciplinary and Grievance Code appearing at page 63 of the Record of Appeal, particularly clauses 3.0 to 3.1.8 and Section 50(f) of the Employment Code Act No. 3 of 2019, the learned Judge came to the conclusion that the Appellants herein were in breach of the Disciplinary and Grievance Procedure Code and the rules of natural justice for failure to formally charge and accord the Respondent an opportunity to be heard.

3.4 On the second question for consideration, the learned Judge considered the arguments suggesting that the Respondent admitted committing the offence and came to the conclusion that there was no evidence of the Respondent admitting committing the offence for which he was dismissed.

4.0 **DAMAGES**

4.1 When the learned Judge considered the law on damages he was alive to the fact that the general rule is that the normal measure of damages is that equivalent to the notice period.

4.2 He however, considered authorities in which the Courts have departed from the normal measure of damages such as *Kasote Singogo*[1] *and Weston Lyuni and Suzyo Ngulube*[2], in which the Supreme Court and the Court of Appeal held future job prospects, inconvenience, stress and abruptness of termination as considerations for departing from the normal measure of damages.

4.3 The learned Judge then formed the view that the Respondent was entitled to damages above the normal measure because of the scarcity of jobs and the degenerated global economies. The learned Judge found support from the case of *Dennis Chansa v Barclays Bank Zambia Limited PLC*[3].

4.4 The learned Judge awarded the Respondent 24 months of his last salary as damages.

5.0 **THE APPEAL**

5.1 Displeased with the outcome in the Court below, the Appellants filed a Notice and Memorandum of Appeal on 23rd December, 2020; fronting nine grounds of appeal.

5.2 The grounds of appeal as contained in the Memorandum of Appeal are as follows;

1. *The learned trial Judge erred both in law and fact when it found that the Respondent was not formally charged with the alleged offence and was not given opportunity to exculpate himself or be heard when the punishment for the offence the Respondent had committed according to the Appellant's Disciplinary Code was summary dismissal and further that the Judge erred when he failed to give effect to settled jurisprudence that failure to follow procedure is not fatal where there is evidence of an offence through a confession.*

2. *The learned trial Judge erred both in law and fact when it found that the Appellant's decision to dismiss the Respondent was in breach of its disciplinary Code of Conduct, was wrongful and unlawful when in fact the Appellant dismissed the Respondent in accordance with Rule 6.35 (page 9) of the Appellants' Disciplinary Code of Conduct and in accordance with Section 50 (i) (f) of the Employment Code Act and also in the face of evidence of the Respondent's culpability.*

3. *The learned trial Judge erred in law and fact when he found that the Respondent was unfairly dismissed and proceeded to award the Respondent damages for unfair dismissal*

when in fact there was no breach of any statutory provision to warrant a finding of unfair dismissal let alone award damages grounded in unfair dismissal and especially that the Appellants adequately disclosed the reasons for the dismissal which reasons were not in breach of any statutory provision.

4. *The learned trial Judge erred both in law and fact when he held that the Appellants' reliance on section 50 (i) (f) of the Employment Code Act was misconceived at law.*

5. *The learned trial Judge erred both in law and fact when he found that the Appellants' evidence on record namely; exhibit "IW12" was an afterthought intended to fix the Respondent when in fact the said evidence existed at the material time when the Respondent was dismissed and was only reduced to writing at a later date for confirmation purposes only and in accordance with section 3 of the Evidence Act Chapter, 43 of the Laws of Zambia.*

6. *The learned trial Judge erred both in law and fact when it awarded the Respondent 24 months of the Respondent's last basic salary plus allowances as damages for wrongful, unlawful and unfair dismissal which award was excessive in the circumstances of the case especially that it included damages for unfair dismissal which did not happen and*

also given the nature of the Respondent's jobs namely; Assistant Manager in a supermarket.

7. *The learned Judge in the Court below misdirected himself in law and fact when he found that there was no evidence on record which showed that the Respondent admitted to the offence of disclosure of sensitive or confidential information to an unauthorized person when in fact the Appellants' witness under oath gave evidence that the Respondent had made an outright confession to disclosing the companies' confidential information to an authorized person and the Court below did not give any reasons as to why this evidence was not considered and or believed.*

8. *The learned trial Judge erred in law and fact when he found that the reason given for dismissal was not substantiated and not a valid reason despite all the evidence before it proving otherwise and that his finding is perverse as it was made in the absence of any evidence and was clearly made upon a misapprehension of the facts and it is a finding which, on a proper view of the evidence, no trial Court acting correctly can reasonably make.*

9. *The learned trial Judge erred both in law and fact when it awarded the Respondent costs contrary to the jurisprudence that costs are only awarded when there is a*

wrong committed by the Appellant which is not the case in this matter.

6.0 ARGUMENTS IN SUPPORT

6.1 The Appellants filed their Heads of Argument on 15th March, 2021, in which they argue grounds 1, 2, 4 and 7, 8 in clusters and the rest of the grounds individually.

6.2 In arguing grounds 1, 2 and 4, the Appellants have canvassed the view that where the punishment prescribed for an offence is summary dismissal; it is not necessary to formally charge and take the accused through the disciplinary procedure.

6.3 The Appellants have placed reliance for their held view on their interpretation of the holding by the Supreme Court in the case of <u>*Chilanga Cement PLC v Kasito*</u>[4] (8 December 2017) in which it stated as follows;

> *"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question. An employer has a legal right to summarily dismiss an employee without notice for serious misconduct or other conduct which justifies such dismissal".*

6.4 The Appellants have also found comfort for their view in Section 50(i) (f) of the Employment Code Act, No. 2 of 2019 which provides as follows;

> *"An Employer shall not dismiss an employee summarily except in the following circumstances;*
> *(f) for misconduct under the employer's disciplinary rules where the punishment is summary dismissal".*

6.5 The argument in ground three is that the Respondent cannot be said to have been unfairly dismissed because his dismissal was not linked to any of the reasons listed in section 108 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

6.6 According to the Appellants, the offence of unfair dismissal is statutory and grounded in the said section 108 of the Industrial and Labour Relations Act which essentially prohibits termination on account of race, sex, marital status, religious, political, tribal affiliation or employee status.

6.7 In ground five the Appellants contend that the learned Judge below erred when he dismissed exhibit 'IW12', a statement allegedly made by the person to whom the Respondent allegedly disclosed the information that founded the Respondent's dismissal. They have relied on section 3 of the Evidence Act Chapter 43 of the Laws of Zambia.

6.8 In ground six, the argument is essentially that the award of 24 months damages without evidence of unacceptable conduct on the part of the Appellants in dismissing the Respondent was contrary to the principle of law on measure of damages being equivalent to the notice period. The Appellants relied on the case of *Victor Kampamba Mulenga v Zambia China Mulungushi*

Textiles Joint Venture Limited and Mutex Development Company Limited[5].

6.9 The Appellants also argued that as Assistant Shop Manager, a junior position, the Respondent would not face dim prospects of finding a job.

6.10 In grounds seven and eight, the Appellants criticize the Judge below for holding that there was no evidence that the Respondent admitted committing the offence for which he was dismissed. They contend that their witness testified on oath that the Respondent confessed to committing the offence.

6.11 They have also contended that the Respondent did not deny committing the offence for which he was dismissed in his pleadings.

6.12 As regards the argument that the Appellants did not follow procedure in dismissing the Respondent, they have argued that even if that were the case, the fact that he admitted committing the offence, renders the dismissal lawful and fair for no prejudice was occasioned to the Respondent. The cases of *Sikombe v Access Bank (Zambia) Limited*[6] and *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*[7], were called into aid.

6.13 The argument in ground nine is against the award of costs to the Respondent without the learned Judge stating what wrong the Appellants had committed in line with the law.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent filed his Heads of Argument on 6th October, 2022 largely agreeing with the judgment of the Court below. The gist of the arguments is that the Respondent was wrongfully dismissed on account of the Appellant's failure to follow its disciplinary and grievance procedure.

7.2 The Respondent also called into aid the case of *Rabson Sikombe v Access Bank Zambia Limited (Supra)* where the Supreme Court, in clarifying the position it took in the case of *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa*, stated as follows;

> *"........we must, however, stress that the position that we have taken with regard to an employer's failure to follow procedural imperatives, is predicated on the commission by the employee of a dismissible offence or a transgression which the employee admits, or is otherwise established by unimpeachable evidence. Where an employee has not committed any identifiable dismissible wrong or such wrong cannot be established, the employer shall not be allowed to find comfort in the principle we expounded in the Zambia National Provident Fund v Chirwa case."*

7.3 The Respondent has thus argued that he was neither formally charged nor given an opportunity to be heard and neither did he admit the offence for which he was dismissed.

7.4 As regards the measure of damages, the Respondent has argued that there are factors that took his case outside the common law principle that equates the measure of damages to the notice period.

8.0 **ANALYSIS AND DECISION**

8.1 We have carefully considered the Judgment of the Court below, the grounds of appeal and the arguments in support of the grounds. In our considered opinion, there are only three issues that require consideration and resolution from all the grounds.

8.2 The first issue is that of whether or not the Respondent ought to have been formally charged and subjected to a disciplinary process before summary dismissal. The second issue is the quantum of damages, namely 24 months salaries, being without justification and finally whether costs should have been awarded.

8.3 In their arguments around summary dismissal, the Appellants have strongly and confidently asserted that where there is a summary dismissal provision in the disciplinary and grievance code, the employer is not required to formally charge and subject the employee to the prescribed disciplinary process.

8.4 In their view, summary dismissal was instant, upon the employer receiving evidence of an employee committing an

offence whose punishment is summary dismissal. They have stoutly argued that the Employer is not required to invoke the disciplinary procedure in such cases.

8.5 It is however, interesting to note that the Appellants have largely relied on the statement by the Supreme Court in the case of Chilanga Cement v Kasito (Supra) that; ***"An employer has a legal right to summarily dismiss an employee without notice for serious misconduct or other conduct which justifies such dismissal"*** (Emphasis ours).

8.6 The question is; what does dismissing an employee without notice mean? Is it equivalent to dismissing without adhering to the due disciplinary process?

8.7 The point to note is that most contracts of employment provide for termination of contract by giving notice of a specific duration or payment of a salary equivalent to the notice period in lieu of giving notice.

8.8 In effect, therefore, an employer or employee cannot terminate the contract of employment instantly without first informing the other party that at the end of the specified period of time as provided in the contract, the employment contract will terminate. Where the contract has no notice period provision, the party intending to terminate shall give reasonable notice.

8.9 From the above, it is reasonable to draw an inference that in summary dismissal, once it has been established that an employee has committed a dismissible offence, they are liable to be dismissed without regard to the contractual or reasonable notice period or payment of salary in lieu of notice.

8.10 This is however, only applicable where, the employee has been subjected, to the due process; namely, being formally made aware of the wrong he is alleged to have committed, given an opportunity to give his side of the story and informed of his guilty.

8.11 A close look at section 50 (i) (f) of the Employment Code Act No. 2 of 2019 reveals that summary dismissal must follow disciplinary rules as established by the employer in providing as follows;

> *"An Employer shall not dismiss an employee summarily except in the following circumstances: for misconduct under the employer's disciplinary rules where the punishment is summary dismissal".*

8.12 Although the Appellants have argued that section 50(i) (f) is independent of section 52(3), we find no substance in the argument because both sections occur under division 3.3 of the Code which deals with suspension and termination of contract of employment of which summary dismissal is a way of terminating a contract of employment.

8.13 The fact that section 52(3) prohibits termination of contract of employment by an employer for reasons relating to conduct or performance of an employee without giving the employee an opportunity to be heard re-enforces the importance of adhering to the rules of natural justice.

8.14 In turn, rules of natural justice are incorporated in the employers' disciplinary rules as envisaged by section 50 (i) of the Code.

8.15 Summary dismissal should therefore, be understood to refer to the power bestowed upon the employer to instantly dismiss an employee following adherence to the disciplinary process as set out in the employer's disciplinary code or rules. Once this procedure has been followed there is no requirement for the employer to give notice or payment in lieu of notice.

8.16 The learned author of "Summary Dismissal (Fair Procedure Guide)" revised on 16th September 2022 @ davidsonmorris.com states as follows;

> *"Summary dismissal does not equate to instant dismissal or dismissal 'on the spot' as you will need to ensure you have followed a fair process and established lawful grounds for dismissal before taking the decision to dismiss without notice."*

> *"Regardless of the seriousness of the misconduct you will still be required to follow a fair procedure, as you would with any other disciplinary matter before a decision can be made on which disciplinary action is to be taken."*

> *"As such, summary dismissal is not actually an instant decision but rather requires a thorough investigation and full disciplinary hearing. In particular, you must provide the employee with the opportunity to defend the allegations made against them before deciding to dismiss either with or without notice."*

8.17 We take note of the limb of the Appellants' argument to the effect that the Respondent confessed to committing the offence by reason of which it was not necessary to conduct a disciplinary hearing. This argument is said to be anchored on the testimony of the Appellants' witness in the Court below.

8.18 We have, however, painstakingly read over the testimony of the Appellants' sole witness in the Court below, Mr. Zwide Ngwenya, and nowhere in his testimony by examination-in-chief, cross-examination and re-examination does he state that the Respondent confessed to committing the offence he was dismissed for.

8.19 The only statement from the witness is that one Frazer Clint informed the Appellants' Management that the Respondent had disclosed confidential information to him. The Appellants are therefore, relying on a statement purportedly made by the said Frazer exhibited at page 75 of the Record marked "IW12".

8.20 The author of the statement was not called as a witness but the Appellants have placed reliance on section 3(i) of the Evidence

Act, Chapter 43 of the Laws of Zambia which provides as follows;

> *"In any civil proceedings where direct evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied that is to say:*
>
> *(a) if the maker of the statement either*
>
> *(i) had personal knowledge of the matters dealt with by the statement.*

8.21 Notwithstanding the statement of Frazer Clint, and the apparent support of its evidential value by section 3 of the Evidence Act, it does not show that the Respondent admitted committing the alleged offence.

8.22 It follows therefore, that in the absence of a formal charge and an opportunity to be heard being accorded to the Respondent, there is no basis upon which the learned Judge in the Court below should have found that the Respondent admitted the offence for which he was dismissed.

8.23 We therefore, find no merit in grounds one, two, three, four and five and dismiss them accordingly.

8.24 In ground six, the argument is that the 24 months salaries award for damages was excessive as there was nothing extra-ordinary in the Respondent's dismissal and that as Assistant Shop Manager, it would not be difficult for the Respondent to find another job.

8.25 We have looked at the circumstances under which the Respondent was dismissed in flagrant violation of the rules of natural justice in an abrupt manner and the authorities the learned Judge relied upon in awarding the 24 months damages.

8.26 The *Kasote Singogo, Josephat Lupemba*[8] *and* *Dennis Chansa v Barclays Bank* case provide sufficient guidance on the circumstances under which the Court may depart from the normal measure of damages.

8.27 We are satisfied that this was an appropriate case for the learned Judge to depart from the normal measure of damages and the award of 24 months salaries is not excessive and we find no reason to interfere with the award.

8.28 The penultimate issue is the issue to do with whether the Appellants' decision to dismiss the Respondent fell within the principle in the case of *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa.*

8.29 In the *Yekweniya Chirwa* case (Supra) the Supreme Court held as follows;

> *"Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with procedure in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."*

8.30 What is of significance in the above cited holding is that the employee should have committed the offence. The employer should have satisfactory proof that the employee committed the offence. In this case, there is neither satisfactory proof that the Respondent committed the offence nor adherence to the disciplinary procedure.

8.31 This position was well settled by the Supreme Court in the case of *Rabson Sikombe v Access Bank Zambia Limited* (supra).

8.32 It is therefore, our considered view that the *Yekweniya Chirwa* case is not applicable to the facts of this case. These grounds are therefore dismissed.

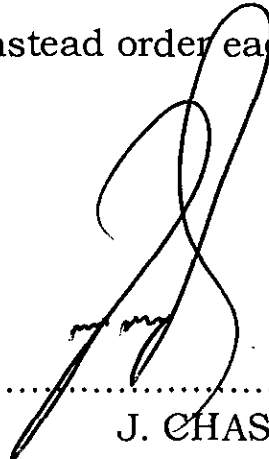
8.33 The final complaint by the Appellants is against the learned Judge's award of costs to the Respondent contrary to the rules of the Industrial Relations Division and established jurisprudence that only where the unsuccessful party has committed a wrong should they be condemned to costs.

8.34 Rule 44 of the Industrial and Labour Relations Rules provides inter-alia that costs may only be awarded where the employer is guilty of delaying the case or other misconduct. We find no such misconduct on the record and the learned Judge did not give any reason for condemning the Appellants to costs. This ground therefore, succeeds.

9.0 **CONCLUSION**

9.1 From our analysis of the appeal, we find no merit in all but one ground of appeal. We therefore, dismiss the appeal except with regard to ground nine.

9.2 We accordingly set aside the order for costs against the Appellants and instead order each party to bear their own costs here and below.



J. CHASHI
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE