IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 209/2021
HOLDEN AT LUSAKA CAZ/08/128/2021

(Civil Jurisdiction)

B E T W E E N:

ZAMBIAN BREWERIES PLC **APPELLANT**

AND

GILBERT KAUNDA **RESPONDENT**

CORAM: Kondolo, Majula and Chembe, JJA
On 21st September 2023 and 27th October 2023

For the Appellant : *Mr. M. Kasofu of Tembo Ngulube & Associates*

For the Respondent : *In Person*

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Zambia Consolidated Copper Mines vs James Matale (1995-1997) ZR 157*
2. *Attorney General vs Marcus Kampumba Achiume (1983) ZR 1.*
3. *Barclays Bank of Zambia Plc vs Stephenson Zawinji Gondwe - CAZ Appeal No. 135 of 2016.*
4. *Samson Katende and Crosby Bernard vs NFC Mining Plc (2018) ZR 112*
5. *Prudence Rashai Chikatisha vs Stanbic Bank Zambia Limited - SCZ Appeal 95/2015.*
6. *Kansanshi Mining Plc vs Mathews Mwelwa - CAZ Appeal No. 103/2019.*

7. *KB Davies and Co (Zambia) Limited vs Andrew Masunu - SCZ Appeal 181/2006.*
8. *ZESCO vs Lubasi Muyambango (2006) ZR 22.*
9. *Mukansemu Shambweka Nyirenda (Mrs.) (suing as Administratrix of the estate of the late Elijah Nyirenda vs Zambia Forestry and Forest Industries Corporation Limited — SCZ Appeal No. 127/2013.*
10. *Zambia Telecommunications Limited vs Simon Mudenda - SCZ Appeal No 17/2006.*
11. *Superbets Sports Betting vs Batuke Kalimukwa - SCZ Selected Judgment No. 27/2019.*
12. *Engine Petroleum vs Willis Muhanga - SCZ Appeal No. 117 of 2016.*
13. *Amiran Limited vs Robert Bones - SCZ Appeal No. 42 of 2010.*
14. *Zambia National Commercial Bank vs Joseph Kangwa - SCZ Appeal No. 54 of 2008.*

Legislation referred to:

1. *The Industrial Relations Court Rules, Chapter 269 of the Laws of Zambia*

Other authorities referred to:

1. *Dr. Winnie Sithole Mwenda and Chanda Chungu, Comprehensive Guide to Employment Law in Zambia (2012), Lusaka: UNZA Press.*

1.0 INTRODUCTION

1.1 This appeal emanates from a decision of the Industrial Relations Division of the High Court which was rendered by Judge Mumba dated 17th February, 2021. There was an employment relationship between Zambian Breweries Plc, the appellant herein, and the respondent.

1.2 Unhappy with the decision of the court below which found in favour of the respondent, the appellant launched this appeal.

2.0 BACKGROUND

2.1 The respondent, Gilbert Kaunda, was the complainant in the court below. The appellant was the respondent's employer from 1st September 2012 when he was employed as a Laboratory Technician on permanent and pensionable basis. He was later promoted to the rank of Brewery Microbiologist, Food and Safety Specialist and finally as Acting Quality Manager before he was summarily dismissed.

2.2 On 10th and 11th May, 2018, the appellant conducted a check-to-coach (C2C) audit at the Ndola Plant in various departments including the micro – laboratory which was managed by the respondent. The findings of the audit revealed some gaps in the respondent's laboratory.

2.3 In June, 2018, the appellant's Regional Quality Manager – Zambia and Botswana alleged that most of the samples which were processed in the respondent's micro laboratory were contaminated. The Quality Manager further asserted that some results were not being reported and the minimum mandatory sampling plan (MMSP) was not being adhered to, resulting in falsification of lab results. As a result of this state of affairs, the respondent was instructed to exculpate himself which he did in a letter dated 8th June, 2018. He was subsequently charged with the offence of gross negligence of

duty and gross misconduct on 12th June, 2018 and suspended from work.

2.4 A disciplinary hearing was held on 21st June, 2018 where he was given a chance to further exonerate himself. He was consequently found guilty and dismissed from employment on 4th July, 2018.

2.5 He appealed against the dismissal but his appeal was unsuccessful. He then graced the doors of the High Court alleging wrongful, unfair and unlawful dismissal.

2.6 In the court below, the appellant denied allegations of wrongful, unlawful and unfair dismissal. It contended that it complied with all the disciplinary processes outlined in its disciplinary code.

3.0 THE DECISION OF THE LOWER COURT

3.1 After reviewing the evidence that was before it, the trial court identified the issues for determination as being two-fold; firstly, whether the appellant complied with the disciplinary code and secondly, whether the charge levelled against the respondent which led to his dismissal were substantiated.

3.2 In addressing the first issue, the learned Judge was of the view that wrongful dismissal is concerned with how the dismissal was effected and not why. He found that the appellant in this case had complied with its laid down

procedures and rules of natural justice. That the claim for wrongful and unlawful dismissal was therefore not proved.

3.3 In further analyzing the evidence, the lower court found as a fact that the samples that were alleged to have been contaminated were later found to be okay after they were taken to Lusaka for re-testing. The allegation that the respondent was falsifying results was thus not established. The lower court further found that the appellant's disciplinary code exhibited did not have a definition section for the two offences that the respondent was charged with. That the disciplinary code produced by the respondent defined 'gross negligence' as follows:

> *"Gross negligence means failure by an employee to carry out a normal part of his job which leads to loss of revenue, production, sales or any other loss relating to the efficiency or profitability of the company."*

3.4 Based on the cited definition, the trial court held that the offence of gross negligence of duty was not substantiated against the respondent as there was no evidence to show that the appellant had lost revenue, production, sales or loss relating to the efficiency or profitability of the company. He ultimately awarded the respondent damages equivalent to 3 months of his last basic salary plus allowances with interest and costs.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the court below, the appellant appealed to this Court raising three grounds of appeal framed as follows:

> *"1. The learned Judge erred in law and fact when he erroneously relied on the Disciplinary and Grievance Code exhibited in the respondent's affidavit in support of complaint instead of the Disciplinary and Grievance Code in the appellant's Bundle of Documents based on the fact that the respondent admitted in cross-examination that the Disciplinary Code in use at the time of his dismissal was the one in the appellant's Bundle of Documents.*
>
> *2.The learned Judge erred in law when he interposed himself as an Appellate Tribunal to the appellant's Tribunal and went on to hold that the charges that had been levelled against the respondent were not substantiated before the appellant's Tribunal and before trial Court.*
>
> *3.The learned Judge erred in law when he awarded costs to the respondent in light of the well-established principle on costs for matters before the Industrial Relations Division of the High Court for Zambia, especially that the record shows no evidence of the appellant having offended* ***Rule 44 of the Industrial and Labour Relations Rules****."*

5.0 APPELLANT'S ARGUMENTS

5.1 On 10th February, 2021, the appellant filed its heads of arguments. Under grounds one and two, the appellant submitted that the trial court erred when it relied on the

respondent's Disciplinary and Grievance Code that was exhibited in the respondent's affidavit in support. It was contended that the court below ought to have relied upon the appellant's Disciplinary and Grievance Code that was produced in its bundle of documents. Counsel pointed out that the error by the Court is significant as it determines whether or not the offence of gross negligence of duty was defined and assigned a meaning.

5.2 Counsel asserted that the determination further resolves the issue of whether the court below could hold that the appellant did not lead evidence of loss of revenue, production or sales relating to the efficiency or profitability of the company. He stressed that the appellant's Disciplinary Code provided that all definitions and abbreviations are as applied in the Grievance and Disciplinary Procedure ZHN-HUM-P-03. That from the appellant's Disciplinary Code, there was no need to prove that the appellant had lost revenue, production, sales or suffered any loss relating to efficiency or profitability.

5.3 Counsel noted that the appellant further disputed the applicability of the respondent's code in evidence in the court below. It was contended that the findings of fact by the lower court was therefore not supported by the evidence and should therefore be set aside.

5.4 To support his argument, we were referred to a passage from a book titled, **'Comprehensive Guide to Employment Law in Zambia (2012)'**[1] by the learned authors Dr. Winnie Sithole

Mwenda and Chanda Chungu where they cite the case of ***Zambia Consolidated Copper Mines vs James Matale***[1]. In the said case, the Supreme Court held that:

> *"It should be noted 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 facts which cannot reasonably be entertained."*

5.5 In respect of ground two, it was argued that the trial court interposed itself as an appellate tribunal when it held that the appellant ought to have led evidence of loss. The appellant further criticized the court below for allegedly ignoring evidence that there were other factors that led to the dismissal of the respondent. That this entailed that there was an unbalanced evaluation of evidence which should warrant this court to allow the appeal. Reliance was placed on the case of ***Attorney General vs Marcus Kampumba Achiume***[2] in which the Supreme Court held that:

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

5.6 It was further submitted that the findings of fact by the appellant's tribunal were not the subject of re-litigation by the lower court but that the role of the court was to find out if the tribunal had the power to do what was done, and if the power was properly exercised. For this proposition, the appellant's counsel referred us to a number of authorities including

Barclays Bank of Zambia Plc vs Stephenson Zawinji Gondwe[3], ***Samson Katende and Crosby Bernard vs NFC Mining Plc***[4] and ***Prudence Rashai Chikatisha vs Stanbic Bank Zambia Limited***[5].

5.7 Pertaining to ground three, it was submitted that the lower court misdirected itself when it granted costs to the respondent in a matter that was dealt with by the Industrial Relations Division of the High Court. That there was no finding of either unreasonable delay, improper, vexatious or unnecessary steps taken on the part of the appellant as required by **Rule 44(1) of the Industrial and Labour Relations Rules**[2] to warrant an award of costs. Our decision of ***Kansanshi Mining Plc vs Mathews Mwelwa***[6] was cited as authority for guidance on the issue of costs as it relates to matters that are determined in the Industrial Relations Division of the High Court.

5.8 Counsel therefore prayed that the order for costs be set aside and the appeal be allowed.

6.0 Respondent's Arguments

6.1 In response to ground one, the respondent pointed out that there were two disciplinary codes that were produced in the court below, one from the appellant and the other from the respondent. That the one produced by the respondent did have a definition for 'gross negligence of duty' while the other code did not have a definition for the offence, but simply referred to a 'Grievance and Disciplinary Procedure ZNH –

HUM – P – 03'. It was submitted that the same was never produced thereby creating a *lacuna* in the evidence. The case of ***KB Davies and Co (Zambia) Limited vs Andrew Masunu***[7] was called in aid. In the said case, it was held that where there is a *lacuna* in the evidence, the court should resolve that lacuna in favour of the party who was not responsible for the lacuna.

6.2 In relation to ground two, the respondent submitted that since the samples were found not to have been contaminated after re-testing, there was no basis upon which he could be said to have been grossly negligent. In other words, there were no facts to support his dismissal.

6.3 Moving on to ground three, the gist of the submission was that the order for costs was correct since the appellant charged the respondent on facts which were not supported by the ingredients of the offence. He beseeched the Court to dismiss the appeal.

7.0 Hearing of the Appeal

7.1 The parties wholly relied on the heads of argument that were filed in respect of their cases when the matter came up for hearing on 21st September, 2023.

8.0 Decision of the Court

8.1 We have assiduously considered the record and the arguments by the parties in arriving at our decision. We propose to deal with the grounds of appeal seriatim. The

issues that we are being called upon to interrogate are firstly, which disciplinary code was applicable. Secondly, whether the court below had interposed itself contrary to established principles of law. Thirdly, the question of the infliction of costs on the appellant notwithstanding the principle on costs on matters relating to the Industrial Relations Division.

9.0 Wrong disciplinary code

9.1 In the first ground of appeal, the appellant is displeased with the use of the disciplinary and grievance code exhibited by the respondent as opposed to the one exhibited in the appellant's bundle of documents, notwithstanding the fact that the respondent admitted in cross examination that the appellant's disciplinary code was the one in use.

9.2 Indeed it is not in dispute that there were two disciplinary codes that were exhibited, one by the appellant and one by the respondent. We have had sight of both of them and have also examined the evidence on record. A careful analysis of the evidence reveals that the disciplinary code that was applicable to the respondent was that exhibited by the appellant which is exhibit 'GK4'. The witnesses namely Ernest Moonga on the part of the appellant and the respondent himself did concede that the disciplinary code that was applicable was that of the appellant. We therefore see no basis upon which the trial Judge decided to use the disciplinary code exhibited by the respondent given the evidence adduced.

9.3 We are thus compelled to set aside the finding that the disciplinary code applicable was 'GK5' as opposed to 'GK4'. This is in line with our mandate which is that we can only upset findings of fact when we are satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make (see ***Wilson Masauso Zulu vs Avondale Housing Project Limited***).

9.4 In *casu*, the finding flies in the teeth of the evidence. Ground one is found to be meritorious and is accordingly upheld.

10.0 Court interposing itself

10.1 In the second ground of appeal, the appellant is disconsolate with the finding by the lower court that the charges that had been leveled against the respondent had been substantiated before the appellant's tribunal. In this vein, it has been argued that the lower court had interposed itself as an appellate tribunal. The hotly contested issue is whether or not the trial court did in fact interpose itself.

10.2 The starting point is to establish what the function of a court is, in relation to tribunals within domestic disciplinary procedures. There are a plethora of authorities in this regard. The cases of ***ZESCO vs Lubasi Muyambango***[8], ***Barclays Bank Zambia Plc vs Stephenson Zawinji Gondwe***[3] and

Samson Katende and Crosby Bernard vs NFC Mining Plc[4] ably articulate the principle that 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 that power had been properly exercised.

10.3 The law is therefore settled on the functions of the court. The question in this regard is whether the court below was on firm ground in finding that the allegations were unsubstantiated. After combing through the record, what emerges is that, the samples, the basis upon which the charge was anchored which were taken for re-testing in Lusaka, were found not to be contaminated. Evidence of this is from the appellant's own witness Ernest Moonga. At page 166 of the record of appeal, this witness agreed that the Mosi samples that had been taken for re-analysis were not contaminated but went on to state that:

> *"according to the charges that he was given there were other findings that were done which led to him being dismissed."* The question that begs an answer is what were these *"other findings?"*

10.4 The view we take is that the 'other findings' were not deployed before the court in order to substantiate the allegation leveled against the respondent. It is insufficient in our view to simply state that there were other findings or considerations without

providing a substratum of facts to support the disciplinary measures that were imposed on the respondent.

10.5 A dismissal must be based on substantiated or reasonable grounds. Where a valid reason exists that is substantiated, an employee's claim for unfair dismissal would have no legal leg to stand on. The principle of law that there is need to establish a substratum of facts to support the disciplinary measures taken against an employee was well expressed in the case of ***Mukansemu Shambweka Nyirenda (Mrs) (suing as Administratrix of the estate of the late Elijah Nyirenda) vs Zambia Forestry and Forest Industries Corporation Limited***[9].

10.6 In yet another illuminating case of ***Zambia Telecommunications Limited vs Simon Mudenda***[10] where the employer summarily dismissed an employee for causing loss to the company, the Supreme Court found it to be a case of unfair dismissal on account of the fact that it was established that the loss that was incurred was actually not caused by the employee but was due to the employer's weak practices in dealing with the administration of certain allowances.

10.7 In another insightful case of ***Superbets Sports Betting vs Batuke Kalimukwa***[11], the court of last resort eloquently opined that:

> *"The court is, in unfair dismissal, obliged to consider the merits or substance of the dismissal to determine*

whether the reason given for the dismissal is supported by relevant facts".

10.8 We would like to associate ourselves with the foregoing and which we respectfully adopt. Having thoroughly examined the record, we have not been able to find a substratum of facts upon which the dismissal was predicated. The evidence that was led, was in relation to, the alleged contamination of the sample of Mosi which it was later found did not hold water by the appellant's own witness. There was no other material before the court to be considered as being relevant facts in support of the disciplinary measures. In the absence of the relevant facts, the trial Judge's finding cannot be criticized.

10.9 We are of the well-considered view that the lower court was on firm ground as the appellant did not properly exercise its disciplinary power. Consequently, ground two is dismissed for want of merit.

11.0 Costs

11.1 The frustration in the third ground of appeal stems from the award of costs in a matter that was adjudicated upon in the Industrial Relations Division of the High Court. We quickly turn to the provisions of **Rule 44** of the **Industrial and Labour Relations Rules** and find it imperative to reproduce the same. It provides as follows:

"(1) Where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexations or unnecessary steps in any proceedings, or of

other unreasonable conduct, the court may make an order for costs or expenses against him.

(2) where an order is made under sub-rule (1), the court may direct that the party against whom the order is made shall pay to any other party a lump sum by way of costs or expenses, or such proportion of the costs of expenses as may be just, and in the last mentioned case may itself assess the sum to be paid, or may direct that it be assessed by the Registrar, from whose decision an appeal shall lie to the court."

11.2 It is crystal clear from the above provision, that in order for the court to inflict an order for costs on a party, they must be guilty of unreasonable conduct or unreasonable delay, improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. This principle has been articulated in a myriad of authorities. A leading case that comes to mind is that of ***Engen Petroleum vs Willis Muhanga***[12] where the Supreme Court pronounced itself on the unique position that the Industrial and Labour Division has in relation to a departure from the principle of costs following the event.

11.3 Other cases that we recall espousing the same principle include, ***Amiran Limited vs Robert Bones***[13], and ***Zambia National Commercial Bank vs Joseph Kangwa***[14]. We had occasion to deal with the aspect of costs in the case of ***Kansanshi Mining Plc vs Mathews Mwelwa***[6] where we held as follows:

"In order for one to be awarded costs the onus falls on them to demonstrate that the claim falls under one of the exceptions. The long and short is that the general rule of costs follows the event does not apply in matters under the Industrial Relations Division "unless one is guilty of unreasonable delay or taking improper vexatious or unnecessary steps in any proceedings or of other unreasonable conduct.

A claim for costs must thus fall in one of the instances highlighted above and if not costs should not be awarded. This was the reasoning espoused in ***Engen Petroleum Zambia Limited vs Willis Muhanga & Jeremy Lumba***[5] *where the Supreme Court set aside the order for costs awarded to the respondents on the ground that there was no basis to have awarded costs when the respondents did not fall into the criteria stipulated in* ***Rule 44(1)****."*

11.4 In light of the foregoing we assail the order of the lower court as we see no basis upon which it departed from the principle as articulated in **Rule 44** and the aforecited cases. The record does not reveal any form of misconduct as envisaged under **Rule 44**.

11.5 We accordingly find merit in the third ground and uphold it.

12.0 Conclusion

12.1 In sum, we have found that the appellant has been successful on the first and third grounds of appeal but unsuccessful in the second ground for reasons articulated earlier in this judgment.

12.2 Notwithstanding the fact that there was success in the first and third ground, because of our holding in the second ground of appeal, we find the success in that ground does not aid the appellant for reasons that have been advanced in the judgment.

12.3 The net effect is that the judgment of the lower court with respect to the damages awarded still stands. Consequently, we uphold the award of damages as stated by the lower court.

12.4 This matter having emanated from the Industrial Relations Division of the High Court, we order that each party bears their own costs in this court and in the court below.

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M.M. Kondolo, SC

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE

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Y. Chembe

COURT OF APPEAL JUDGE