

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

Appeal No. 287/2022

(Civil Jurisdiction)

BETWEEN:

NCHINDIKA NANKOLONGA

APPELLANT

AND

ZAMBIA NATIONAL BUILDING SOCIETY

RESPONDENT

***Coram: Kondolo SC, Majula and Banda-Bobo JJA
On 15th August, 2024 and 18th September, 2024***

For the Appellant : Mr. K. Mwale of Messrs K. Mwale & Company

For the Respondent : Ms. M. Nsofwa of Messrs AB & David Advocates

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Sithole v. State Lotteries Board (1975) ZR 106*
- 2. Supabets Sports betting v. Kalimukwa SCZ Appeal 110/2016*
- 3. Caroline Daka v. Zambia National Commercial Bank PLC (2012) 3 ZR.8 (HC).*
- 4. Miller v. Minister of Pensions (1947) 2 All ER 372.*
- 5. BJ Poultry Farms Limited v. Nutri Feeds Zambia Limited SCZ Judgment No. 3 of 2016.*
- 6. Zambia Railways v. Pauline S. Mundia and Another SCZ Appeal 189/2004.*
- 7. Chimanga Changa Limited v. Stephen Chipango Ng'ombe (2010) 1 ZR 208 (SC).*

8. *Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others* (2005) Z.R. 138 (SC).
9. *Zulu v. Avondale Housing Project* (1982) ZR 172.
10. *Mohamed v. The Attorney General* (1982) ZR 49.
11. *Zambia National Provident Fund v. Yekweniya Mbiniwa Chirwa* (SCZ Judgment No. 18 of 1986).
12. *Musupila v. Copperbelt University* (SCZ Appeal 149/2013)
13. *Frost v. Telkom SA* (2001) 22 ILJ 1253 (CCMA)
14. *BMW (SA) (Pty) Ltd v. L Van der Walt* (2000) JA10/99
15. *AEL Zambia Plc v. Swift Simwinga* SCZ Appeal No. 223/2015
16. *General Electrical (Hotpoint) and Local No. 601, United Association of Journeymen and Apprentices of the Plumbing and Pipe Industry of the United States and Canada 30 – CA 9450*
17. *McIntyre v. Hockin* (1889) 16 Q.A.R 498
18. *Shepherd Muzhike v. Chambeshi Copper Smelter Limited* CAZ Appeal No. 75/2019.
19. *The Attorney-General v. Phiri* (1988 – 1989) ZR. 121.
20. *Lusaka City Council v. Mumba and Others* (1976) ZR.53 (HC).
21. *Jack Kawamya Chibi v. Silondwa Engineering Limited*
COMP/IRC/NO.90/2019.
22. *John Caiphas Mumba v. Society for Family Health* SCZ Appeal No.175/2005.
23. *Sarah Aliza Vekhnik v. Casa Dei Bambini Montessori Zambia* CAZ Appeal No. 129/2017.
24. *Annard Chibuye v. Zambia Airways* (1985) ZR.4 (SC).
25. *African Banking Corporation Zambia v. Lazarous Muntente* CAZ Appeal No. 51/2021.
26. *Sampa Joseph Luwisha v. Indo Zambia Bank Limited* CAZ Appeal No.227/2021.
27. *Emporium Fresh Foods Limited (T/A Food Lovers Market) & Gourment Market Limited v. Kapya Chisanga* CAZ Appeal No.44/2021.

28. *David Banda v. The Attorney-General CAZ Appeal No. 233/2020*
29. *Kafue District Council v. James Chipulu (1995) S.J. 13 (SC).*
- 30 *Tom Chilambuka v. Mercy Touch Mission International SCZ Appeal No. 171/2012*
31. *Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others (SCZ No. 2 of 2002)*
32. *Ward vs Bradford Corporation (1971) 70 LG 27.*

Legislation referred to:

1. Employment Code Act, No 3 of 2019

Other works referred to:

1. *Kenny CS (1952) Outlines of Criminal Law 16th edition, JWC turner.*
2. *Le Roux in Contemporary Labour Law, Disciplinary Inquiries: When can a second inquiry impose a heavier penalty? Volume 11 No. 2 of 2011*
3. *Bryan A Garner's, Black's Law Dictionary. 9th Edition, (United States of America, Thomson Reuters, 2009)*
4. *Mwenda, Winnie Sithole and Chungu, Chanda "A Comprehensive Guide to Employment Law in Zambia (2021) UNZA Press*
5. *Halsbury's Laws of England, 4th Edition*
6. *Chungu Chanda (2022) "MP Infrastructure Zambia Limited v. Matt Smith and Kenneth Barnes CAZ Appeal 102/2020, SAIPAR Case Review: Vol. 5: Iss. 2, Article 6.*

1.0 Introduction

- 1.1 By this appeal, the Appellant is contesting the judgment of Lady Justice E.P. Mwikisa rendered on 6th May, 2022.

1.2 This appeal focuses on the validity and process of the forensic examination and the involvement of independent public offices in the investigation. The arguments center on whether due process was followed and whether the evidence was fairly evaluated. Furthermore, we are being called upon to interrogate the fairness of the second disciplinary inquiry.

2.0 Background

2.1 The Appellant was employed by the Respondent in the position of Banking Clerk, starting on 1st January 2015, on a basic salary of ZMW 17,496.00 per annum. The employment lasted over three years and eight months before the dismissal.

2.2 On 2nd February, 2018, the Appellant paid out ZMW 30,000.00 from a client account named Marjory Mwamba, which the client disputed, claiming no withdrawal was ever made.

2.3 The Respondent conducted an internal investigation and also sought the involvement of the public office of the Inspector General of Police to investigate the matter further.

2.4 On 8th February 2018, six days after the initial disputed withdrawal of ZMW 30,000.00, the Appellant allegedly wrongfully paid out an additional ZMW 9,500.00 from another account.

2.5 The Appellant faced charges of gross negligence of duty and inefficiency, under specific clauses of the Respondent's

Disciplinary Grievance Rules and Procedure Code ("the Code"). The charges were based on the wrongful payment of ZMW 30,000.00 and ZMW 9,500.00 to unauthorized individuals.

- 2.6 The Disciplinary Committee found the Appellant not guilty regarding the ZMW 30,000.00 due to insufficient evidence but guilty of negligence related to the ZMW 9,500.00 payment, which led to summary dismissal.
- 2.7 The Respondent's appeals committee considered the Appellant's admission and the repayment of the wrongful payments as mitigating factors. They decided to overturn the Disciplinary Committee's decision and reinstated the Appellant.
- 2.8 That notwithstanding, the investigations in relation to the ZMW 30,000 were concluded by the office of the Inspector General of Police whose forensic report stated that the Appellant had forged a withdrawal slip for the said sum of money. With this fresh evidence, the Respondent proceeded to charge the Appellant for the offence of forgery and dishonest conduct. She was subsequently found guilty of forgery and dishonest conduct by the Respondent's disciplinary committee contrary to clause 7.38 and 7.32 and thereafter dismissed. The decision was upheld by the Respondent's appeals committee.

3.0 High Court Proceedings

- 3.1 Aggrieved with the loss of employment, the Appellant initiated legal proceedings in the High Court for Zambia on 26th October 2018, seeking, *inter alia*, damages for wrongful dismissal, embarrassment and mental anguish. She also sought interest on sums found due as well as costs for the suit.
- 3.2 The learned trial Judge scrutinized the evidence that had been presented by the parties and thereafter proceeded to make notable findings of fact. She found that the report from the Zambia Police pointed to the Appellant as having been the one who forged the signature on the withdrawal slip in issue, which evidence was not before the disciplinary committee at the first instance when the Appellant was charged.
- 3.3 The lower court was of the view that the Appellant's handwriting on the sampled withdrawal slips matched the writing on the withdrawal slip that was presented. That the offence of forgery was therefore proved against the Appellant and was found guilty of dishonest conduct which resulted in summary dismissal.
- 3.4 On 6th May, 2022, the High Court ruled in favor of the Respondent, dismissing all the Appellant's claims.

4.0 Grounds of Appeal

- 4.1 Displeased with the outcome, the Appellant is before us on three grounds of appeal couched as follows:

“1. The High Court Judge erred in law and in fact when she held that the Appellant was guilty of forgery and as a consequence was lawfully dismissed from employment.

2. The High Court erred in law and in fact when she held that the Appellant was lawfully and fairly dismissed despite the Respondent refusing to avail the Appellant with the CCTV footage and photographic album during the disciplinary hearings.

3. The High Court Judge erred in law and in fact when she found that the Respondent had followed the disciplinary Code when dismissing the Appellant.”

5.0 Appellant’s Arguments

- 5.1 The submissions outline the Appellant’s dissatisfaction with the High Court’s decision and the basis for seeking a review in the Court of Appeal, focusing on the alleged errors in the judgment related to the Appellant’s dismissal.
- 5.2 In respect of ground one, the Appellant argues that the High Court Judge erred in determining that the Appellant was guilty of forgery, leading to lawful dismissal. The Appellant further asserts that the Judge’s decision was based on findings by the disciplinary committee and supported by a handwriting expert’s report. The Appellant disputes these findings, suggesting that

the court's reliance on the Respondent's disciplinary code and associated evidence was flawed.

- 5.3 The Appellant references the Respondent's disciplinary code, particularly clause 3.1(c), which states that a fair and just disciplinary action should be based on principles of law, especially in cases where society might be directly affected. The Appellant draws attention to the principles governing civil and criminal cases in Zambia, specifically mentioning the case ***Sithole vs State Lotteries Board***¹, which deals with handwriting reports and the standard of evidence required.
- 5.4 The Appellant argues that the High Court erred in relying solely on the handwriting expert's report to determine the guilt of forgery. That the Supreme Court in the ***Sithole***¹ (*supra*) case stated that the function of a handwriting expert is to highlight similarities or differences in handwriting specimens, but the court must independently evaluate the significance of these findings.
- 5.5 The Appellant points out that there was no documentary or pictorial evidence presented to substantiate the handwriting expert's conclusions. That the ***Sithole***¹ case emphasized that such evidence must be properly presented for the court to assess the basis of the expert's conclusions.

- 5.6 It was submitted that the Appellant's request for the photographic album and handwriting specimens for independent analysis was denied. This denial, along with the expert's failure to appear before the disciplinary committee, prevented the Appellant from questioning the findings and the basis for the conclusion of forgery. The Appellant argues that this constitutes a serious error, as the committee relied heavily on the expert's report without thorough examination.
- 5.7 The Appellant criticizes the disciplinary process and the court's reliance on the handwriting expert's report without proper supporting evidence. She highlights the lack of opportunity for her to challenge the findings and calls into question the validity of the conclusions drawn from the report.

6.0 Grounds 2 & 3

- 6.1 The Appellant argues that the High Court erred in law and fact by ruling that she was lawfully and fairly dismissed. The main contention is that the Respondent failed to provide her with CCTV footage and a photographic album during the disciplinary hearings, which were crucial for proving her case. The Appellant believes this omission rendered the disciplinary process unfair and contrary to the principles of due process.
- 6.2 The Appellant cites clause 3.3 of the relevant disciplinary code, to emphasize that employees have the right to a fair hearing.

This includes being given an opportunity to defend themselves and ensure their rights are protected during disciplinary procedures.

- 6.3 That the Supreme Court in the ***Supabets Sports Betting v. Kalimukwa***² case emphasized the importance of compliance with disciplinary procedures to ensure fair and transparent determination of disciplinary offences. Additionally, the case of ***Caroline Daka v. Zambia National Commercial Bank PLC***³ was cited, where it was held that disciplinary procedures are meant to give employees every possible opportunity to address and rectify any misconduct.
- 6.4 The arguments presented focus on the procedural fairness of the disciplinary process, highlighting the failure to provide critical evidence and the denial of the Appellant's right to a fair hearing. The Appellant argues that these lapses compromised the integrity of the process and should invalidate the dismissal decision.
- 6.5 The case of ***Caroline Daka v. Zambia National Commercial Bank***³ was again cited, highlighting that if a disciplinary procedure is part of the contract, it must be strictly followed. That the failure to provide the CCTV footage and other necessary documents was a breach of the procedural requirements, undermining the fairness of the process.

- 6.6 The Appellant noted that the Respondent's witness, Stephen Kakudala, a Human Resource Practitioner, confirmed that the CCTV footage was critical for proving her case. However, the footage for the relevant period was deleted. That the witness admitted not knowing who deleted the footage or the reasons behind its deletion.
- 6.7 In addition, the Appellant argues that the Respondent failed to adhere to mandatory disciplinary procedures, particularly in the handling of her case. This includes issuing three letters on the same day: a letter of disciplinary layoff, a charge form, and a letter to exculpate herself. The Appellant asserts this was a deliberate breach of the Respondent's disciplinary process.
- 6.8 That despite the initial investigation clearing the Appellant of forgery, the Respondent pursued further action, which the Appellant claims was an orchestrated effort to remove her from employment. The Appellant argues that these actions were malicious and aimed at unjustly dismissing her.
- 6.9 The Appellant asserts that the Respondent acted with malice and wrongful intent from the beginning of the disciplinary proceedings. Due to these actions, the Appellant has struggled to find new employment in a challenging job market. The Appellant seeks compensation for the loss of income resulting from the Respondent's actions.

7.0 Respondent's Arguments

- 7.1 On the first ground of appeal, the thrust of the Respondent's arguments regarding the forensic report and handwriting expert analysis, was that the report was generated by an independent handwriting expert who reviewed various specimens, not limited to the Appellant's. That the Inspector General of Police, an independent public office, confirmed the report's validity.
- 7.2 In furtherance of the arguments, it was submitted that the record of appeal reveals that the Appellant testified about the availability of the report, indicating that the Appellant had access to the necessary documents and evidence during the proceedings. That the report confirmed that the handwriting on the withdrawal slip matched the specimen samples of the Appellant's handwriting, supporting the charge of forgery.
- 7.3 The Respondent argued that these elements complied with the Code in the disciplinary process and supported the decision reached regarding the Appellant.
- 7.4 Turning to the Appellant's grievance that he was not provided access to the photographic album used in the investigation, the Respondent has asserted that the photographic album used in the investigation had already been reviewed by an expert as per the Respondent's procedural requirements. That the failure to

present the handwriting expert at the disciplinary committee hearing does not negate the evidence.

- 7.5 The Respondent's Counsel emphasized that while forgery is a criminal offence under Zambian law, the proceedings before the Respondent's Disciplinary Committee and the Court were civil in nature. Therefore, the standard of proof required is 'on a balance of probabilities' rather than 'beyond a reasonable doubt', as in criminal cases. That this principle is supported by legal precedents, including the case of ***Miller v. Minister of Pensions***⁴.
- 7.6 Counsel for the Respondent references the Supreme Court case of ***BJ Poultry Farms Limited v. Nutri Feeds Zambia Limited***⁵, which reinforced that in civil matters, the plaintiff must prove their case on a balance of probabilities. The emphasis is on achieving a reasonable degree of probability, not as high as the requirement in criminal cases. Counsel has further called in aid the case of ***Zambia Railways vs Pauline S. Mundia and Another***⁶ which articulates the same principle.
- 7.7 The Respondent's Counsel references ***Kenny's Outlines of Criminal Law***¹, which states that a higher minimum of proof is required for criminal charges compared to civil matters, where a preponderance of evidence suffices. That the disciplinary committee and the Court found the Appellant guilty of forgery based on the balance of probabilities. That they

determined that the Appellant wrote and signed the withdrawal slip used for the unauthorized withdrawal of ZMW 30,000.00.

- 7.8 The case of ***Chimanga Changa Limited v. Stephen Chipango Ng'ombe***⁷, has been called in aid where the Supreme Court stated that an employer does not need to prove that an offence was committed beyond a reasonable doubt in cases of employee misconduct. The employer's role is to act reasonably in decision-making.
- 7.9 The Respondent's actions, including obtaining a handwriting expert's report and the account holder's testimony, were deemed reasonable. That the evidence showed the handwriting on the withdrawal slip was not the account holder's but matched the Appellant's, justifying the dismissal.
- 7.10 Based on the foregoing, we were urged to dismiss ground 1 of the Appellant's Appeal as lacking merit.
- 7.11 The bone of contention in grounds two and three is the deletion of the CCTV footage and the second disciplinary enquiry.
- 7.12 The Respondent asserts that the CCTV footage was unavailable because it had been deleted by an unknown person. This position was supported by witness testimony, as referenced in the record of appeal (pages 48 and 174). The Respondent also maintains that the photographic album was not available to the

Appellant but had already undergone an independent forensic examination. Furthermore, the forensic handwriting report was provided to the Appellant.

- 7.13 The Respondent asserts that it followed the Disciplinary Code in dismissing the Appellant. That the procedures adhered to were consistent with the contractual provisions between the Appellant and the Respondent, as documented in the Supplementary Record of Appeal. That the Appellant was given an opportunity to appeal at all stages of the process, and procedural fairness was maintained throughout.
- 7.14 It is stated that all pertinent and available documents were provided to the Appellant, as admitted by the Appellant during trial. This counters the Appellant's claim of lack of access to necessary documents.
- 7.15 The Respondent argues that due process was clearly followed, and the Appellant failed to prove that the Respondent breached the Code. The legal principle cited is from **Black's Law Dictionary**², emphasizing that the burden of proof rests on the person who affirms, not the one who denies.
- 7.16 Counsel referred to the case ***Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others***⁸, where the Supreme Court clarified that the burden of proof lies with the plaintiff, especially when alleging wrongful or unfair

dismissal. The court emphasized that it is generally up to the plaintiff to prove their allegations.

- 7.17 Counsel also referenced the case ***Zulu v. Avondale Housing Project Limited***⁹, reiterating that the plaintiff must prove their case as failure to do so means they are not entitled to judgment, regardless of the opponent's defence. Additionally, that in ***Khalid Mohamed v. The Attorney General***¹⁰, the court stated that a plaintiff cannot automatically succeed if a defence fails; they must still prove their case.
- 7.18 The Appellant argued that the Respondent acted in breach of its own disciplinary procedures following the Appellant's reinstatement, citing a letter of disciplinary layoff issued on the same day. However, the Respondent maintains that there was no such breach.
- 7.19 The Respondent highlights Clause 1.3 of the Code, which states that the Code may not cover all aspects of unacceptable behavior or standards in the workplace.
- 7.20 The Respondent justifies their actions under clause 1.3 of the Code, which allows for flexible measures not explicitly covered by the Code. This flexibility was used to issue three letters to the Appellant simultaneously: a disciplinary layoff, a charge form for forgery and dishonest conduct, and a letter allowing the Appellant to defend herself. The Respondent argues that

this was necessary due to difficulty in locating the Appellant to serve the documents.

- 7.21 Regarding the Appellant's argument that the whole process was an orchestrated effort to remove her from employment, the Respondent counters by referring to testimony from their witness, indicating that the actions taken were consistent with procedural requirements and necessary under the circumstances. That the witness testimony supports the Respondent's assertion that the measures were not punitive but rather procedural, aimed at addressing the issues at hand.
- 7.22 That the testimony indicates that investigations into the ZMW 30,000.00 withdrawn from a client account were still ongoing. That an independent investigation was conducted by the Zambia Police after the initial inquiry. That the Appellant was reinstated by the appeal committee due to insufficient evidence for gross negligence, but had previously admitted to paying ZMW 9,500.00 to the wrong person.
- 7.23 The Respondent justified charging the Appellant again based on new and material information that emerged from the forensic handwriting expert's report. This additional evidence, which was not available during the initial inquiry, supported the charges of forgery and dishonest conduct. The Respondent argues that this justified re-opening the case and pursuing further disciplinary action.

- 7.24 This argument was supported by references to legal principles discussed in ***Le Roux's Work on Labour Law***³, particularly when a second disciplinary inquiry can be held. The cited text explains that a second inquiry is justified if the first was not compliant with the company's disciplinary code or if new evidence emerges.
- 7.25 The Respondent references the Supreme Court's decision in ***Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa***,¹¹ stating that if an employee commits an offence warranting dismissal, failure to follow the company's laid down procedure does not render the dismissal wrongful. This principle was affirmed in ***Musupila v. Copperbelt University***¹².
- 7.26 It is argued that the Appellant committed offences of forgery and dishonest conduct, which are serious enough to warrant dismissal. Therefore, the Respondent's decision to charge and dismiss the Appellant was justified, irrespective of procedural issues. It has been strongly argued that even if there were procedural lapses, the dismissal remains justified due to the severity of the offences.
- 7.27 In wrapping up, the Respondent asserts that grounds two and three of the Appellant's appeal lack merit, given the legal precedents and the facts of the case. The Respondent requests that the appeal be dismissed.

8.0 Reply

8.1 On 6th August, 2024, the Appellant filed in heads of argument in reply. This was after leave of court was obtained on 29th July, 2024. The Appellant in the argument in reply is challenging the fairness and reasonableness of his dismissal.

8.2 The Respondent is accused of acting unreasonably and unfairly in dismissing the employee, as the dismissal did not align with legal standards or the employer's established practices.

8.4 Counsel references **Halsbury's Laws of England**⁵ as the legal authority which outlines a threefold test to determine if a dismissal for misconduct is justified, namely:

“ 1. The employer must genuinely believe the employee is guilty of misconduct. (2). This belief must be based on reasonable grounds. (3). The employer must have conducted a reasonable investigation.”

8.4 The Appellant asserts that the Respondent did not meet these criteria and acted unfairly by pursuing a second charge against the employee based on the same facts.

8.5 Counsel cites the case **Frost v. Telkom SA**,¹³ which holds that conducting a second disciplinary inquiry on the same facts is generally unfair, especially when the first inquiry was compliant with the company's disciplinary code.

- 8.6 Counsel emphasizes that a second disciplinary inquiry is not justified if the first inquiry followed the employer's disciplinary code and considered all relevant facts. The case of ***BMW (SA) (Pty) Ltd v. Van der Walt***¹⁴ is cited, stating that fairness is key in labor law and that holding more than one inquiry on the same charge is generally unfair unless there are exceptional circumstances.
- 8.7 The court in the above cited case of ***BMW (SA) (Pty) Ltd v. Van der Walt***¹⁴ highlighted that fairness is the criterion for initiating disciplinary processes. It stressed that a second disciplinary process is usually unfair unless exceptional circumstances exist.
- 8.8 It was contended that the Supreme Court confirmed in ***AEL Zambia Plc v. Swift Simwinga***¹⁵ that for a disciplinary committee's decision to be valid, two conditions must be met:
- (a) The disciplinary panel must have valid disciplinary powers; and
 - (b) These powers must be exercised validly.
- 8.9 The thrust of the Appellant argument is that once the Appellant was exonerated and reinstated, the Respondent no longer had valid disciplinary powers to act against him.

- 9.10 The Appellant's behavior was condoned, and thus, they could not be dismissed later for the same behavior. Counsel references **A Comprehensive Guide to Employment Law in Zambia**⁴, which states that if an employer condones misconduct or fails to alert the employee to it, the right to dismiss on the same charge is lost.
- 8.12 He highlights the fact that the doctrine of condonation as cited in **General Electrical (Hotpoint) and Local No. 601, United Association of Journeymen and Apprentices of the Plumbing and Pipe Industry of the United States and Canada**¹⁶ case, holds that if an employer forgives or "wipes the slate clean" regarding an employee's misconduct, the employer cannot later take disciplinary action for that same conduct. This applies when there is clear evidence that the employer has chosen to overlook the misconduct and continue the employment relationship.
- 8.13 It has been strenuously argued that the Respondent in this case condoned the Appellant's behavior. The Appellant references additional case law, including **McIntyre v. Hockin**¹⁷, which reinforces the point that once an employer condones misconduct, they cannot later dismiss the employee for that same misconduct unless new issues arise.
- 8.14 Counsel has reminded us of our decision in **Shepherd Muzhike v. Chambeshi Copper Smelter Limited**¹⁸ where we affirmed

that condonation by an employer equates to acceptance of behavior that would otherwise be unacceptable or illegal.

- 8.15 Pertaining to ground 2, the argument centers on the alleged insufficient substratum of facts. The Appellant contends that the High Court wrongly found the dismissal to be lawful and fair despite the Respondent's refusal to provide crucial evidence, such as CCTV footage and a photographic album, during the disciplinary hearings. This evidence was essential to establish a factual basis for the disciplinary action.
- 8.16 Reliance is placed on the case of ***Attorney General v. Richard Jackson Phiri***,¹⁹ emphasizing that a court must establish whether there are sufficient facts to support disciplinary measures. Without these facts, any exercise of disciplinary powers is considered improper.
- 8.17 In addition, it was submitted that the minutes from the disciplinary hearing were not presented to the court, which should have enabled the court to determine whether the disciplinary committee had a sufficient factual basis for its decision. They have pinned their faith on the case of ***Lusaka City Council vs Mumba and Others***²⁰, which supports the need for a substratum of facts in such situations.
- 8.18 According to the Appellant, the omission to produce the minutes makes it impossible to verify whether the Appellant

was given a fair opportunity to be heard or whether the disciplinary process was properly conducted.

- 8.19 To cement their argument, the case of ***Jack Kawamya Chibi v. Silondwa Engineering Limited***²¹ is referenced highlighting the importance of minutes in establishing the validity of disciplinary actions. That without these records, the employer cannot prove the existence of a valid reason for dismissal, which is crucial for upholding the principles of fairness and due process.
- 8.20 Our attention was been drawn to the Supreme Court decision of ***John Caiphas Mumba vs Society for Family Health***²², where they held that an employee's dismissal was wrongful and unfair due to the employer's failure to disclose evidence that could have allowed the employee to defend himself adequately. Counsel had called in aid the case of ***African Supermarkets T/A Shoprite Checkers vs Bethel Mumba & Another, Appeal No.48 Of 2018*** and examined whether the decision to dismiss was fair and reasonable taking into account all the circumstances of the case.
- 8.21 It has been averred that in the current case, the Respondent failed to disclose critical evidence, including the forensic handwriting expert report, CCTV footage, and a photographic album, which formed the basis for the dismissal. That failure to

provide evidence deprived the Appellant of the opportunity to defend himself, making the dismissal both wrongful and unfair.

8.22 Furthermore, it has been averred that there is a necessity of providing a valid reason for the dismissal.

8.23 Counsel references the ***Sarah Aliza Vekhnik vs Casa Dei Bambini Montessori Zambia***²³ case, where we adjudged that employers are no longer at liberty to terminate employment without providing substantiated reasons. That we emphasized that it is their duty to ensure that the rules of natural justice are complied with and that there is a sufficient substratum of facts to justify disciplinary actions.

8.24 The Appellant contends that in the absence of forensic reports, CCTV footage, and a photographic album, the dismissal of the Appellant was unsubstantiated. The Respondent failed to provide the necessary evidence, thereby making the dismissal unfair and wrongful.

8.25 It has further been argued that the Respondent's actions violated the principles of natural justice because the Appellant was not given an opportunity to respond to the evidence that formed the basis for his dismissal.

8.26 In furtherance of the Appellant's arguments, it has been asserted that there was misdirection in relying on criminal investigations. Counsel highlights the distinction between

criminal and civil proceedings, referencing the case of ***Annard Chibuye v. Zambia Airways***.²⁴ The court in that case ruled that the judgment in a criminal trial cannot be used in civil proceedings.

8.27 That the employer should have conducted an independent disciplinary process and proven the allegations against the Appellant based on a balance of probabilities. The reliance on criminal proceedings by the Respondent is portrayed as usurping the disciplinary function, which further renders the dismissal unfair and wrongful.

9.0 Ground 3

9.1 Counsel addresses the third ground of appeal, challenging the High Court's finding that the Respondent followed the disciplinary code when dismissing the Appellant.

9.2 The Appellant has argued that the burden of proof in employment matters now lies with the employer. The employer must prove that the dismissal was valid, substantiated, and based on a fair and reasonable basis. That this principle is supported by the case ***African Banking Corporation Zambia v. Lazarous Muntente***.²²

9.3 Counsel cites the ***Sampa Joseph Luwisha v. Indo Zambia Bank Limited***²⁴ case, which requires employers to show that

the termination of employment was both fair and for a valid reason. This reinforces the necessity for employers to substantiate their decisions to terminate employment.

- 9.4 It has been avowed that with the introduction of the **Employment Code Act**, the law on dismissal has evolved, making wrongful and unfair dismissal claims more challenging for employers to defend. The burden is now on the employer to ensure that all terminations follow due process unless there is a clear and express admission by the employee, which was not present in this case.
- 9.5 Great store has been placed on the case of *Emporium Fresh Foods Limited (T/A Food Lovers Market) and Gourment Market Limited v. Kapya Chisanga*,²⁵ which underscores that **Section 52(3)** of the **Employment Code** prohibits termination without giving the employee an opportunity to be heard. This reinforces the importance of adhering to the rules of natural justice in employment matters.
- 9.6 In wrapping up on ground 3, Counsel insists that the Respondent failed to discharge its burden of proving that the dismissal was for a valid, substantiated reason as required by law, contending that the High Court erred in its finding.
- 9.7 Counsel emphasizes that rules of natural justice are embedded in the employer's disciplinary rules, as outlined by **Section 50(i)**

of the Employment Code. This means that even in cases of summary dismissal, the employer must adhere to the disciplinary process set out in the code or rules.

- 9.8 It is argued that summary dismissal should be understood as the employer's power to instantly dismiss an employee, but only after following the proper disciplinary procedures. Failure to comply with these procedures, as required by **Section 52(3) of the Employment Code Act**, renders the dismissal unlawful.
- 9.7 Learned Counsel criticizes the court for failing to recognize that the Appellant's dismissal was both wrongful and unlawfully executed. He references our guidance in *David Banda v. The Attorney-General*,²⁶ suggesting that the Appellant should have been awarded up to forty-two (42) months' salary as damages.
- 9.9 Our attention has been drawn to the critical elements for awarding damages. That the damages for breach of contract or non-compliance with statutory obligations cannot be awarded unless specific elements are present, as established in the case of *Kafue District Council v. James Chipulu*.²⁷
- 9.10 The Supreme Court guided that the normal measure of damages in wrongful dismissal cases is to place the innocent party in the position they would have been in if the contract had not been wrongfully terminated. This includes the salary that would have been earned during the notice period. fortification

for this proposition was placed on the case of **Tom Chilambuka v. Mercy Touch Mission International**²⁸

9.11 However, the Appellant asserts that in this case, where the Respondent's conduct was particularly wrongful, unfair, and caused undue distress or mental suffering, the court should deviate from the normal measure of damages. This position is supported by the case of **Swarp Spinning Mills Plc. v. Sebastian Chileshe and Others**,²⁹ where the Supreme Court indicated that additional compensation might be warranted in cases involving traumatic terminations.

9.12 Counsel continues to develop the argument that the dismissal of the Appellant was wrongful and that the damages awarded should reflect the severity of the Respondent's actions.

9.13 To buttress his arguments, he has submitted that there has been a revision of the common law position on termination. The argument references common law, which historically allowed employers to terminate employment without providing a reason, with the normal measure of damages being the salary equivalent to the notice period. However, this position has evolved due to amendments in the **Employment Code Act**, which now requires valid reasons for termination.

9.14 The Orthodox measure of damages has been challenged. The Appellant cites **Chanda Chungu's Article in the SAIPAR Case**

Review⁶, which discusses how the need for valid reasons for termination has changed the traditional approach to damages. It is argued that since employers are no longer free to terminate without cause, the previous measure of damages (equivalent to the notice period) is no longer appropriate.

9.15 It has been suggested that damages should be based on the actual harm and circumstances surrounding the wrongful dismissal, rather than the traditional notice period. The argument implores the court to adopt this updated approach in light of the statutory requirement for valid reasons for termination.

9.16 In rounding off, the Appellant has stressed that the unfair and unlawful manner in which the Appellant was dismissed justifies the highest possible award of damages. The traumatic nature of the dismissal carried out without reason and without providing the Appellant an opportunity to be heard supports the need for substantial compensation. We have been urged to award 36 to 42 month's salary as enhanced damages reflecting the severity of the wrongful dismissal and its consequences. Fortification for this recommendation is from the *David Banda v. The Attorney-General*²⁵ case.

10.0 Hearing of the Appeal

10.1 Both learned Counsel placed full reliance on the documents that had been filed on behalf of their respective client's case.

11.0 Consideration and Decision of The Court

11.1 We have thoroughly considered the evidence presented to the trial Judge, the submissions of Counsel, authorities relied upon and the Judgment appealed against.

11.2 The appeal is centered on the findings by the trial Judge that the Appellant was lawfully dismissed. We intend to deal with ground one and proceed to ground two and three as they are interrelated.

11.3 The criticism of the decision is that the court found that the Appellant was guilty of forgery and thus lawfully dismissed. We have reflected on the arguments advanced. We immediately turn to the provisions of the employment contract which governed the relationship of the parties. Clause 3.1 (c) reads as follows:

“A fair and just disciplinary action should be based on the conditions of service under which an employee works deriving mainly from:

(c) Principles of law, particularly in criminal and civil cases where the society may be directly affected.”

11.4 It is settled law that parties have a right to be heard. The *audi alterm partem* rule speaks to this position. The disciplinary code therefore is in conformity with the law. In this case the Appellant was taken through the disciplinary process. However, she contends that she was found guilty on an unproven allegation. That the Respondent relied on the opinion of the handwriting expert, but this expert was not called to the hearing.

11.5 To make matters worse, the photographic album and handwriting specimens were not availed to the Appellant. It has been asserted that this failure ought to militate against the Respondent as the procedure was flawed.

11.6 Pertaining to the law in relation to handwriting reports the case of ***Sithole v. State Lotteries Board***¹, the Supreme Court observed as follows:

“The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors.”

11.7 Further that:

“Where there is in fact documentary or pictorial evidence which forms the basis of the expert’s opinion it is necessary for these documents to be properly proved and for the court to see for itself the various points on which the expert bases his conclusions.”

- 11.8 We have addressed our minds to the foregoing and it is clear to us that the court is not obligated to accept a handwriting expert opinion. In the case at hand, it is not in dispute that the withdrawal slip used in the forgery was subjected to a forensic handwriting expert who concluded that the signature matched that of the Appellant. Armed with this report, the Respondent proceeded to convene a disciplinary hearing. It was on the basis of this, among others, that they found the Appellant wanting.
- 11.9 We are in agreement with the arguments advanced by the Respondent’s counsel that there is a distinction on the standard of proof between a criminal matter and a civil matter. In the former, the requisite standard is considerably higher in that it is proof beyond reasonable doubt, whereas in the latter case, it is on a balance of probability.
- 11.10 There is another limb in relation to ground one pertaining to the process that was followed in instituting a second disciplinary inquiry after the initial inquiry had exonerated the

Appellant. The Appellant has argued that there were no exceptional circumstances to warrant the Respondent commencing a second disciplinary inquiry as they lacked valid disciplinary power and/or did not exercise them properly.

11.11 We have pondered on the question of whether in employment matters an employer after concluding a first inquiry can proceed to re-open the case. We have examined the Judgment of the Labour Appeal Court of South Africa in the case **BMW (SA) (Pty) Ltd v. L Van der Walt**¹³ called in aid by both parties where it was held as follows:

*“Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in Amalgamated Engineering Union of SA & Others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC) at 596 A – D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. **In labour law fairness and fairness alone is the yardstick.**” (Emphasis ours)*

11.12 Two cautionary remarks were made in the said Judgment

indicating that a second disciplinary inquiry might be *ultra vires* the employer's disciplinary code. Secondly, that it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.

11.13 A brief recap of the aforesaid case of **BMW**,¹³ shows that the Appellant after a disciplinary enquiry had been found guilty on a charge of misrepresentation by removing 2 FMC wheel alignment equipment to Garaquip for repairs and was consequently dismissed. There was an initial disciplinary enquiry on 10th January, 1995 at which the Respondent had been charged with fraud for the removal of the wheel alignment equipment. At this first hearing, the disciplinary finding was that the Respondent had not been found guilty for any transgression save for a "misrepresentation" when removing the equipment for repairs.' As a consequence the employer did not impose any sanction on the Respondent.

11.14 Subsequent to the hearing on or about 11th January 1995, further and new information became known to the Respondent. On or about 17th February 1995, the Applicant was charged with a new and different charge of misconduct in that it was alleged that the Applicant made certain misrepresentations when the wheel alignment equipment in question was removed from Respondent's premises to Garaquip.

11.15 It is this new and different charge of misconduct that resulted in the Respondent being found wanting. This is what astonished the Respondent. It was the further and new information that the employer's basis for a second disciplinary hearing. The Judge took the view that:

“Although the charges both involved misrepresentation, the full import of the deception was not realised at the first disciplinary enquiry. It would be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence. That must have been the case here when the full extent of the respondent's deceit became apparent. And since this loss of confidence justifiably occurred only after a first disciplinary enquiry had been held, I do not consider that it was unfair to hold another. In my view the respondent's dismissal was both substantively and procedurally fair.” (Underlining ours for emphasis)

11.16 We have drawn inspiration from the aforesaid case and also from the authoritative author of ***Le Roux in Contemporary Labour Law, Disciplinary Inquiries***² regarding the question of when a second disciplinary enquiry can impose heavier penalties, it was opined as follows:

“... The above approach envisages two situations in which a second disciplinary enquiry can be held. The first is if the first enquiry/procedure was ‘not in compliance with the

companies disciplinary code'. The second is when new and material information comes to light which was not in the employer's possession at the time of the first enquiry, and which, if true would materially have altered the outcome of the disciplinary enquiry." (Underlining our for emphasis)

11.17 After having analyzed case law and authoritative works, it is clear that conducting a second disciplinary enquiry depends on the circumstances and should be fair to both the employer and employee. Fairness in re-visiting a disciplinary enquiry involves considering whether it is justifiable in the specific case. There is no set of factors to determine fairness; it must be assessed based on the facts of each case.

11.18 Turning to the case at hand, there is no dispute that the Respondent took the Appellant through an initial enquiry. However, the forensic handwriting expert report was not available at the time. Upon receipt of the report which implicated the Appellant, a second enquiry was initiated.

11.19 It is our view that in the circumstances of this particular case, there was new material necessitating the second enquiry. We have borne in mind the guidance given that in labour law, fairness and fairness alone is the yardstick. We have considered that the circumstances of this case are exceptional warranting the second disciplinary hearing. To borrow from the **BMW**¹³ case, it would be unfair to compel an employer to retain an

employee in whom it has justifiably lost all confidence. This new and material information only emerged after the first hearing, and had the employer been in possession of the same, they would have arrived at a different decision at the first enquiry.

11.20 We have considered the argument advanced on the principle of condonation that owing to the fact that the Respondent condoned the misconduct, they can now not turn around and dismiss him on the same charge as the slate had been wiped clean. We are fully aware of the doctrine of condonation and the cases called in aid. However, we take the view that in the circumstances of this case, this doctrine is misplaced. We thus refuse to entertain it in the circumstances of this case.

11.21 We therefore find no merit in the first ground of appeal and dismiss it.

12.0 Ground 2 and 3

12.1 In the second and third grounds of appeal, the Appellant has bemoaned the fact that there was no CCTV footage and photographic album during the disciplinary hearing. The Respondent has reacted by stating that the same was not availed to her because it had been deleted by unknown persons.

12.2 We have examined these rival positions and cast our minds to the role of the courts regarding internal administrative tribunals. It is settled law that the function of the court is not

to interpose itself as an appellate tribunal. Its' duty is to examine if there was the necessary disciplinary power and it was exercised in due form. There is an abundance of cases articulating this principle, but to name a few: ***The Attorney-General vs Phiri***¹³, ***Zambia Electricity Supply Corporation Ltd vs Mukupa Mwila***,¹⁴ and ***Luciano Mutale and Jackson Chomba vs Newstead Zimba***¹⁵.

12.3 In the case of ***The Attorney-General vs Richard Jackson Phiri***¹⁶, the apex court clearly stated that:

“The Court cannot be required to sit as a Court of Appeal from the decision of the Public Service Commission to review proceedings or to inquire whether its decision was fair or reasonable. The Court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.”

12.4 Pertaining to the case at hand the question we ask ourselves is whether or not the Respondent complied with the disciplinary process. Furthermore, whether there was a substratum of facts upon which it exercised its power to dismiss the Appellant.

12.5 A perusal of the record reveals that the Respondent had the necessary disciplinary power. (see pages 1 to 41 of of supplementary record of appeal). Regarding whether there was

sufficient substratum of facts to warrant dismissal there is evidence of the forensic handwriting report being given to the Appellant (page 48 ROA). The Appellant conceded this fact. From where we stand there was sufficient material for the Respondent to act in the manner they did. Disciplinary hearings are not akin to criminal trials where the standard of proof is beyond reasonable doubt. As long as the employer acted in a reasonable manner, they cannot be faulted. Fortification for this position is in the case of **Chimanga Changa Ltd vs Chipango Ngombe**⁷ which held that:

“... the employer does not have to prove that an offence was committed or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.”

12.6 In **Ward v. Bradford Corporation**²⁸ Lord Denning made the following pronouncement:

“We must not force disciplinary bodies to become entrapped in the nets of legal procedure. So long as they acted fairly and justly, their decisions should be supported.”

12.7 In our jurisdiction, the learned authors of **Employment in Zambia Winnie Sithole Mwenda and Chanda Chungu** have also sang from the same hymn sheet at page 177 wherein after

citing the case of **Chimanga Changa Limited**,⁷ they went on to state that:

“One important guideline for determination of the fairness of a dismissal is, whether or not the employer acted reasonably. Whether or not the employer acted reasonably, is a question of fact, that needs to be determined based on the circumstances of the case.”

- 12.8 The principle to be gleaned from the foregoing is that an employer ought to act reasonably in coming up with a decision.
- 12.9 Regarding an instance where an employee has committed a dismissible offence, the principle is that the employer is entitled to mete out the punishment of dismissal and will not be faulted even if they failed to comply with the laid down procedure. We stand guided by the **Zambia National Providence Fund vs Yekweniya Mbiniwa Chirwa case**¹¹ where it was held as follows:

“Where it is not in dispute that an employee committed an offence for which the appropriate punishment is dismissal, no injustice arises for failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.”

12.10 In light of the foregoing, we firmly hold that the attack on the court below cannot be sustained owing to the fact that the Respondent did comply with the disciplinary procedure. The Appellant was heard, and the CCTV footage and photographic album upon which she anchored her grievance is misplaced in view of the authorities cited.

12.11 Furthermore, the offence that she was found guilty of by the disciplinary committee is one justifying dismissal. It cannot be said that there was any injustice occasioned if at all the laid down disciplinary procedure was not followed. We accordingly find that grounds two and three are equally devoid of merit and dismiss them.

13.0 Conclusion


13.1 We have found all three grounds of appeal to be without merit and dismiss them forthwith. For the avoidance of doubt, the key points arising from our Judgment are as follows:

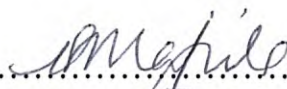
1. The standard of proof in criminal matters is beyond reasonable doubt which is not the same with civil matters where the standard is on a balance of probabilities. The Respondent was not required to prove that the Appellant committed the offence beyond reasonable doubt.
2. An employer is generally not allowed to hold a second disciplinary enquiry against an employee save in exceptional circumstances. The exceptional circumstances include the

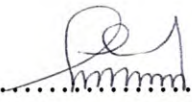
discovery of new and material evidence which may not have come to light or been unavailable to an employer during the first enquiry. The subsequent issuance of a handwriting expert report was new and material evidence which fell in the category of exceptional circumstances warranting a second enquiry.

3. Evidence on record which include the Appellant's admission reveals that all pertinent documents were availed to the Appellant.
4. Notwithstanding, the none availability of the CCTV footage and the photographic album at the disciplinary hearing, was not fatal to the Respondent's case as the respondent acted reasonably in handling the case. The court's role is not to sit as an appellate court against domestic disciplinary tribunals.
5. The doctrine of condonation is not applicable in this case because the appellant's behavior was not condoned. He was charged and acquitted and when new evidence became available, he was charged and found guilty.
6. Employers must always show that a termination or dismissal of employment was both fair and for a valid reason. It is therefore necessary for employers to comply with statutory law as well as the contract of employment.

13.2 Costs follow the event to be taxed in default of agreement.


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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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A.M. Banda-Bobo
COURT OF APPEAL JUDGE