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IN THE SUPREME COURT OF ZAMBIA **Appeal No. 157/2006**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

G.B.M MILLING Co. LTD **APPELLANT**

AND

MARRIOT BESA **1ST RESPONDENT**
REAGAN NDAMIKWA **2ND RESPONDENT**

Coram: Chirwa, Silomba and Mushabati, JJS
On 1st April 2008 and 20th October 2008

For the Appellant: Ms B. Luo of Eric Silwamba & Co.

For the Respondents: Mr F. Chishimba of Frazer Chishimba & Co.

JUDGMENT

Chirwa, JS, delivered the Judgment of the court.

Cases referred to:

1. **Sovereign House Security Services Ltd Vs Savage (1989) IR LR 115 C.A.**
2. **The Attorney-General Vs Marcus Achiume (1983) Z.R.1**

Works referred to:

3. **Employment Law 3rd Edition. An Adviser's Handbook**
4. **Trolleys Employment Handbook 19th Edition**

This is an appeal against the judgment of the Industrial Relations Court which found that the respondents, MARRIOT BESA and REAGAN NDAMIKWA were wrongfully dismissed from the employment of the appellant, G.B.M MILLING Co. LTD.

The common facts of the case are that the respondents were employed by the appellant. The 1st respondent was a Production Manager and the 2nd respondent was a Mill Engineer. On 10th July 2004, both respondents reported for work at the milling plant of the appellant in the Chinika Industrial Area of Lusaka and they discovered that they had no electricity. They then went to Zambia Electricity Supply Corporation (ZESCO) to report the matter. Whilst there, the 2nd respondent received a call on his mobile phone from the Chairman and Chief Executive of the appellant, one G.B. Mwamba who inquired as to where he was. He told the Chairman and Chief Executive that he was with the 1st respondent at ZESCO faults office reporting the fault at their plant as they had no electricity. After a short time the Chief Executive rang again and insulted him and fired him and the 1st respondent and told them to go to the plant and

surrender their personal-to-holder vehicles to Mr Musonda, a Personnel Officer. On arrival at the plant they found Mr Musonda and a Mr Mulenga, Special Assistant to the Chief Executive who grabbed car keys from them and were told they were dismissed and should leave the plant immediately.

On 12th July 2004, both respondents received similar charges of gross negligence of duty and insubordination and were asked to exculpate themselves within 48 hours. They both responded to the charges in their own way but in a similar tone. On 17th July 2004, they both received letters terminating their employment.

The dispute arises as to when they were dismissed. The respondents say that they were dismissed verbally on the phone by the Chief Executive on 10th July 2004 and also verbally told by the Personnel Officer that they had been fired by the Chief Executive on 10th July 2004. The appellant say that the respondents were dismissed on 17th July 2004 after they exculpated themselves to the charges of gross negligence and

insubordination. In resolving this dispute the Industrial Relations Court said that they would resolve the dispute on the basis of credibility of the witnesses that testified before it and the court believed the evidence of the respondents that they were dismissed verbally on 10th July 2004 without being heard. It therefore found that the subsequent charges against the respondents did not invalidate the dismissals verbally communicated by the Chief Executive on 10th July 2004 and held the dismissal as *ultra vires* of the Employment Act and therefore null and void and awarded the respondents 12 months salary as compensation for the wrongful dismissal and also ordered that they be paid their June and July 2004 salaries and accrued leave days. The amounts were to carry the usual interest of short term fixed deposit rate from the date the salaries were due to date of judgment and therefore at the current lending rate up to date of payment. It is against that judgment that the appellant has appealed.

There are three (3) grounds of appeal and these are:-

(i) **The trial court misdirected itself in law and in fact in holding that the complainants were dismissed without being afforded an opportunity to be heard.**

(ii) **The trial court misdirected itself in law and in fact in making a finding that the complainants were not required to respond to the charge statements and exculpate themselves.**

(iii) **The trial court erred in law in holding that the respondents did not adhere to the Rules of Natural Justice.**

The grounds of appeal are supported by detailed heads of argument and all the grounds are argued as one ground. The gist of the argument is that while accepting that these were findings of fact this court can upset them as the Industrial Relations Court did not take into account that the purported dismissals were done in the heat of the moment as a result of the argument between the employer and worker and that it was merely an expression of frustration or anger by the Executive Chairman and he did not intend to have the respondents

dismissed and to support this argument authors of EMPLOYMENT LAW 3RD EDITION, AN ADVISER'S HANDBOOK(3) and TROLLEYS EMPLOYMENT HANDBOOK 19TH EDITION(4) were referred to and the case of SOVEREIGN HOUSE SECURITY SERVICES LTD VS SAVAGE(1) was also quoted as authority to support the view that the conclusion of the Industrial Relations Court was wrong.

In answer to the submission, it was submitted that the finding of the Industrial Relations Court were findings of fact and in terms of **Section 97 of the Industrial and Labour Relations Act**, appeals against findings of facts are not competent and therefore the appeal should be dismissed.

We have considered the evidence on record, the judgment of the Industrial Relations Court and submissions by Counsel and it is true that the findings of the Industrial Relations Court were findings of fact and this court cannot entertain appeals from Industrial Relations Court on findings of fact. This court can only interfere with the findings of fact if such findings were

either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts or that they were findings which on proper view of the evidence, no trial court acting correctly can reasonably make. See THE ATTORNEY-GENERAL VS MARCUS ACHIUME(2). Finding of fact which is being attacked is on answering the question the court posed itself, namely, whether or not the complainants were dismissed prior to their being charged and asked to exculpate themselves. The court on deciding on credibility had this to say:-

> **"Having heard and seen the complainants and defence witnesses in witness box, and having carefully examined their evidence on record, we are inclined to believe the evidence of the complainants that DW1 fired them on the mobile phone on 10th July 2004 and ordered to surrender their personal-to-holder motor vehicles at the respondent's plant. We are fortified in this conclusion because first, the complainants' evidence on the issue of being fired by DW1 on the day in question was not rebutted by the**