IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 67 OF 2009

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

**MINDECO SMALL MINES LIMITED** APPELLANT

AND

**DERRICK SICHONE** RESPONDENT

CORAM: **SAKALA, C.J., CHIBOMBA AND WANKI, JJS**

 On 24th January, 2012 and 14thMarch, 2012

For the Appellant: Mr. S. Lukangaba of Messrs. Mweemba Chambers and Partners

For the Respondent: N/A

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:

1. **Zambia Privatisation Agency -Vs- James Matale, (1995/1997) ZR 157.**
2. **Edward Mweshi Chileshe -Vs- Zambia Consolidated Copper Mines Limited, (1995/1977) ZR 148.**
3. **Roston Mubili Mwansa -Vs- NFC Africa Mining Plc, SCZ Appeal No. 12 of 2008.**
4. **Zambia National Provident Fund -Vs- Y.M. Chirwa, (1986) ZR 70.**

LEGISLATION REFERRED TO:

1. **Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, Section 85A.**

When we heard this appeal, there was no appearance for the respondent. Mr. LUKANGABA, however, informed the Court that they had informed the respondent about the hearing date and an affidavit of service was filed on 23rd January, 2012.

The Court being satisfied that the respondent was informed and was aware of the date of hearing directed that, the hearing of the appeal proceeds in the absence of the respondent.

This is an appeal against the judgment of the Industrial Relations Court delivered on 13th June, 2006, whereby it was adjudged that the respondent was unfairly dismissed because all the rules of natural justice were breached; and that the respondent be declared redundant pursuant to the **Minimum Wages and Conditions of Employment, Statutory Instrument No**. **119 of 1997**, **Section 11** for the seventeen years served with interest to be calculated at the Bank of Zambia lending rate from the date of judgment.

The facts leading to the appeal are that: the respondent was employed by the appellant as a general worker. On the 31st May, 1998 he worked over time from 07.00 hours. On 1st June, 1998 he reported for work; but was refused to enter the premises. On the same day, he was given a letter dismissing him from employment. Subsequently, he commenced an action in the Industrial Relations Court by filing a notice of complaint pursuant to **Section 85(4) of the Industrial and Labour Relations** **Act**. The relief that the respondent sought was payment of his long service bonus for the 17 years that he served.

The notice of complaint was supported by an affidavit, in which it was stated that: he was employed by the appellant as a general worker on the 1st June, 1982; that on 31st May, he was working over time from 07.00 hours to 16.00 hours; that he reported for work on 1st June, 1998; but was refused to enter the premises; that on the same day, he was given a dismissal letter; and that he wanted to be paid his long service bonus for the 17 years he served.

The respondent’s answer showed that the respondent had often absented himself from work without permission; that on several occasions he refused to follow instructions; that he was warned about his attitude towards work including late - coming; but that there was no change of behaviour; and that in the light of the above, it was found necessary for the appellant company to dismiss the respondent; that the accountant in the appellant company was duly requested to calculate the respondent’s benefits; and that in any case, there was nothing wrong with the dismissal as the respondent did not allege any unlawfulness or wrongfulness in the said dismissal.

The supporting affidavit which was sworn by Julia KAMANGA showed that on 3rd January, 1992, she did write the respondent warning him to stop reporting for work late; that on 31st January, 1995 a report was made against the respondent for refusing to obey instructions; that on 31st February, 1995 the respondent was warned to change his attitude towards work including absenteeism and refusal to obey instructions; that despite the warnings, the respondent continued to act irresponsibly and did not change his behaviour; that in view of this, the respondent was dismissed from employment on 1st June, 1998; that the dismissal was justified; and that in any case the respondent did not allege any unlawfulness or wrongfulness in the dismissal. The deponent exhibited the warning letters and the dismissal letter.

The respondent Derrick SICHONE was CW1. His evidence was that on Sunday 31st May, 1998 he was working over time from 07.00 hours up to 16.00 hours. When he went back on Monday, 1st June, 1998 to report for duty the Guard informed him that he was not supposed to enter the premises because his employment was terminated because he worked 7 hours instead of 8 hours on the previous day.

He prayed that his terminal benefits be paid to him for the years he worked and what the Court deems fit in the circumstances.

His evidence in cross-examination was that he was praying for the terminal benefits for the period he served the company. He was not paid the benefits, he was only paid leave days. He was dismissed outside as he was not even allowed to enter the premises. He just wanted to be paid his terminal benefits.

According to the letter of dismissal, his employment was terminated because he knocked off earlier. He was supposed to knock off at 17.00 hours. He knocked off at 16.00 hours because the Supervisor, Alfred SIKOTA agreed. It was not that he used to dodge work.

CW2 was Alex SIKOTA. His evidence was that on 30th May, 1998 he was the Supervisor to the respondent. On the same day the machine had a major breakdown; which they could not finish working on. He decided to organize his juniors to come for work on Sunday. The respondent got permission to go and repair his toilet and his home. But because of the seriousness of the work to be done, he asked him to report at 06.00 hours instead of 08.00 hours. He did follow the instructions. About 15.00 hours, the respondent reminded him about the permission he had asked for. He allowed him to knock off at 16.00 hours, which would be covered by the one hour he covered in the morning. He accordingly, left at 16.00 hours. Everybody knocked off according to the company time of 17.00 hours.

On 1st June, 1998, he found the respondent outside, when he reported for work and he informed him that the Guard advised him that he had been instructed not to let him in. In the course of the day, he came to know that the respondent had been dismissed because he knocked off before the time allowed by the appellant on Sunday 31st May, 1998. As a Supervisor, he was not asked by the General Manager as to why the respondent knocked off early. The General Manager found that the respondent had knocked off early when he came to check.

His evidence in cross-examination was that he used to report to the General Manager. He never informed the General Manager that he gave permission to the respondent to leave work early. When he heard that the respondent had been dismissed, he did not intervene because the General Manager did not approach him over the matter. He had the chance to tell the General Manager. He never knew that the respondent had a long list of absenteeism; that, he was charged before; and that he was on final warning.

The appellant did not call any witness.

After considering the evidence before it, the Court below found that in accordance with ***SECTION 85 of the INDUSTRIAL AND LABOUR RELATIONS ACT*** (5), the respondent was unfairly dismissed because all rules of natural justice were breached when the General Manager neither consulted his immediate Supervisor nor the respondent himself. The Court below, accordingly, ordered that the respondent be declared redundant pursuant to the ***MINIMUM WAGES AND CONDITIONS OF EMPLOYMENT, STATUTORY INSTRUMENT NO. 119 OF 1997***, ***SECTION 11*** for the seventeen years served. This sum was to attract interest at deposit rate from the date of filing the complaint to the date of judgment and thereafter interest to accrue at Bank of Zambia lending rate from the date of judgment to the date of final execution.

The appellant advanced two grounds of appeal as follows:-

1. **That the trial Court misdirected itself in law and fact when it disregarded the lack of allegation by the respondent of any unfairness or unlawfulness or wrongfulness in the dismissal, neither did he challenge his dismissal. All he was claiming for were his terminal benefits; and**
2. **That the trial Court misdirected itself in law and in fact by considering and relying on the evidence of CW1 and thereby disregarding the evidence on record from page 6 to 9 of the bundles of documents which disclosed the respondent’s attitude towards work.**

Mr. LUKANGABA, Counsel for the appellant filed heads of argument on which he entirely relied.

In relation to the 1st ground of appeal, Mr. LUKANGABA pointed out that, ***Section 85 of the INDUSTRIAL AND RELATIONS*** ***ACT*** (5) confers jurisdiction to the Industrial Relations Court and ***Sub-Section 4*** confers jurisdiction to hear any dispute between employers and employees even if not connected with group rights or grievances. The said ***Sub-Section*** ***4*** provides that:-

**“The Court shall have the jurisdiction to hear and determine any dispute between any employer and an employee and notwithstanding that such dispute is not connected with a collective agreement or other trade union.”**

He further pointed out that the respondent in this case brought a complaint in the Court below on the strength of the above section. He submitted that the respondent, as could be seen on page 17, was only claiming for his benefits. The Court below however, proceeded to consider and gave effect to remedies which were not sought by the respondent. He contended that the pertinent question was: **Can the Industrial Relations Court grant remedies on an issue which has not been presented before it or complaint (pleadings)?**

Counsel submitted that the Industrial Relations Court cannot grant unsought for remedies; that it lacks jurisdiction. He argued that in accordance with **Section 85(4)**, jurisdiction is only assumed over an issue when the issue is presented before the Industrial Relations Court for determination.

He further contended that the issue in the Court below was the payment of terminal benefits and not whether the dismissal was unlawful or not. If the issue of the unlawfulness of the dismissal is not presented before the Industrial Relations Court to determine, he argued that there was nothing in the language of the Sub-section to suggest that in certain complaints of any particular kind or category the Court may exceed its mandate by dealing with issues that are not in dispute.

Counsel also contended that the mandate of the Court is limited to disputes as alleged by either the employer or the employee. He submitted that the Court should only have considered the matters contained in the complaint and the evidence adduced. The Court below, therefore, erred when it found that there was unfair dismissal.

Counsel further submitted that he was mindful of ***Section*** ***85(5) of the INDUSTRIAL AND LABOUR RELATIONS ACT*** (5) which clearly indicates that the main object of the Court below is to do substantial justice between the parties before it. That by logical extension that does not include dealing with matters that are NOT BEFORE THE INDUSTRIAL RELATIONS COURT. He contended that determining issues that are not before the Industrial Relations Court is prejudicial to the party adversely affected by the order for lack of an opportunity to defend oneself over a specific issue alleged. Thus, to determine in the absence of a specific allegation is contrary to the tenets of substantial justice.

In support, the Court was referred to the case of ***ZAMBIA PRIVATISATION AGENCY -VS- JAMES MATALE*** (1) where it was stated that:-

**“In the instant case however, the respondent pleaded other grounds. The Court in our view was entitled to consider these grounds particularly in the light of the appellant’s answer to those grounds.”**

He contended that this Court was seemingly suggesting that the Industrial Relations Court can only assume jurisdiction where justice is seen to be done because the party has had opportunity to respond to the allegation contained in the answer and evidence adduced. He further contended that substantial justice will not be seen to be done if the Court upholds the judgment of the Court below because the appellant was denied an opportunity to be heard on the issue of unlawfulness of the dismissal.

The Court was further referred to the case of ***EDWARD MWESHI CHILESHE -VS- ZAMBIA CONSOLIDIATED COPPER MINES LIMITED*** (2) where the Court stated that:-

**“The substantial justice the statute calls upon the Industrial Relations Court to dispense should endure for the benefit of both sides.”**

Counsel further contended that, **Sub-Section 5** which requires that substantial justice be done does not in anyway suggest that the Industrial Relations Court should fetter itself with any technicalities or rules. However, the object of doing substantial justice must be administered in accordance with the tenets of the law. In aid, Counsel referred the Court to the case of ***ROSTON MUBILI MWANSA -VS- NFC AFRICA MINING PLC*** (3) where the Court said:-

**“There is a very unfortunate assumption by some parties appearing before the Industrial Relations Court that since it is not bound by rules of evidence in civil and criminal proceedings and that the main object is to do substantial justice between the parties before it, the Court must be seen to be assisting the parties on its own motion. This assumption as we have seen is unfortunate and misguided. The Statutory provision that the IRC is not bound by the rules of evidence means that the Court exercises flexibility and not rigid in the adjudication process. For a example, the rule of evidence that only original documentary evidence may be allowed in evidence is not adhered to with rigidity as duplicates or photocopies are allowed. Again, the phrase that the Court shall do substantial justice between the parties before it does not mean that the Industrial Relations Court should lose its impartiality and take sides when determining a complaint or application. It simply means that the Court must determine the complaint fairly and impartially by taking into account all the evidence adduced by both parties, the law and surrounding circumstances of each case.”**

 Counsel pointed out that it is settled law that an allegation must be proved for a Court to uphold it. He submitted that the process of proving an allegation calls for adducing evidence.

 It was contended that in this matter, there was no evidence adduced to establish that the dismissal was unfair. Thus it was erroneous for the Court to exercise the power in the name of substantial justice and find that the dismissal was unlawful.

 It was further contended that the Court fell in error and misapprehended the law by determining that there was unfair dismissal as it had not been asked to do so, and had no jurisdiction to decide whether the employment was unfairly terminated and that there was no proof of facts that establish unfair dismissal.

 It was, therefore, prayed that the finding of the Court below, be set aside and this ground of appeal be allowed.

 In relation to ground two, Counsel contended that the record on pages 5 to 11 shows that the Court entirely relied on the evidence of the respondent and disregarded the evidence contained in the bundles of documents. He pointed out that the record shows that no evidence was led by the respondent to support a finding that the dismissal was unlawful. It was submitted that in the absence of such vital evidence on record, it was procedurally improper for the Court to make a finding that the dismissal was unlawful. It was contended that the Court below erred when it placed reliance on the evidence of the respondent to make a finding that the dismissal was unlawful in the absence of evidence pointing to the fact that there were facts that warranted a dismissal.

 It was prayed that the finding of the Lower Court be set aside and ground two be allowed.

 We have considered the grounds of appeal, and the heads of argument in support. We have also considered the judgment of the Court below.

 In ground one, the appellant has attacked the Court below when it disregarded the lack of allegation by the complainant of any unfairness or unlawfulness or wrongfulness in the dismissal, neither did he challenge his dismissal. All he was claiming for were his terminal benefits.

 We have considered ground one and the argument in support.

 We have noted that the Court below in its judgment at page 10 in the last paragraph stated that:-

**“In accordance with Section 85(A) of the Industrial and Labour Relations Act, we however, find that Mr. Derrick Sichone was unfairly dismissed because all rules of natural justice were breached when the General Manager neither consulted the immediate Supervisor of the complainant nor interviewed Mr. Derrick Sichone himself ….”**

The said **Section 85(A)** provides that:-

**“85A: Where the Court finds that the complaint or application presented to it is justified and reasonable, the Court shall grant such remedy as it considers just and equitable and may-**

1. **Award the complainant or applicant damages or compensation for loss of employment;**
2. **Make an order for reinstatement, re-employment or re-engagement;**
3. **Deem the complainant or applicant as retired, retrenched or redundant; or**
4. **Make any other order or award as the Court may consider fit in the circumstances.**

From the foregoing provisions of the law, there is no doubt that the Industrial Relations Court has been given a wider mandate. The issue we have to consider is whether the Court erred and misdirected itself in finding that the complaint or application presented to it by the respondent was justified and reasonable.

The facts that were presented before the Court below, which were common to both parties, revealed that the respondent left his working place before his knocking off time on the material day; and that, that was a dismissible case. The conduct of the respondent’s Supervisor was questionable and suspect.

If the Court below had considered the foregoing facts, we have no doubt that it would have not found that the complaint that was presented by the respondent was justified and reasonable.

In the case of ***ZAMBIA NATIONAL PROVIDENT FUND -VS- M. CHIRWA*** (4), we said that:-

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

Because of the evidence that the respondent committed a dismissible offence, the Court below erred or misdirected itself in holding that the complaint was justified and reasonable to justify evoking the provisions of **Section 85(A)**. (5) In the circumstances, we find merit in ground one. It is, accordingly, allowed.

In ground two, the Court below has been challenged for considering and relying on the evidence of CW1 and thereby disregarding the evidence on record from page 6 to 9 of the bundles of documents which disclosed the respondent’s attitude towards work.

We have considered ground two of the appeal; and the arguments in support. We have also considered the evidence that was adduced before the Court below as contained in the record of appeal.

The evidence as it stands, we agree that the Court below’s finding that the respondent was unfairly dismissed was not based on the totality of the evidence.

The totality of the evidence revealed that the respondent’s attitude towards work was poor; that he was of poor discipline; and that the appellant was justified to dismiss him because of the offence he had committed.

In the circumstances, we find merit in ground two of appeal. It is, accordingly, allowed.

In the light of the foregoing, we find merit in the appeal which is allowed.

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E. L. Sakala,

**CHIEF JUSTICE**

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 H. Chibomba, M. E. Wanki,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**