**IN THE SUPREME COURT OF ZAMBIA Appeal No 157/2008**

**HOLDEN AT LUSAKA/NDOLA**

**(Civil Jurisdiction)**

**B E T W E E N:**

**ERNEST MAXWELL KABEYA APPELLANT**

**AND**

**NEON AND GENERAL SIGNS LIMITED RESPONDENT**

**Coram: Sakala, CJ, Mwanamwambwa and Chibomba, JJS.**

**On 11th May, 2010 and 11th July, 2012**

*For the Appellant: Messrs Oliver Sakala & Company - No appearance.*

*For the Respondent: No appearance.*

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

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

**Cases and Other Materials referred to:-**

1. Salomon vs. Salomon and Company Limited (1895-99) All E. R. 33

When we heard this appeal, there was no appearance by both the appellant and the respondent. We, however, decided to proceed and reserve the matter for Judgment as the parties had filed written Heads of Argument.

This appeal is against the Judgment of the Industrial Relations Court sitting at Ndola, in which the Court below held that the appellant’s dismissal from employment was not wrongful, as the Disciplinary Code and the principles of natural justice were complied with.

The brief history of this matter is that the appellant was an employee of the respondent. He rose through the ranks up to the position of Sales Executive, which he held until he was dismissed in 2003. The appellant was charged with insubordination for failing to attend a meeting called by the Managing Director. Instead of exculpating himself of the charge of insubordination, the appellant alleged that White Senior Managers were stealing more than the black employees. The appellant was also alleged to have misused the employer’s motor vehicle, which was a duty motor vehicle, instead of parking it at knocking off.

On his part, the appellant claimed that he was dismissed because he had differed with Mr. Neil Taylor over a racial remark he had made to the effect that blacks were stealing a lot. The appellant said he had responded by stating that whites were stealing more than blacks. He said he cited instances of the alleged under-invoicing on specific orders by some white employees.

Following his dismissal, the appellant filed a Complaint in the Industrial Relations Court, claiming the following reliefs:-

“**1. That he was wrongfully terminated;**

**2. Compensation for all the inconvenience caused as a result of (1) above;**

**3. Payment of salary and full retirement benefits and**

**4. Costs.”**

Both parties adduced evidence.

The sum total of the appellant’s evidence was that on the date in question and after the quarrel with Neil Taylor, when he reported for work on Monday, he was asked to hand-over the car keys and to go home and to report after three days. When he reported back, he was handed a fourteen days suspension letter in which he was asked to exculpate himself over his allegation that whites were stealing more than blacks. He said he submitted his exculpatory statement the following day, to which he attached documents justifying his claim that whites were actually stealing. That, whilst still on suspension, he was charged by the police with theft and fraud but that the Subordinate Court acquitted him. That however, when he reported back for work, the respondent refused to take him

back and refused to pay him a reasonable package for the period he had served.

When asked in Cross examination, the appellant told the trial Court that although Neil Taylor only asked him over the K1,000,000 payment to Zinke Taylor, which Steve Taylor had approved, it was not his duty to collect payments. He said it was not his duty to bank the money and that he handed over the money to “the girls”. On exhibit 9, the appellant agreed that the document shows that he collected the K2,000,000. He said the document has his signature. That however, the signature of Steve Taylor shows that he handed over the money to him. The appellant agreed collecting the sum of K2,000,000 shown on exhibit 10. He however, disputed pocketing it. He disputed refusing to meet Mr. Neil Taylor on 6th June, 2003. He said he was rushing to collect the money. He also agreed that he was not entitled to a personal to holder motor vehicle and that he had been warned over the abuse of the motor vehicle. He said he used to drive the motor vehicle home on knocking off instead of parking it.

On the other hand, the respondent’s position is that the appellant was suspended for insubordination, dishonest and gross misconduct and that during his suspension, it was discovered that the appellant had collected some money on behalf of the respondent but that he did not bank the money. As a result, he was arrested and prosecuted and subsequently acquitted. That, however, management revived the administrative charges against him for which he was subsequently dismissed. That the charge of insubordination, dishonest and gross misconduct stemmed from the appellant’s failure to heed instructions on the usage of the motor vehicle and failure to surrender money on time. And that his benefits were computed and he was paid but that he sent the cheque back.

After considering the evidence before it, the Court below came to the conclusion that the appellant was not wrongfully dismissed.

Dissatisfied with this decision, the appellant appealed to this Court advancing four grounds of appeal as follows:

“**1. That the learned trial Deputy Chairman erred in law and in fact when he began to consider the alleged charges from the employer against the Complainant; as against hearing of the Complainant’s case brought before the Court for wrongful termination of service and non payment of terminal benefits.**

**2. That The learned trial Deputy Chairman erred in law and fact when he held that the Complainant’s loss of employment was as a result of the Complainant’s naivety and lack of foresight by thinking that he could extricate himself from events of 6th June 2003.**

**3. That the learned Deputy Chairman erred in law and in fact when he failed to separate the Company from individual Directors who owned it.**

**4. The learned trial Deputy Chairman erred in law and in fact when he held that the procedure adopted in dismissing the Complainant was in order and in line with the rules of natural justice without questioning the said procedure coming after the Complainant’s acquittal from allegations of theft.”**

Grounds 1 and 2 were argued together in the appellant’s Heads of Argument. It was contended that the Court below erred in law and in fact when it began to consider the alleged charges from the employer against the appellant’s case brought before it and also when it held that the appellant’s loss of employment was as a result of the Complainant’s naivety and lack of foresight for thinking that he could extricate himself from the events of 6th June, 2003.

It was submitted that the Court positioned itself as a disciplinary body, when it ought to have instead questioned whether the Disciplinary Committee had convened to look at the charges and whether Minutes were available for the Court to see. Further, that the Court failed in its duty when it justified and concluded that the appellant was a victim of his own naivety, when the appellant was a victim of racial remarks by his employers and deserved the Court’s protection, as the events of 6th June, 2003 spoke volumes.

It was further submitted that the Court’s failure to inquire how the Disciplinary Committee hearing was conducted in order for it to see how wrongful the decision to terminate the appellant’s employment was, as this was after he had been racially harassed. Therefore, that the Court ought not to have justified such termination as the appellant should not have been dismissed because he was acquitted of the allegations of theft by the Subordinate Court, as evidenced at page 42 of the record.

In support of the third ground of appeal, it was submitted that the Court below erred in law and in fact when it failed to separate the Company from individual Directors who owned it. This contention is based on the Court below’s remark that since the Company was a relatively small Company that was very closely linked to its owners in its operations, the appellant was being naive if he thought he could extricate himself from the events of 6th June, 2003. It was argued that it is trite law that shareholders are separate from the Company as pronounced in the case of **Salomon vs. Salomon and Company Limited1** in which the House of Lords held that:-

“**Once a Company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the Company (eg, to enable them trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A Company is not the agent of the shareholder to carry on their business for them nor is it the trustee for them of their property.”**

It was pointed out that by stating that “**it is virtually impossible to see the respondent without bumping into the owners who also happen to be family members; and that this means that any injury inflicted on one member of the family hurts everybody**,**”** was at variance with the law established in **Salmon vs. Salmon1**.

It was argued that the danger of following the position taken by the trial Court is that Courts would be ‘**promoting immorality**’, as the law says that there is a separate legal personality between a Company and its Directors and Shareholders.

In support of the fourth ground of appeal, it was argued that the Court below erred in law and in fact when it held that the procedure adopted in disciplining the appellant was in order and in line with the rules of natural justice. That the Court should have questioned the procedure used, as this was after the appellant’s acquittal for the alleged theft by the Subordinate Court and hence the argument that the procedure used to dismiss him was not in accordance with the Disciplinary Code.

It was argued that by stating that the respondent is a relatively small Company, whose Directors are so protective of each other, that an injury inflicted on one member of the family hurts everybody; this suggests that there is no Code to follow. And as such, the decision cannot be said to have been based on a fair Disciplinary Code worth matching with the demands of natural justice. That the Court below should not, therefore, have justified the dismissal by stating that once the employee has rendered his exculpatory statement, it is not necessary for the disciplinary body to hear the employee in person unless the disciplinary Code specifically provide for it. Therefore, that the trial Court erred by not realizing that the decision to dismiss the appellant was contrary to the rules of natural justice, as the family members who formed the Disciplinary Committee were biased as they had a common agenda to dismiss the appellant. Therefore, that the appellant was not fairly heard and as such, his dismissal was wrongful, as it traversed the rules of natural justice.

On the other hand, in opposing this appeal, it was contended in the respondent’s Heads of Argument that the appellant has not demonstrated why this Court should interfere with the findings of the trial Court. It was pointed out that the appellant did not deny wrong-doing as he only sought to justify his actions. It was argued that the appellant admitted that although he was not entitled to a personal to holder motor vehicle and that he had been instructed to be park the vehicle after work at 17:00 hours, the appellant said he used to take the motor vehicle home.

In response to the second ground of appeal, it was contended that the Court below was on firm ground when it found that the appellant’s deeds and lack of foresight regarding the events of 6th June, 2003, led to his dismissal. And that it was difficult to believe the appellant’s testimony that he could not remain behind for a meeting with the Managing Director on ground that he feared an altercation.

In response to ground three, it was contended that the trial Court was on firm ground when it found that the procedure adopted in dismissing the appellant was correct as the appellant was initially charged for insubordination and gross misconduct and that he exculpated himself as evidenced at pages 60 and 61 of the record. That, however, following the discovery of the loss of K2,000,000, the appellant was informed that he would remain on suspension pending the outcome of the case. And that the case of gross misconduct was revived following his acquittal. The appellant was dismissed after the case hearing of 4th November 2004, as evidenced at page 66 of the Record of Appeal. We, were, accordingly, urged to uphold the lower Court’s decision.

We have seriously considered this appeal together with the arguments advanced in the respective Skeleton Arguments and the authorities cited. We have also considered the Judgment by the Court below. This appeal raises two major questions. Firstly, whether the appellant was wrongfully dismissed from employment and secondly, whether the principles of natural justice were complied with in dismissing the appellant from employment.

With respect to the first and second grounds of appeal, the major complaint is that the Court below was wrong in holding that the appellant’s loss of employment was as a result of his naivety and lack of foresight if he thought that he could extricate himself from the events of 6th June, 2003. That it was the appellant who was racially abused by his employers and that he was therefore, wrongfully dismissed.

We have considered this argument. It is our considered view that the Court below was on firm ground when it held that the appellant was not wrongly dismissed from employment. The view that we take of the circumstances leading to the suspension and subsequent dismissal of the appellant from employment by the respondent is that following the altercation with the Managing Director and the appellant’s failure to attend the meeting called by the Managing Director, the appellant was charged and he submitted an exculpatory statement before the case was heard.

The appellant’s conduct of retorting that ‘whites were stealing more than black employees’, and his failure to attend the meeting called by the Managing Director formed the basis upon which the Court below based its observation that the appellant was being naive and lacked foresight if he thought he could extricate himself from the events of 6th June, 2003. We do not agree that by so stating, the Court positioned itself as a disciplinary body or that it only considered the respondent’s case and not that of the appellant.

As stated above, the record shows that after the altercation and his retort that senior white Managers were stealing more than black employees, the appellant did not attend the meeting called by the Managing Director. Hence, the respondent, suspended him for 14 days and charged him for **Insubordination and Gross-misconduct**. The record shows that the appellant was asked to exculpate himself over the said charges. The appellant confirmed in his evidence that this indeed, is what transpired. The appellant went on to state that in fact, he submitted a written exculpatory statement in which he gave instances of what he meant when he said whites were stealing more than blacks. The appellant did this instead of exculpating himself on the charges of insubordination and gross-misconduct that were leveled against him. The charge of ‘insubordination’ related to his failure to attend the meeting called by the Managing Director and to the alleged misuse of his employer’s motor vehicle which he admitted he used to take home instead of parking it at work at knocking off, contrary to the instruction of the Managing Director.

It was common cause that whilst he was on suspension, the appellant was arrested, charged and prosecuted over the allegation that he had misappropriated the employer’s money. He was subsequently acquitted by the Subordinate Courts. The record also shows that the money that he collected was only banked six months after it was collected. The appellant confirmed collecting this money, even though he said he was not responsible for banking it.

In view of these facts, the Court below cannot be faulted for coming to the conclusion that it did and for making the observations that the appellant was insubordinate as he did not attend the meeting called by the Managing Director, who was the Chief executive of the Company that he worked for. He also used to take the employer’s motor vehicle home instead of parking it at knocking off, contrary to instructions by the Managing Director.

On the allegation that it was in fact the appellant who was racially abused by the employer, perusal of the record has shown that in fact, it was the appellant who made the racial remarks by retorting that “**whites were stealing more than black employees**”.

We are also not persuaded by the appellant’s claim that he was not heard or that there was breach of the rules of natural justice, as the record shows that he exculpated himself in writing and his case was heard before he was dismissed. Therefore, the learned trial Judge was on firm ground when he found that there was no breach of the rules of natural justice or the Disciplinary Code.

On the argument that the respondent ought not to have dismissed him since he was acquitted of the criminal charges against him, our response is that a criminal acquittal does not bar the employer from taking out disciplinary measures against an erring employee and if the employee is found wanting, the employer can give appropriate punishment, including dismissal where this is the proper remedy. We, therefore, find no merit in grounds one and two of the appeal. We dismiss them.

With respect to the third ground of appeal concerning the allegation that the trial Court failed to separate the Company from its directors and shareholders; this argument stems from the observation by the Court below that since the respondent was a relatively small Company that was closely linked to its owners in its operations, the appellant was being naive and lacked foresight if he thought he could extricate himself from the events of 6th June, 2003. The case of **Salmon vs. Salmon1** was relied upon to support the above contention. We have considered this contention. It is our firm view that in no way did the Court suggest that there was no distinction between the respondent company and its shareholders and directors. The learned trial Judge was merely expressing his observations based on the facts and circumstances of the case before him. We, therefore, have no doubt that the case of **Salmon vs. Salmon1** has been cited out of context. We, therefore, find no merit in the third ground of appeal and we dismiss it.

With respect to the fourth ground of appeal and the argument thereof, our response as stated above, is that the fact that an employee is acquitted of a criminal offence does not preclude the employer from taking out any disciplinary measures and meting out appropriate punishment including dismissal even where the disciplinary charge(s) taken arose out of the same set of facts as the criminal charge. In the current case, the appellant was charged with insubordination and gross-misconduct for failure to obey instructions issued by the Managing Director and for abusing his employer’s motor vehicle. The fact that he was acquitted of the alleged theft and fraud did not prevent the respondent from disciplining him over the alleged insurbordination. We, therefore, find no merit in ground four of the appeal and we dismiss it.

All the four grounds of appeal having failed, the sum total is that this appeal has failed on ground that it has no merit. The same is dismissed.

In the circumstances of this case, we make no order as to costs.

E. L. Sakala

CHIEF JUSTICE

M.S. Mwanamwambwa

SUPREME COURT JUDGE

H. Chibomba

SUPREME COURT JUDGE