**IN THE SUPREME COURT FOR ZAMBIA SCZ/8/128/2011**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction) Appeal No. 111/2011**

**BETWEEN:**

**DENNIS CHANSA APPELLANT**

**AND**

**BARCLAYS BANK ZAMBIA PLC RESPONDENT**

**CORAM: CHIBESAKUNDA, WANKI AND MUSONDA, JJJS.**

**On 20th March 2012 and 27th July 2012.**

***For the Appellant: Mr. Z. Muya of Z. Muya***

***For the Respondent: Ms. I. Lamba of Chongo Manda and Associates***

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

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

***Cases Referred To:***

1. ***Chitomfya V Ndola Lime Company Limited (1999) ZR 172.***
2. ***Nyoni V Attorney General (SCZ Judgment No. 11 of 2001).***
3. ***Zambia Airways Corporation Limited V Gershom Mubanga (1992) ZR 2.***

***Legislation Referred To:***

***Industrial Relations Act, Chapter 269 of the Laws of Zambia.***

This was an appeal against an award of 36 months salaries as damages with interest thereon of 20 percent for wrongful dismissal.

The background to this appeal was that the appellant filed into the Industrial Relations Court a complaint against the respondent alleging that the respondent’s allegations that the appellant connived with a junior officer for fraudulent reasons was unjustified, wrongful and/or unlawful. The respondent’s allegation that the complainant contravented Section 26 (b) of the respondent’s disciplinary code was unjustified. The respondent had therefore contravened Section 25 of the Employment Act. The appellant sought a declaration that the termination or dismissal from employment was null and void ab initio.

The complainant testified in the court below, that he returned from leave on 30th April 2004. His Retail Manager Mr. Zhoromi Kazhinga assigned him to head the Foreign Department, where he found Mubanga Chibeka being trained as the new Foreign Department Cashier. He took over from Mr. Frank Mwale. The handover took 8 days. Both the cashier of the Foreign Department a Ms. Hazel Makunku and the supervisor Frank Mwale proceeded on leave on 10th May 2002. On that day Mubanga Chibeka operated alone as foreign casher and made a few mistakes due to computer system failure. The cashier referred the matter to him as supervisor. He deleted some entries which were duplicated, and the entry where no commission was charged. Then posted the correct one showing the commission charged.

The appellant explained that he did not connive with a junior employee, but that the deletions he made were genuine and within his level of authorization to correct posting mistakes which had been made by the cashier. He was able to delete the entries because the Bank had given him authority. The system was such that an unauthorized person (a person without a user code) could not access the system. The appellant went through the transaction journal and explained the entries in dispute. He explained that he deleted entry No. 22 on page 36 as no commission was charged and the correct one showing commission charged was entered thereafter. The other transactions he deleted had been duplicated. The appellant showed the duplicated transactions on the journal to the lower court. The court below was asked to make a finding that he had not done anything wrong as he had authority to make the deletion of mistakes.

The witness for the appellant at trial was Mubanga Chibeka. He testified that when he was assigned to work in the foreign department, he was initially trained by Hazel Makungo for about 2 weeks, then on 9th May 2002 he was told that she was proceeding on leave. The witness expressed misgivings about his capacity to operate alone as a forex cashier, but the Retail Manager told him, he would be assisted by the appellant who was the Forex Department Supervisor. The following working day which was Monday 13th May 2002, he worked alone and there was a computer problem and he made some mistakes.

Later in the morning he was told to stop working at the counter and after the bank closed to the public he was told to balance his work. When balancing it was realized that there were posting errors which he referred to the appellant as his supervisor, who deleted four duplicated entries of USD1,000 each and thereafter, he managed to balance.

He was told to knock off but wait for Mr. Ngwenya, then Head of Retail. Mr. Ngwenya came between 20:00 hours and 21:00 hours. He called the witnesses to his office, where he asked him what was happening in the forex department. The witness asked for details, but he was told that could raise Mr. Ngwenya’s temper. The witness told Mr. Ngwenya that he was very new in the department and still under training so he could not explain unless asked a specific question.

Mr. Ngwenya was very annoyed. He asked Mrs. Mwamba to write the witness a suspension letter as he was shielding some people. Later Mr. Kunda Kalaba came from Headquarters and asked him similar questions as those that he had been asked by Mr. Ngwenya. Mr. Kalaba told him that there were frauds in the Foreign Department. The witness explained that it was not true that he had failed to explain what had happened nor had he misled the appellant as claimed in Mr. Kalaba’s report. He said he had never been shown a transaction he did fraudulently and denied any wrong doing.

For the respondent Mr. Zhoromi Kazhinga testified that at the time of the case in issue he was retail manager for Barclays Bank Buteko Branch. He said on 13th May 2002, Mr. Ngwenya their Head of Retail visited his branch and asked him to carry out a snap check on his cashier.

The witness found the cashier had an average of K12m and a shortage of USD3,000. Upon going through the entries, he found that there were some vouchers which had names of customers, but no signatories and a print screen for USD6,000. He asked the cashier to stop operating and write a letter explaining the shortage. The matter was reported to his line manager and the appellant who was Mubanga’s supervisor. He explained that in the course of his duties the appellant had authority to delete and correct entries, but on the day in question since he had stopped the cashier from operating, he expected the deletions to be done by himself.

Further, the appellant did not advise him on the deletions he was making. He said the deletions caused the cashier to balance. The appellant was charged and given an opportunity to be heard.

The second witness Mr. Kunda Kalaba testified that he investigated the matter. During his investigations, he discovered that Chibeka Mubanga had sold USD6,000 to a customer he later identified as Sydney Malunga who had no forex account and could as such only buy USD1,000. He later discovered that Chibeka Mubanga had an average of K25,000,000 the previous day and had deleted four transactions. He was told the deletion was with the supervisor’s authority. And when he questioned the appellant, he told him he was misled by the cashier who told him they were duplicated. In his investigations he did not find any duplicated transaction. He authored a report. Later the appellant was charged and dismissed.

The appellant contended in the court below that the deletions were normal and within his authority, while the respondent contended that they were fraudulent and unauthorized. The court below discounted the respondent’s second witness’ evidence (Mr. Kalaba), that he had attached vouchers which were not tendered in court. The lower court was of the view that had those vouchers been available, the appellant’s line manager Mr. Kazhinga would have talked about and they would have been placed before the court. The lower court did not also believe Mr. Kalaba’s evidence that there was a sequence in the deletion of a duplicated transaction.

The lower court further found that the appellant’s explanation through the journal voucher was so straight forward and compelling to the effect that they were left with no option, but to actually accept that he merely deleted duplicated transactions after which the apparent average disappeared. It was for that reason that in the lower court’s view, the Bank suffered no loss.

Further taking the circumstances of the cahier’s inexperience, the lower court accepted that it was normal for him to make a mistake. The lower court went on that, the court did not accept Mr. Kazhinga’s (DW1) evidence that since he had stopped the cashier, the appellant had to refer everything to him. The lower court’s view was that though he had stopped the cashier, he did not specifically ask the appellant to refer everything to him. Mr. Kazhinga by asking the cashier to balance, he actually authorized him to work again.

The lower court concluded that the case against the appellant was not properly investigated and handled. They therefore found that the appellant was wrongfully dismissed. Considering the environment where the appellant worked, the lower court was of the opinion that trust is a cardinal component required. They did not believe reinstatement will restore the eroded trust. The court awarded the appellant 36 months salaries as damages with interest thereon of 20 percent.

For the appellant one ground of appeal was filed. It was argued that the court below erred in law when it awarded the appellant a package less than it awarded to Chibeka Mubanga when the two similarly circumstanced. The essence of this ground was that an application was made by summons, supported by an affidavit in the court below to make the court aware of an earlier judgment of the Industrial Relations Court under complainant No. 41 of 2003, in the matter of ***Chibeka Mubanga V Barclays Bank of Zambia Plc***.

It was argued that the facts in both ***Chibeka Mubanga*** and the ***appellant***, emanated from the bank account of Sydney Malunga through which a sum of K335m passed. The witnesses for the respondent were the same in both cases. The appellant was awarded 36 months’ salaries as damages with interest thereon of 20 percent. Chibeka Mubanga had reinstatement, payment of all salary arrears at current salary of cashier, entitlement to all leave days ordered in her favour. He was also deemed to have been retrenched from the date of the judgment. Damages for loss of opportunity to take up the position of B3 at Kabwe branch were also awarded.

These similarities, it was submitted ought to have been taken into account by the court below, as an application was made in the court below in that regard.

For the respondent, it was argued that the court below was correct in granting the appellant a different award from the one granted to Chibeka Mubanga. It was submitted that, that was not the purpose of Section 85 (6) of the Industrial Relations Act. The section is couched in these terms:

***“An award, declaration, decision or judgment of the court on any matter referred to it for its decision or in any matter falling within the exclusive jurisdiction shall subject to section ninety seven, be binding on the parties to the matter and on any parties affected”***

The section was intended to be used in circumstances where the affected employees are many in number and just a few of them have taken the matter to court and it is either impractical or impossible to include each and every one of them on the complaint or writ of summons. All of them should be in the same category with the same set of circumstances which merit their taking the matter to court. If a judgment is granted in their favour the section acts as a tool to be used to ensure uniformity and to forestall a situation whereby there is multiplicity of actions concerning the same parties and with the same set of facts.

It was contended that, the appellant played a different role from the one played by Chibesa Mubanga, as the former was supervisor and the latter a cashier. The issues and facts which were brought out in the appellant’s trial were different from what was brought out in Chibesaka Mubanga’s trial.

In the case for Chibeka Mubanga the court found that he had been unfairly dismissed in that the said dismissal was based on false charges. That is essentially the reason he was given the awards alluded to earlier. In the appellants case however, the court found that he had been wrongfully dismissed on the ground that the case against him was not properly investigated and handled. The cases were handled by different Judges of the Industrial Relations Court and they cannot bind each other. We were urged to follow our decision in ***Chitomfwa V Ndola Lime Company Limited***(1) where we awarded 24 months’ salary as the appropriate award, which award we followed in ***Nyoni V Attorney General***(2). We were urged to reduce the 36 months salaries awarded by the lower court to 24 months salaries. Further as was decided in the case of ***Zambia Airways Corporation Limited V Gershom Mubanga***(3), the court will very rarely grant orders for reinstatement and for such an order to be made, the case would have to be exceptional to the general rule.

We have considered submissions by both counsel. The issues as we see them, is whether the lower court correctly interpreted the provision of Section 85 (6) of the Industrial Relations Act. Was the lower court on firm ground when it awarded 36 months’ salaries as damages?. The wrongfulness of the dismissal of the appellant has not been disputed by the respondent.

In our view Section 85 (6) gives statutory expression to the doctrine of **res judicata**. The philosophy underlying the doctrine is that an issue already settled by judicial decision should not be litigated. This is intended to save on judicial time, which is a scarce resource and to avoid multiplicity of actions. The facts and the parties must be similarly circumstanced. We do not agree that a supervisor in the foreign department is similarly circumstanced to a cashier. Their job, description and responsibilities are different. The lower court was on firm ground in its refusal to apply Section 85 (6) to the action by the appellant.

We now come the second issue. The court in ***Zambia Airways Corporation Limited V Gershom Mubanga supra*** awarded 12 months’ salaries as damages in lieu of reinstatement in 1992. Seven years later in ***Chitomfwa V Ndola Lime supra***, we awarded 24 months. The lower court seven years later in the appeal before us awarded 36 months’ salaries as damages. The rationale is as the global economies, detoriate, the chances of finding employment even by graduates are dimmer. There should be a progressive upward increase in damages, as it is bound to take longer to find a job in the current domestic and global economic environment.

For what we have said, we cannot fault the lower court for awarding 36 months’ salaries as damages. The award was not wrong in principle. We do not agree with the appellant’s sole ground of appeal nor do we agree that we should disturb the award. The appeal is dismissed. We make no order as to costs as both parties have been partially successful.

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L. P. Chibesakunda W.E. Wanki

**SUPREME COURT JUDGE SUPREME COURT JUDGE**

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P. Musonda

**SUPREME COURT JUDGE**