

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 005/ 2013

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

BWALYA MATAFWALI

Appellant

AND

COATES BROTHERS ZAMBIA LIMITED

Respondent

Coram: Chibesakunda Ag. CJ, Wood, JS and Lisimba, Ag. JS.

On 3rd June, 2014 and 1st August, 2014

For the Appellant: In Person

For the Respondent: Mr. J.M. Kapasa – Messrs J.M. Kapasa and Company

JUDGMENT

Wood, JS, Delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Communications Authority v Vodacom Zambia Limited (2009) Z.R. 196.**
2. **Nkhata and four others v The Attorney-General of Zambia (1966) Z.R. 124.**
3. **Undi Phiri v Bank of Zambia (2007) Z.R.186.**
4. **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70.**
5. **Gerrison Zulu v Zesco Limited (2005) Z.R.39.**

6. Kabwe Transport Company Limited v Press Transport (1975) Limited (1984) Z.R. 43.

7. NFC Africa Mining Plc v Techro Zambia Limited (2009) Z.R.236.

LEGISLATION REFERRED TO:

Supreme Court Rules, Cap 25 of the laws of Zambia.

This is an appeal against a judgment of the High Court dismissing the appellant's claim for a declaration that his dismissal was null and void, or that he was entitled to damages for wrongful dismissal, interest and costs.

The appellant was employed by the respondent as a Stores/Dispatch man and Charge Hand in August, 2007. On 27th August, 2008, the appellant was summarily dismissed by the respondent for what it termed gross negligence because the appellant lost 157 kilograms of ethyl acetate (R260) and 67 kilograms of normal propanol (R703) which were secured in the barrel store that he was in charge of. Other allegations were that he caused the loss of 107 kilograms of SM 1357 and 36 kilograms of SMA 465 when he left the chemicals in the factory unattended to. The respondent placed the value of the lost items at ZMW88,000.00.

According to the evidence which was accepted by the court below, the appellant was responsible for general stores, receiving and entering all raw materials and was also responsible for the daily issuance and accounting for all stock. The appellant admitted that materials went missing on at least three occasions. Upon discovering that the materials were missing, the appellant was asked to explain the losses but was unable to do so to the satisfaction of the respondent. The respondent then invoked clause 7.2 of the offer of employment and summarily dismissed the appellant.

In her Judgment, the learned trial Judge came to the conclusion that the appellant was properly dismissed for negligence resulting in the loss of materials that were under his custody and care as a stores man. The learned trial Judge also held that the respondent was entitled to invoke clause 7.2 of the contract of employment and to dismiss the appellant summarily for misconduct or breach of company regulations. The learned trial Judge drew a distinction between negligence and theft and held that the appellant's defence that thefts continued after he was

dismissed was of no use because he was dismissed for negligence after a hearing was conducted in which he was asked to exculpate himself. The appellant did not challenge the loss of the raw materials that were under his custody. The learned trial Judge concluded her judgment by stating that the respondent had acted reasonably in the circumstances considering the loss that it incurred and dismissed the appellant's claim with costs.

The appellant filed six grounds of appeal against the judgment. The first ground of appeal was that the learned trial Judge erred in law and fact when she took into account a stock count report which was conducted on 8th October, 2008 when the appellant had been dismissed on 27th August, 2008.

According to the appellant's heads of argument filed on 10th January, 2013, he was wrongfully dismissed for loss of material weighing 364Kg worth ZMW4, 347.41 and not the ZMW88, 000.00 mentioned by the respondent. He illustrated this argument with a long schedule of the respondent's inventory report for July, 2008 to September, 2008 whose items came to ZMW88, 000.00. In response, Mr. Kapasa who was counsel for the respondent

submitted that there was ample evidence on the record of appeal from the reports written by the appellant admitting that there was loss of property which was in his custody.

We have considered the arguments advanced by the appellant and Mr. Kapasa in respect of ground one of the appeal. The appellant did not dispute that materials went missing, but his dispute is with regard to the amount of the materials that were missing. This in our view did not diminish the appellant's liability in any way. The learned trial Judge was entitled to consider all the evidence that was presented before her and we do not see any error on her part in considering evidence that was discovered after the appellant had been dismissed provided it related to the period when he was in employment. From the record of appeal before us, the evidence complained of covered the period the appellant was in employment as he was only dismissed on 27th August, 2008. Further, while the value of the items lost may go towards mitigation on the appellant's part, the fact of the matter is that materials that were in his care and custody went missing.

The appellant also submitted that the hearing that was conducted by a Mr. Bulaya, the then Assistant Technical Manager and a Mr. Teleka, the then Chief Accountant was done in bad faith as Mr. Bulaya was later found to be responsible for the theft of the materials. We do not agree with the appellant. The evidence on record does not show that Mr. Bulaya was responsible for the theft of the property as the respondent's witness Mr. Edson Kalenga only indicated that Mr. Bulaya was under investigation. The finding by the learned trial Judge that the appellant was properly dismissed for negligence was a finding of fact. In the case of **Communications Authority v Vodacom Zambia Limited**¹ we held that:

“The appellate Court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial Court acting correctly, can reasonably make.”

In our view, the finding of fact by the lower court was properly made and complies with the principles laid down in **Nkhata and four others v The Attorney-General of Zambia**² and affirmed in

the above case and numerous other cases. This ground of appeal lacks merit and is accordingly dismissed.

In ground two of the appeal, the appellant contended that the respondent breached the rules of natural justice when it failed to follow the procedure laid down in the respondent's Disciplinary Code of Conduct.

In this ground, the appellant submitted that under Appendix A of the respondent's Disciplinary Code of Conduct, a person charged with negligence resulting in the loss of company property should be disciplined as follows:

“1st breach- written warning, 2nd breach-written warning and suspension up to seven working days, 3rd breach-dismissal.”

In response Mr. Kapasa argued that the respondent observed the rules of natural justice as the appellant was given an opportunity to exculpate himself. He pointed out that the appellant confirmed in his evidence that he was summoned for a hearing after which he was dismissed and given fourteen days within which to appeal against the dismissal, which he did.

With regard to the respondent's failure to follow the procedure laid down in its Disciplinary Code of Conduct, Mr. Kapasa relied on the case of **Undi Phiri v Bank of Zambia**³ in which we held that:

“Procedural rules are part of conditions of service and not statutory and that where it is disputed that an employee committed an offence for which the appropriate sentence is dismissal, no injustice arises for failure to comply with the laid down procedure in the contract of service and the employee has no claim on that ground for wrongful dismissal or a declaration that a dismissal is a nullity.”

Contrary to what is alleged in ground two of the memorandum of appeal, the letters at pages 58 to 67 show that that the appellant was given a chance to exculpate himself. The record at page 140 also shows that Mr. Edson Kalenga, whose evidence was accepted by the court below, testified to the effect that there was a hearing and the appellant was given an opportunity to explain the loss. The appellant's explanation was not satisfactory and he was summarily dismissed. Further, in grounds one and three of his memorandum of appeal, the appellant in fact confirms that a hearing was convened.

Also, even if there was a breach in the procedure laid down in the Disciplinary Code of Conduct, that argument would not help the

appellant in view of our earlier decisions in the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**⁴ and the case of **Gerrison Zulu v Zesco Limited**⁵ in which we held that where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.

We have also noted that the offer of employment dated 16th July, 2008 which was duly accepted by the appellant has a termination clause which reads as follows:

“In case of misconduct or breach of company regulation, the company reserves the right to suspend without pay or terminate the employment of the employee without notice or payment in lieu of notice.”

In our view, the respondent properly exercised its option under the termination of employment clause and no injustice was occasioned to the appellant when the respondent did not follow the procedure laid down in Appendix A of the respondent's Disciplinary Code of Conduct.

We find no merit in ground two of the appeal and dismiss it accordingly.

In ground three, the appellant contended that the disciplinary hearing was not conducted in a fair manner since he was the only one charged when other persons also had access to the store room. He argued that Mr. Edson Kalenga testified that he had entrusted the spare key to other members of staff who were not called as witnesses. In response, Mr. Kapasa argued that the evidence on record pointed to the fact that the appellant was the custodian of the stores and he admitted at page 130, lines 5 to 15 that items went missing from the stores on three occasions.

As custodian of the store room, the onus was on the appellant to prove that the respondent's loss was not due to him but to a third party as he stated in his third ground of appeal. The appellant referred to himself as a suspect but he overlooked the fact that he was dismissed for negligence and not on account of theft. The fact that he was the only one called to the disciplinary hearing does not make it unfair even though Mr. Kalenga admitted in cross-examination at page 145 of the record of appeal that his personal

assistant kept the other set of keys. In any event, Mr. Kalenga confirmed in his evidence at page 145, line 25, that the respondent was dismissed because he left drums containing chemicals in the factory unattended to on two occasions, causing the respondent to suffer loss. This ground of appeal lacks merit and is accordingly dismissed.

Ground four of the appeal was that the learned trial Judge erred in her evaluation of evidence when she overlooked the fact that the respondent failed to bring the police officer that conducted the investigation in respect of the thefts.

The appellant submitted that when the thefts started, he advised the respondent to report the matter to the police but the respondent did not immediately do so. He argued that the learned trial Judge did not consider the fact that when the respondent eventually reported the matter, the appellant was never formally arrested by the police concerning the losses and also that the respondent did not call the police officer that was in charge of the investigations to come and testify. In response, Mr. Kapasa submitted that it was not necessary for the respondent to call the

police officer that was in charge of investigating the losses as this was purely a civil matter.

We do not see how the alleged failure by the respondent to promptly report the matter to the police could have affected the administrative investigations conducted by the respondent which revealed that the appellant was guilty of negligence. No law has been cited in support of the argument on this fact and the memorandum of appeal does not show which facts the learned trial Judge wrongly decided. The appellant was dismissed for gross negligence and not theft. We therefore agree with Mr. Kapasa that this was purely a civil matter and it was not necessary for the investigating officer to come and testify. In the case of **Kabwe Transport Company Limited v Press Transport (1975) Limited**⁶ we stated that evidence of criminal proceedings was not admissible in civil proceedings. Further, this ground of appeal is mainly a description of events leading to the dismissal of the appellant. It does not specify the points of law or fact which are alleged to have been wrongly decided. We find no merit in this ground of appeal, it is dismissed.

In ground five, the appellant contended that the learned trial Judge erred in her assessment of evidence on the loss of the materials that were left in the factory as these were properly issued to a Mr. Mwaba, the then Liquid Ink Supervisor, as evidenced by the bulk stores requisition book. In ground six, the appellant contended that the learned trial Judge erred when she accepted the evidence of the respondent that the appellant was forced to write the report over the materials that went missing from the barrel store room.

We have considered grounds five and six of the appeal and our view is that these grounds of appeal are a recast of grounds one to three. So far as we can discern from the memorandum of appeal, the appellant has appealed against the manner in which the disciplinary proceedings were conducted and that he was denied an opportunity to exculpate himself. He was also questioning the actual amount of lost stock and the failure by the respondent to deal with Mr. Alfred Bulaya who according to him is on the run. We have adequately dealt with all these issues under grounds one to three and hold that at law they have no merit.

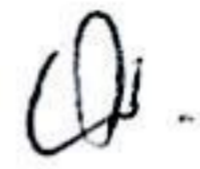
We have observed that grounds four to six of the appeal are also in narrative form and do not specify the points of law or fact which are alleged to have been wrongly decided. We appreciate the fact that the appellant was appearing in person and may not be familiar with Rule 58 (2) of the Supreme Court Rules, Cap 25 of the Laws of Zambia, which reads as follows:

“(2) The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.”

It is not enough for a party to simply generalize a memorandum of appeal and state that the court below erred in law or in fact without specifying the points of law or fact which are alleged to have been wrongly decided. In the case of **NFC Africa Mining Plc v Techro Zambia Limited**⁷ we held that:

“Rules of the Court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed.”

This appeal is unsuccessful and is dismissed. The parties shall bear their respective costs.



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L.P. CHIBESAKUNDA
ACTING CHIEF JUSTICE



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A.M. WOOD
SUPREME COURT JUDGE



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M. LISIMBA
ACTING SUPREME COURT JUDGE