

BETWEEN:

JEFFREY TEMBO

APPELLANT

AND

STANBIC BANK ZAMBIA LIMITED

RESPONDENT

CORAM: Chibesakunda, Ag.C.J, Mwanamwambwa, Muyovwe, J.J.S.
On the 14th August, 2012 and 4th July, 2014

*For the Appellant: Mr. B. C Mutale, S.C. and Mr L. Kalaluka, of Messrs
Ellis and Co.*

*For the Respondent: Mr M. Mundashi, SC and Mr. M. Chiteba of Mulenga
Mundashi and Co.*

JUDGMENT

Mwanamwambwa, J.S., delivered the Judgment of the Court.

Cases referred to:

1. Minster of Home Affairs and the Attorney General V. Habasonda (Suing on his own behalf and on behalf of SACCORD) (2007) ZR 207 at 213-214
2. Zambia Consolidated Copper Mines V. James Matale (1995-1997) ZR 144
3. Sithole V. State Lotteries Board (1975) ZR 106.
4. The Attorney-General v Richard Jackson Phiri (1988 - 1989) Z.R. 121 (S.C.)
5. ZNPF V. Chirwa (1986) ZR 70
6. Barclays Bank Zambia Limited V. Mando Chola and Ignatius Mubanga (1997) ZR 35
7. Ward V. Bradford Corporation (1971) 70 LG R27

Legislation referred to:

The Industrial and Labour Relations Act, Cap 269 of
the Laws of Zambia, Section 97.

This is an appeal against a Judgment of the Industrial Relations Court dated the 21st of January, 2010.

The brief facts of the matter are that in 2003, the Appellant worked as the Respondent's Manager-Corporate and Structured Finance. On the 21st of October, 2004, the Appellant received an application for a loan from a company called Tricon Limited. The application was made by Wayne Wright, a Director in Tricon Limited. On the 26th of October, 2004, the Appellant prepared a formal application indicating the name of Rite Investments T/A Tricon Limited as the applicant. The formal application showed that the Directors for the applicant, Rite Investments T/A Tricon Limited were Mr Wayne Wright and Mr Gregory Wayne Madden.

The Appellant then sent the application to RW1, Caiaphas Habasonda. RW1 sort clarity from the Appellant on the use of the names. The record shows that the Appellant explained that Rite Investments was a division of Tricon Ltd or the other way round. With the explanation, RW1 proceeded to consider the application and he approved it. RW1 stated that he approved the application because he expected that the Appellant would have done his homework and ensured that correct facts were included in the application before recommending it. Further, the Appellant prepared the third party mortgage relating to this transaction but it was not sent to the Legal Department for approval as per the procedure.

On the 11th of November, 2004, the Respondent, through a letter signed by RW1 and the Appellant's assistant, Douglas Kalebwe, wrote to Rite Investments T/A Tricon Limited stating

that the loan facility of USD80,000.00 had been granted. The money was disbursed by Douglas Kalebwe to Tricon Limited.

On the 11th of April, 2005, a Mr Mhango wrote to the Bankers Association of Zambia, complaining about the Appellant's conduct in granting the loan facility to Tricon Ltd. The President of the Bankers Association of Zambia informed the Respondent's Managing Director about the letter. The Respondent's Managing Director asked the Appellant to resign, but the Appellant refused. On the 29th of April, 2005, the Appellant was suspended from duty.

In June, 2005, RW4, Charles Mulenga Sichilima, was asked to investigate the matter surrounding the grant of the loan facility to Tricon Ltd. He stated that after the investigations, he found that the loan facility was disbursed to Tricon Ltd and not Rite Investments T/A Tricon Limited. RW4's investigations revealed that the mortgage deed that was signed as security for the loan was defective in that it had been signed by Directors who had resigned from Rite Investments. He also found that the mortgage deed was not approved by the Legal Department.

On the 31st of August, 2005, the Appellant was charged with the following offences:

- 1. Providing false information to the Bank or outsider with intent to defraud or mislead the Bank. (Clause 4.12 of the Managerial Staff Disciplinary Code).**

2. **Concealing of information, Bank Records or instruments with intent to defraud or mislead the Bank (Clause 4.13 of the Managerial Staff Disciplinary Code).**
3. **Failure to comply with established Bank policy, regulation an procedures or standing order (clause 2.4 of the Managerial Staff Disciplinary Code).**
4. **Misconduct and breach of provisions of the General Conditions of Service (clause 4(i) and 34 of the General Conditions of Service-Rules and Standing Instructions)**

On the 6th of September, 2005, the Appellant exculpated himself by a letter. On the 14th of October, 2005, a Disciplinary Committee hearing was held in which the Appellant was in attendance. The Committee adjourned to another date in order to gather more information. The 2nd hearing was held on the 30th of December, 2005 but the Appellant did not attend this one. On this day, the Committee resolved to dismiss the Appellant. On the 5th of January, 2006, the Respondent wrote to the Appellant, dismissing him from employment.

On the 29th of March, 2006, the Appellant took out a Notice of Complaint for the following reliefs:

1. **A declaration that the dismissal of the complainant was wrongful;**
2. **That the Complainant be reinstated forthwith;**
3. **Alternatively, there be an order for damages in lieu of reinstatement; and**
4. **Any other relief as the Court may deem just and equitable.**

On the 1st of November, 2011, the Industrial Relations Court delivered a Judgment in favour of the Respondent. The Court was of the view that the Respondent breached its disciplinary proceedings procedures when dismissing the Appellant. That, however, the Respondent had reasonable grounds for believing that the Appellant committed the two of the four offences he was charged with. The court was of the view that there was enough evidence to show that the Appellant misled the Respondent and misconducted himself by changing the borrower's name from Tricon Limited to Rite Investments T/A Tricon Limited. The Court also found that Rite Investments Limited T/A Tricon Limited was a non existing entity and that the loan was granted based on defective security. The court also found that the security documents used to cover the loan facility were neither vetted nor approved by the Legal Department.

The Appellant now appeals against the above Judgment. There are five grounds of appeal in this matter and these are:

Ground one:

The Court below misdirected itself when it upheld the dismissal of the Appellant on the basis of findings of conduct which, according to the applicable Grievance Procedures and Disciplinary Code for Managerial Staff and conditions of Service, do not in themselves warrant summary dismissal upon first breach.

Ground two

The Court below misdirected itself both in law and fact when it held that the Complainant misled the Respondent Bank and misconducted himself by changing the

borrower's name from Tricon Limited to Rite Investments T/A Tricon Limited' a non existing entity to which the loan facility was granted.

Ground Three:

The Court below erred both in law and fact when it held that the Respondent acted reasonably in dismissing the Complainant on account of reasonable grounds that the Complainant committed the offences.

Ground four:

The Court below misdirected itself both in law and fact when it held that notwithstanding that the Respondent did not fully comply with its Grievance Procedures and Disciplinary Code for managerial staff in dealing with the Complainants case, no injustice was occasioned as per the case of ZNPF V. Yekweniya Mbiniwa Chirwa (1986) ZR 70

Ground five:

The Court below misdirected itself both in law and fact in failing to delve behind the reasons given for the dismissal to redress the real injustices against the Complainant.

When the matter came up for hearing, both parties relied on their filed heads of argument.

In Ground one, counsel for the Appellant argued that the Appellant was found guilty of two of the four offences he was charged with. He stated that the Grievance and Disciplinary Code for Managerial Staff contains a penalty guidance chart that sets out the appropriate penalty for the relevant disciplinary offences. He stated that 'Concealing information, Bank records or instruments with intent to defraud or mislead

the Bank' is one such offence were an employee can be dismissed summarily at first breach. That, however, the Judgment contains no finding on the question of whether the Appellant had concealed any information, Bank record or instruments from the Respondent, or that if he had, whether he had done so with intent to defraud or mislead the Bank. He stated that dishonesty is a dismissible offence. But that the Judgment made no finding on the issue of dishonesty. That it contains neither an analysis of the circumstances of the Appellant's case, nor any indication of whether the conduct of the Appellant was so grave as to attract a heavier penalty than that indicated in the penalty guidelines charge annexed to the Grievance and Disciplinary code in force at the material time.

He stated that the Judgment being appealed against is not a Judgment. He cited the case of **Minster of Home Affairs and the Attorney General V. Habasonda (Suing on his own behalf and on behalf of SACCORD)**⁽¹⁾, to support his argument.

On behalf of the Respondent, Counsel submitted that there is no basis for the first ground of appeal because the penalty under the Respondent's Disciplinary Code for misleading the bank is dismissal. Counsel submitted that this case should be distinguished from the **Minister of Home Affairs V. Habasonda** case. He argued that in its Judgment, the trial Court set out what it considered to be the issues that

needed consideration. He stated that the trial Court isolated two issues which it thought were supposed to be adjudicated upon. Counsel added that in its Judgment, the trial Court reviewed the evidence and made findings of fact.

We have looked at the evidence on record and considered the submissions by both parties on this ground. The trial Court, at page 24 of the Record of Appeal stated the following:

“Having considered the evidence on record and the submissions of both Counsel, we find that the issues to be determined by this court are:

- 1. Whether or not the Respondent complied with their Grievance Procedures and Disciplinary Code for Managerial Staff in dealing with the Complainant’s case; and**
- 2. Whether or not the Respondent had reasonable grounds for believing that the Complainant had committed the two offences, and had acted reasonably in dismissing him for the same.”**

At page 27 of the Record, the lower Court stated that-

“Having considered the foregoing, we agree with the Complainant’s submission that the Respondent did not fully comply with their Grievance Procedures and Disciplinary Code for Managerial Staff in particular clause 7.1.2 thereof. We say so because the Complainant was not invited to attend and participate at the continued disciplinary hearing of his case on the 30th December, 2005 where Herman Banda presented his findings and the Disciplinary Committee found him guilty on two of the four offences as charged and resolved to dismiss him from employment for the same”

At page 33 of the Record of Appeal, the lower court stated that-

“Having considered the foregoing, we find that the Respondent had reasonable grounds for believing that the Complainant committed the two of the four offences as charged and had acted reasonably in dismissing him for the same. We say so because we are satisfied on the evidence before us that the Complainant misled the Respondent Bank and misconducted himself by changing the borrower’s name from Tricon Limited to Rite Investments T/A Tricon Limited, a non-existing entity to which the loan facility was granted and submitting defective security documents to cover the loan facility, which documents were neither vetted nor approved by RW2, the Head of the Respondent Legal Department as was required by procedure.”

From the above, we are satisfied that the lower court discharged its duty in terms of the content of the Judgment. The lower Court’s judgment set out the facts, outlined the issues to be resolved and made findings of facts that helped it arrive at a decision. The lower court found that the Appellant misled the Respondent and misconducted himself by changing the borrower’s name from Tricon Limited to Rite Investments T/A Tricon Limited. As a result of the action taken by the Appellant, the Respondent was misled.

Further, it appears from the Appellant’s submissions that they concede that the punishment for the offences which the Appellant was charged with invited a penalty of summary dismissal. Therefore, we shall not belabour the issue of the penalty.

We are of the view that the Judgment of the lower court contains the elements which a judgment is supposed to contain. Therefore, we find no merit in this ground of appeal and we dismiss it.

In Ground two and three, counsel for the Appellant submitted that appeals against certain findings of fact can constitute appeals on points of law. He cited the case of **Zambia Consolidated Copper Mines V. James Matale**⁽²⁾ to support his argument. He stated that the findings of the lower Court that the Appellant had misled the Respondent and misconducted himself by changing the name of the borrower from Tricon Limited to Rite Investments Limited T/A Tricon Limited, were not supported by the evidence. That in doing so, he had misled the Respondent into offering a loan facility to an entity that did not exist. He added that the finding that the Respondent had acted reasonably in dismissing the Appellant for two of the four offences he was charged with is not supported by the evidence on record and is based on a view of the facts that cannot reasonably be entertained.

Counsel submitted that as the bulk of the evidence on record is documentary, this Court may substitute its findings for those of the Industrial Relations Court. He cited the case of **Sithole V. State Lotteries Board**⁽³⁾. He added that the formal application for Corporate Borrowers for a loan of US\$80,000.00 was prepared by the Appellant. He argued that

the formal application shows that the Appellant had indicated the customer name as being 'Rite Investments T/A Tricon Limited. Counsel submitted that in that very document, the Appellant made full disclosure of the identity and corporate status of the borrower and made it clear that Rite Investments Limited and Tricon Limited were two companies with common shareholding and/or management.

Counsel referred us to the section that gives the background of the company and argued that the Appellant stated that a new company in the name of Tricon had been incorporated. He added that it would be incompetent for this Court to accept the allegation by R.W.1 to the effect that the Appellant had misled him concerning the corporate status of Tricon Limited, as he was the officer who approved the application. Counsel stated that R.W.1 was shifting the blame onto the Appellant to protect himself. It was submitted further that the evidence before the disciplinary committee and the Court establishes the fact that the Appellant did not conceal the identity or corporate status of the applicant for a loan of US\$80,000.00 and that even if the question of concealment is decided against him, it is clear that his evidence was not to mislead or defraud the Bank but to emphasise the likelihood of the loan being repaid.

In relation to the second offence for which the Appellant was dismissed, Counsel for the Appellant stated that the Appellant was furnished with an undertaking to create a legal

mortgage over Plot 3097, Mosi-o-Tunya Road, signed by Glenn Wright, on behalf of Rite Investments as Guarantor and by Wayne Wright on behalf of Tricon Limited as Borrower. He stated that there was never any dispute that Glenn and Wayne Wright were entitled to execute the undertaking on behalf of Rite Investments Limited and Tricon Limited respectively. It was argued that the third party mortgage template used by the Appellant was obtained from RW2.

Counsel urged us to overturn the findings of the Industrial Relations Court as they were unsupported by the evidence and law and that they are based on a view of the facts that cannot reasonably be entertained.

On behalf of the Respondent, Counsel submitted in ground two and three that the Appellant's appeal is against findings of fact and that this is contrary to provisions of Section 97 of the Industrial and Labour Relations Act. Counsel argued that RW1's testimony was reliable. That RW1 questioned the Appellant on the name and that apart from the explanation from the Appellant, RW1 explained why he proceeded to consider the application. That he did not insist on evidence attesting to the name of the customer because firstly, in motivating the application, the Appellant would have done his homework and ensured that the correct facts were included. Secondly, that the Appellant and him were supposed to be dealing with each other on the basis of good faith, trusting that the Appellant had done his homework.

Counsel submitted that the evidence of all the other witnesses on record suggests that the use of financial statements by one company for another related company is not irregular. But that in so doing, there is no need to create a non-existent legal entity or to obscure the actual borrowing entity. That in fact, the evidence of RW4 shows that when he questioned the Appellant on the name, the Appellant stated that he did that at the behest of RW1. Counsel submitted that the evidence on record shows that the Appellant prepared a defective third party mortgage which he was supposed to take to Legal Department for approval, but he did not.

We have looked at the evidence on record and considered the submissions filed by both parties on these two grounds. Firstly, we wish to state that we agree with the submission by both parties that in accordance with **Section 97 of the Industrial and Labour Relations Act**, an appeal from the Industrial Relations Court should be on points of law or on mixed law and fact. We note that these two grounds of appeal, are on findings of fact.

The penalty guideline chart of the Respondent's disciplinary code under 4.13, states that for the offence of concealing of information, Bank records or instructions with intent to defraud or mislead the Bank, the penalty is summary dismissal.

The Respondent's General Conditions of Service, Rules and Standing Instructions, clause 34, states as follows:

"if an employee commits any breach of any provision of the General Conditions of Service or is guilty of misconduct of any kind either during or outside usual business hours (as to which the Bank shall be sole judge) or if the employee is addicted bankrupt or enters into any arrangement or compromise with creditors, the Bank shall have the right at any time thereafter to determine the employment of the employee with or without any notice depending on the gravity of the offence. Upon such determination the employee shall be entitled to receive and be paid only the remuneration due to him up to the date of such determination."

From the above, we note that both offences for which the Appellant was found guilty, were dismissible offences.

There is evidence to show that the application for the loan in issue was made by Tricon Limited. However, in the formal application that was prepared by the Appellant, the Appellant changed the name from Tricon Limited to Rite Investments Limited T/A Tricon Limited.

Part of the said formal application, read as follows:

"Customer name : Rite Investments T/A Tricon Limited...

Background:

Rite investments Limited is a long established company that has been operating in Livingstone town since it was incorporated ...In 1998, the Company changed names again to Rite Investments Ltd following the expansion and commencement of new business interest as follows...

A new Company called TRICON Limited was incorporated mid this year to operate the distribution business refrigerated trucks...

The Company has enjoyed lease facilities with the Bank in the past and these have been serviced very well and the Company has now decided to diversify its distribution business, the outstanding lease facility of K70m has been to allow an additional borrowing of USD \$80,000 which is now the subject of this credit application...

This transaction is recommended primarily from a point of view that the clients have been banking with us for a long time and their performance has been acceptable.

Also, we are in discussions with the company on their pending proposals to renovate and construct a two storey town house hotel on their existing structure in Livingstone.

Based on the fact that the new request will be structured against receivables from an existing business and they are happy to pledge their property as security in escrow, we are happy to support.

Jeffrey Tembo

29/10/2004

Name

Signature

Date."

An entity by the name of Rite Investments T/A Tricon Limited did not exist. When asked by RW4 as to why the name was like that, he tried to blame RW1. However, RW1's evidence was not challenged by the Appellant on this issue. The above details, in the formal application, show that the Appellant supported the grant of a loan facility to Rite Investments T/A Tricon Limited. He went further to recommend the application based on the fact that the applicant had been banking with the Respondent for a long

time. However, this was not true because Tricon was a new company. The company that had been banking with the Respondent for a long time was Rite Investments.

Further, the Appellant prepared a defective third party mortgage which cited Rite Investments Limited as the borrower instead of Tricon Limited. The Appellant also cited a wrong property as security in the said third party mortgage.

From the above, it is clear that the Appellant had an interest in the whole transaction. The Appellant knew that since Tricon Limited is a new company, it would be difficult for the Respondent to lend it money. Rite Investments had been a client of the Respondent for some time. Therefore, the Appellant came up with a front company called 'Rite Investments Limited T/A Tricon Limited' so that the Respondent could be made to believe that Tricon Limited is the same or is a 'sister' company to Rite Investments Limited. The name of 'Rite Investments Limited T/A Tricon Limited' came from no other person but the Appellant. The Appellant was the architect of the name. The Appellant was also the originator of the formal application. The Respondent, approved the loan in the name of 'Rite Investments Limited T/A Tricon Limited' but the Appellant's assistant, disbursed the money to Tricon Limited. This just shows that the whole issue of coming up with a front name was in order to have the loan approved using the good name of Rite Investments. Meanwhile, the Appellant knew that ultimately, Tricon Limited

was the one to benefit from the loan because it was the applicant.

From the above, we cannot fault the lower court for arriving at the decision it did. The findings of fact made by the lower court were supported by the evidence on record.

This Court in the case of The Attorney-General v Richard Jackson Phiri ⁽⁴⁾ held that-

“The court cannot be required to sit as a court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or reasonable. The court ought to have regard only to the question whether the Public Service Commission had valid disciplinary powers and, if so, whether such powers were validly exercised.”

From the above, it is clear that the role of the court is to check if the correct procedure was followed in dismissing an employee and whether the disciplinary committee had valid powers to do so. The court should not sit as an appellate tribunal of the disciplinary committee. In this case, we are of the view that the disciplinary committee acted properly. Therefore, no question of law arises in this matter. The lower court was justified in arriving at the conclusion it did. These two grounds of appeal are, therefore, dismissed for lack of merit.

In ground four, counsel for the Appellant submitted that the Appellant was denied natural justice in that he was not

informed about the 2nd disciplinary committee hearing. That he was also denied a copy of the forensic report submitted to the disciplinary hearing committee.

Counsel argued that the trial Court erred when it relied on the **ZNPF V. Chirwa**⁽⁵⁾ case. It was submitted that in the instant case, the Appellant has always denied having provided any false information, having concealed any information, having had any intention to defraud or mislead the Bank, or having been dishonest in any of his dealings. Counsel stated that the Chirwa case has no application to this matter and that the Appellant does have a claim on that ground for wrongful dismissal. He added that the Respondent should pay damages to the Appellant in accordance with the case of **Barclays Bank Zambia Limited V. Mando Chola and Ingatius Mubanga**⁽⁶⁾.

On behalf of the Respondent, counsel argued that the employment relationship between the Appellant and the Respondent was governed by the General Conditions of Service for Managerial Staff and the Disciplinary code. That to this extent, it has to be determined whether the inability to follow the procedures were so glaring as to render the Appellant impotent in defending himself before the disciplinary tribunal. It was argued that in fact, the disciplinary committee followed the laid down procedures under its conditions of service and disciplinary code. That there was no further evidence produced on the 30th of

December, 2005. That all the evidence was produced during the first sitting and that the only information brought on the 30th of December, 2005, was verification of the shareholding of Rites Investments Limited. It was argued that the burden of proving that the meeting of the 30th of December, 2005, deprived him of an opportunity to defend himself, lies on the Appellant. Counsel relied on the case of **Ward V. Bradford Corporation**⁽⁷⁾, where it was held that-

“we must not force disciplinary bodies to become intrumented in nets of legal procedure. So long as they act fairly and justly, their decision should be supported.”

We have looked at the evidence on record and considered the parties' submissions on this ground. In line with what we have stated in grounds two and three, the Appellant acted dishonestly, he misled the Bank with wrong information. He concealed the true identity of the applicant and prepared defective security. Despite the fact that he denied having concealed information and misleading the Respondent, the evidence is very clear that he did so. True, that the Appellant never attended the second Disciplinary Committee hearing. Nevertheless, he was earlier heard through an exculpatory letter. And the evidence on record shows that he committed a dismissible offence. In our view, reliance on **ZNPF v Chirwa** by the lower Court, was in order. On the evidence, no injustice was suffered by the Appellant.

For the foregoing reasons, this ground is also dismissed, for lack of merit.

In ground five, counsel for the Appellant argued that the Appellant was asked to resign by the Respondent's Managing Director, on two occasions. That the other employees involved in processing the application were not disciplined by the Respondent over this transaction. He argued that the lower Court glossed over this issue. Counsel added that the approach of the trial Court in this regard was highly irregular and contrary to the pronouncements of the Supreme Court on substantive justice. He cited the cases of **Minister of Home Affairs v. Habasonda**,⁽¹⁾ above and **James Matale v. ZCCM** ⁽²⁾ to support his argument.

He submitted that the lower court failed to perform its duty as a Court of substantial justice to delve behind the reasons given for the Appellant's dismissal in order to address the real injustices discovered.

On behalf of the Respondent, counsel submitted that the court below did not err in law. He stated that the Appellant's complaint was presented on the basis of section 85 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia. He stated that the Appellant, stated in his affidavit in support of the complaint, that he was victimised and discriminated against. Counsel submitted that the Appellant ought to have proved that there are other employees in the

Respondent Bank who had committed offences similar to his and have been treated differently.

Counsel submitted that even taking into account the case of James Matale V. ZCCM⁽²⁾, the Appellant did not adduce any evidence that would have necessitated the court below to 'delve' into the actual reasons for the dismissal. That the Appellant must demonstrate that there was evidence to suggest that there were some reasons that existed for his dismissal, other than those contained in the letter of dismissal, which the court ought to have taken into account.

We have looked at the evidence on record and considered the submissions filed by both parties on this ground. We wish to agree with the submission by the Respondent that for an employee to invite the court to delve into the real reasons for that employee's dismissal, there should be evidence to that effect. No such evidence was laid either before the disciplinary committee or before the trial Court. What was the court going to rely on? What was the court going to inquire into? The Appellant should have provided some proof to show why he alleges the discrimination. RW1 did not come up with a front name in making the formal application for the loan. He did not prepare a defective third party mortgage which was not signed off by the Legal Department. So it does not make sense that the Appellant expects to be treated in the same way as RW1 or vice versa. Therefore, this ground of appeal also fails for lack of merit.

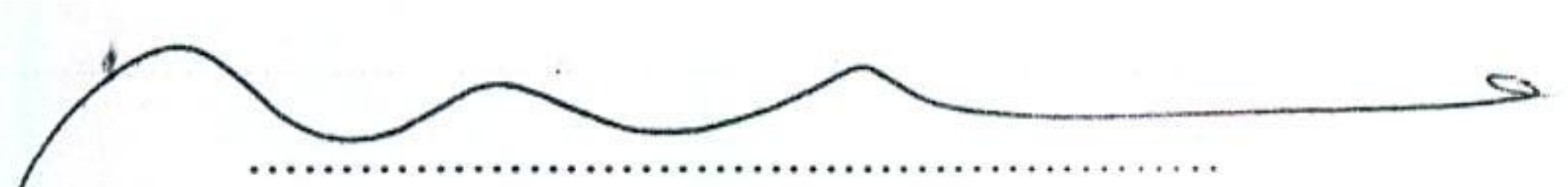
All in all, this appeal fails for lack of merit. We uphold the decision of the Industrial Relations Court. We order that each party bears its own costs.



.....
L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE



.....
M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE



.....
E.C. MUYOVWE
SUPREME COURT JUDGE