

**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA**

COMP/68/2015

BETWEEN:

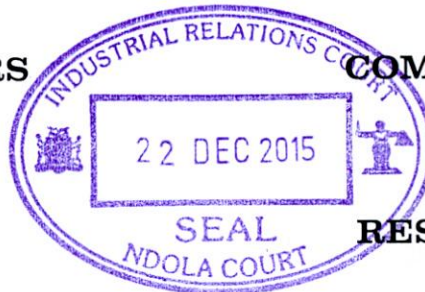
ROBBY GWAI AND 2 OTHERS

COMPLAINANTS

AND

SGC INVESTMENTS LTD

RESPONDENTS



BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

1. **Hon. J. Hasson**
2. **Hon. W.M. Siame**

For the Complainants : Mr. E. Sichone of Legal Aid Board

For the Respondents : N/P (debarred)

JUDGMENT

Date : 22nd December, 2015

LEGISLATION REFERRED TO:

1. **Rule 42 of the Industrial and Labour Relations Act, Cap 269 of the Laws of the Republic of Zambia.**

CASES REFERRED TO:

2. **Wilson Masauso Zulu v Avondale Housing Project (1982) ZR.**

3. **Galaunia Farms Ltd v National Milling Corporation Ltd (2004) ZR.**
4. **Zambia China Mulungushi Textiles (Joint venture) Ltd v Gabriel Mwami SCZ Appeal Number 28 of 2003.**
5. **Setrec Steel and Wood Processing Ltd and 2 Others v Zambia National Commercial Bank Plc, SCZ Appeal Number 39 of 2007.**

This Complaint was filed by M/Robby Gwai and 2 Others. The Complaint was filed against SGC Investments Ltd. We shall, therefore, refer to M/Robby Gwai and 2 Others as the Complainants and to SGC Investments Ltd as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

1. a declaration that the dismissal was wrongful and unlawful.
2. an order for reinstatement and payment of all full salaries effective from the date of the said wrongful and unlawful dismissal.
3. in the alternative, payment of damages for wrongful dismissal and all accrued benefits.
4. Interest.
5. Costs.
6. any relief the court may deem fit to award in the circumstances of the case.

The duty for this court is to ascertain whether or not the Complainant has proved his claims.

The Respondents did not file their Answer to the Complainant's Affidavit in Support of Notice of Complaint. When the matter came for commencement of hearing the Respondents were not present. We noted that there was an Affidavit of Service for the hearing date. We also noted the acknowledgement of service by way of signature dated 26th August, 2015 and produced as exhibit 'JM1'. On the above basis we ordered that the Respondents be debarred from taking any further part in these proceedings in terms of Rule 42 of the Industrial and Labour Relations Act, Cap 269 of the Laws of the Republic of Zambia.

The fact that the Respondents were debarred does not mean that the duty for the Complainants became in any way simpler. This is so because the Complainants still had a duty to prove their case and the standard of proof is the degree of substantial justice.

If the Complainants do not prove their case they cannot be entitled to judgment. We have looked at the case of **Wilson Masauso Zulu v Avondale Housing Project (2)**, wherein the Supreme Court stated that if a Plaintiff does not prove his case he cannot be entitled to judgment whatever may be said of the opponent's case. We have also looked at the case of **Galaunia Farms Ltd v National Milling Corporation Ltd (3)**, wherein the Supreme Court stated that the Plaintiff must prove his case. Indeed, we have been well guided.

The Complainants called only one witness and relied on the evidence on record for the rest of their evidence. We shall refer to the only Complainant's witness as CW1.

CW1 was M/Robby Gwai. The evidence for CW1 who also testified on behalf of Co-Complainants was that he was employed by the Respondents on 11th July, 2009 as a Ware House Supervisor. His duties were:

- (a) receiving stock such as groceries and beverages;
- (b) dispatching groceries and beverages.

On 11th April 2015, he together with the other Co-Complainants were charged with gross negligence. They exculpated themselves on 20th April, 2015. The disciplinary hearing was held on 23rd April, 2015 and resulted in the dismissal of the Complainants for loss of stock.

The appeal against dismissal to the Managing Director was not successful.

CW1 stated that the same people who charged them were the same people who sat to hear the disciplinary hearing. He listed those people as (1) Nawa who was Human Relations Manager, (2) Crispin Zulu who was Loss Control Manager, (3) Diana Musonda who was Secretary to the Human Resource Manager and (4) Sebastian Charles who was Operations Manager.

We have seen the charge sheets. These were produced by the Complainants and collectively marked as 'RG1'. On the charge sheets for all the Complainants only one name appears for the charging official. That charging official was Sebastian Charles. It is, therefore, not true that the same people who charged them were the same people who sat to hear the case. We have already shown herein (above) that 4 people on the side of the Respondents attended the hearing. Out of those four (4) it is only Sebastian Charles who was the charging officer, not all of them as CW1 claimed in his evidence. We have also seen that Crispin Zulu attended that disciplinary hearing as a witness. This is confirmed by exhibit 'RG1' which shows that Crispin Zulu was a witness. This shows that out of the 4 people who CW1 listed to have attended the disciplinary hearing, Crispin Zulu as a witness, Sebastian Charles was the charging officer. The other 2 were Diana Musonda who was Secretary to the Human Resources Manager and Nawa who was the Human Resources Manager. Apart from Crispin Zulu who exhibit 'RG1' shows that he was a witness in that case. CW1 did not tell us in what capacity the other 3 attended that disciplinary hearing or the roles which they played such as Chairman or Secretary for the disciplinary committee. CW1 only stated that all of them were the people who charged the Complainants the fact which as we have already shown is not a true reflection of what transpired.

CW1 also claimed that the Respondents did not follow procedure when dismissing the Complainants. What CW1 claimed

to have been the procedure is that since the matter was reported to police the Respondents should not have dismissed them but should have waited for the police to conclude the police investigations. We do not agree that this is the procedure that pertains to dismissal from employment. The procedure pertaining to dismissal from employment is outlined in the employer manual or disciplinary code. Where no employer manual or disciplinary code is available the guiding principle are the rules of natural justice which require an accused person to be given a hearing.

In the case of **Zambia China Mulungushi Textiles (Joint venture) Ltd v Gabriel Mwami (4)**, the Supreme Court held that:

“It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard.”

We are also alive to the Supreme Court decision in the case of **Setrec Steel and Wood Processing and 2 Other v Zambia National Commercial Bank Plc (5)**. In that case the Supreme Court stated that :

“a decision on the merit is a decision arrived at after hearing both parties.”

Indeed we have been well guided.

It is clear from the evidence in this case that before a decision to dismiss the Complainants was reached the Complainants were given an opportunity to be heard. The decision to dismiss the Complainants was on merit because it was arrived at after hearing

the Complainants. There is no law which precludes an employer from dismissing an employee from employment while police investigations in the matter are pending. This is so because police investigations are criminal in nature and lead to criminal prosecution while the employer's procedures are civil in nature and the standard of proof in criminal and civil proceedings is different. The employer can dismiss an employee provided that the disciplinary procedures leading to dismissal are complied with.

We have seen that following their dismissal, the Complainants appealed against their dismissal to the Managing Director. That appeal was not successful. Suffice to mention that the Complainants were given a hearing right through up to the appeal stage. There is no dispute that there was loss of stock. All the Complainants worked in the Ware House at the material time. We have seen no satisfactory explanation from the Complainants to show what occasioned the loss of stock.

On the above facts we are unable to fault the Respondents for the action they took to dismiss the Complainants.

This Complaint is, therefore, dismissed for being destitute of merit.

We shall order no costs.

Leave to appeal to the Supreme Court within 30 days from today is granted.

Delivered and signed at Ndola and parties shall uplift their judgment on 22nd December, 2015.



Hon. E.L. Musona
JUDGE



Hon. J. Hasson
MEMBER



Hon. W.M. Siame
MEMBER