

IN THE INDUSTRIAL RELATIONS COURT  
HOLDEN AT NDOLA

COMP/109/2014

BETWEEN:

ALEX PONTINI  
TEDDY MUNDELA  
JERCUP SIMUCHIMBA



AND

JCHX CONSTRUCTION LIMITED

RESPONDENT

CORAM: HON. JUDGE Dr. W. S. MWENDA - DEPUTY CHAIRPERSON  
HON. J.M. BWALYA - MEMBER  
HON. G.M. SAMUSUNGWA - MEMBER

For the Complainants : In person

For the Respondent : Mr. A. Imonda of A. Imonda and Company

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## JUDGMENT

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Cases referred to:

1. Zambezi Ranching and Cropping Limited v Lloyd Chewe Appeal No. 128 of 1999 (SC)
2. Attorney General v Richard Jackson Phiri (1988-1989) ZR 121
3. Chimanga Changa v Stephen Chipango Ng'ombe SCZ Judgment No. 5 of 2010
4. Mary Musole v Borassus Estate Limited IRC/Comp/303/2004

Publications referred to:

Gwyneth Pitt, *Employment Law - 6<sup>th</sup> Edition* (Thomson Sweet and Maxwell 2007).

On 6 November, 2014, Alex Pontini, Teddy Mundela and Jercup Simuchimba hereinafter referred to collectively as "the Complainants", filed a Notice of Complaint against JCHX Construction Limited, the Respondent.

The grounds upon which their complaint was presented was that they were unlawfully and wrongfully dismissed by the Respondent. In addition, they claimed defamation of character.

The relief sought by the Complainants were as follows:

1. Compensation for wrongful and unlawful dismissal and being deprived of a livelihood.
2. Compensation for defamation of character and embarrassment suffered.
3. Costs.
4. Interest.
5. Any other relief the Court may deem fit in the circumstances.

The Complaint was supported by an Affidavit filed by Alex Pontini wherein he deposed that he was employed as an Artisan Mechanic, Teddy Mundela was employed as an Office Clerk and Jercup Simuchimba was employed as a Normet Operator.

Alex Pontini whom we shall herein refer to as the 1<sup>st</sup> Complainant averred that on 8 August, 2014 they were told to stay away from work so that investigations could be carried out and they did stay away. He said they were shocked to receive letters of dismissal following investigations, on 20 September, 2014.

According to the 1<sup>st</sup> Complainant, they only had a hearing after receiving the dismissal letters and that exculpating themselves had no bearing on the decision to dismiss them, which decision had according to him, already been made and that what followed only served as a mere academic exercise.

The 1<sup>st</sup> Complainant averred that the offence with which they were charged was misappropriation, altering and giving false evidence regarding 450 x 50 kg cement valued at K31,500.

The 1<sup>st</sup> Complainant deposed that they denied committing the offence and challenged the Respondent to avail them with sufficient evidence as to the acts allegedly committed. The 1<sup>st</sup> Complainant said that they found it malicious that the Respondent fabricated all these lies against them for no reason at all, only to deprive them of their livelihoods.

The 1<sup>st</sup> Complainant further deposed that after management read the statement Mundela had made at the Mine Police Station, they forced him to make a statement they wanted to hear. According to him, Mundela was threatened with imprisonment for 30 years if he did not make a statement they wanted him to make, and under duress he changed his statement to management.



The 1<sup>st</sup> Complainant deposed that at the Human Resource Department Mundela changed his original statement by which he stands.

The 1<sup>st</sup> Complainant urged this Court to compel the Respondent to pay them damages and compensation for loss of employment, anguish and humiliation as they care about being looked at as thieves in the compounds where they live, which makes it hard to get employed again because of their tarnished names.

In rebuttal the Respondent filed an Answer on 13 November, 2014 in which it gave its position on the circumstances leading to the Complainants' summary dismissal as hereunder:-

That on 5 September, 2014, the 2<sup>nd</sup> Complainant Teddy Mundela was given a requisition to draw 100 x 50 bags of cement from Stores. That the second Complainant altered the requisition from 100 x 50kg bags of cement to 200 x 50kg bags of cement. That out of the 200 x 500 kg bags of cement collected from Stores only 100 x 50kg bags were accounted for and the other 100 x 50 kg bags of cement were taken to the house of the 1<sup>st</sup> Complainant in Chambishi using a Sino Truck vehicle, where the cement was subsequently sold.

On 5 September, 2014 the 2<sup>nd</sup> Complainant was accompanied by the 3<sup>rd</sup> Complainant Jercup Simuchimba to collect the cement from Stores and worked closely together to deprive the Respondent of 100 x 50 kg bags of cement. On 8 September, 2014, the 2<sup>nd</sup> Complainant was given another requisition to draw 50 x 50 kg bags of cement from Stores. The second Complainant altered the requisition from 50 x 50 kg bags of cement to

150 x 50 kg bags of cement. Out of the 150 x 50 kg bags of cement collected from Stores, only 50 x50 kg bags were accounted for and the other 100 x 50kg bags were taken out to the house of the 1<sup>st</sup> Complainant in Chambishi using a Sino Truck vehicle where the cement was subsequently sold.

During investigations the 2<sup>nd</sup> Complainant told investigators that he falsified the requisitions whilst working jointly with the 1<sup>st</sup> and 3<sup>rd</sup> Complainants. That the 2<sup>nd</sup> Complainant further indicated that the deal was done on three separate occasions and a total of 450 x 50kg bags of cement were taken out to the house of Alex Pontini where the cement was sold and proceeds shared by all the Complainants.

The 3<sup>rd</sup> Complainant confirmed going with the 2<sup>nd</sup> Complainant on 5 September, 2014 to collect cement. The 1<sup>st</sup> Complainant confirmed selling cement at his house in Chambeshi delivered by a Sino Truck.

Further, that while the average price of cement on the market is between K80 and K100 the 1<sup>st</sup> Complainant was selling a 1 x 50 kg bag of cement at his house at a shocking price of K50 only which is below the wholesale price.

The Complainants attended a disciplinary hearing and were accorded the right to appeal against dismissal.

The Complainants committed offences which attract a penalty of summary dismissal and the complaint lacks merit.



On 27 November, 2014 the Complainants filed an Affidavit in Reply to the Respondent's Answer in which they rebutted the Respondent's allegations.

Hearing of the matter before this Court took place on 5 May, 2015, and each of the Complainants gave evidence on his own behalf.

The first to give evidence on oath was Alex Pontini, whom we shall refer to hereinafter as "CW1". CW1 testified that he started work in 2003 with NFCA Mining as a Mechanic. NFCA is now called JCHX, the Respondent. He said they did not have with them the initial contracts which they signed. In 2011 they signed new contracts which were before Court. It was CW1's testimony that upon signing the 2011 contract he worked for JCHX up to 2014.

CW1 narrated the events that led to his summary dismissal. Most of the evidence was a repeat of what is contained in the Affidavit in Support of Notice of Complaint. He testified about being apprehended by Mine Police and that he denied the charges against him.

CW1 claimed that the requisitions were altered by a Chinese official by the name of Mr. Yu. He also confirmed having attended a hearing and appealing against the dismissal. He testified that they appealed three times and the third appeal was also not successful and according to him they were given permission to go and appeal elsewhere. He said he went to the Labour Office and later came to this Court.

During cross-examination he denied that he was laid off although he accepted that he was charged with offences. When referred to pages 3, 4, and 5 of the Respondent's Bundle of Documents which was a statement taken from him, CW1 said the signature on the statement was his but that he was forced to sign the document.

During further cross-examination CW1 confirmed that he attended a disciplinary hearing and that after the hearing he was found guilty and was summarily dismissed.

When asked whether he was aware that Teddy Mandela also gave a statement, CW1 said he was aware. He said he was also aware that Jercup Simuchimba also gave a statement.

When referred to the letter of apology which he wrote to two managers in the Respondent Company namely, Messrs Chanda and Chungu in which he wrote asking for forgiveness, CW1 said he asked for forgiveness so that he could get along with the manager and also for things he found which were not alright with him. According to CW1 he stays in the same area with the manager and the latter would not respond when he greeted him and wherever he met him he would show an angry face.

In re-examination CW1 reiterated that what he meant in the letter of apology was that he wanted peace between the manager and himself, including everyone in the company.

The next witness to testify on his own behalf was Teddy Mandela whom we shall hereinafter refer to as "CW2". CW2 testified that he was employed in



2011 as a helper. He worked for three months and was appointed as a clerk. He said he used to work in the support section but was taken to Jack Hammer section in 2012.

CW2 averred that he used to draw material that was used underground from Stores. He said if there was no material to collect he would go and work underground.

CW2 testified that on 5 September, 2014 he was given four (04) requisitions by Mr. Yu to get material from NFCA. Mr. Yu signed a requisition for 200 bags of cement. He collected the cement from NFCA store and brought it to Jack Hammer section. On Monday 8 September, 2014 Mr. Yu gave him four requisitions. These were for cement (50 bags), cable bolts, wire mesh and drilling rods. CW2 testified that Mr. Yu went underground and told him to change the requisitions for cable anchor sets (bolts) to 150.

It was CW2's further testimony that he mistakenly changed the requisition for cement to 150. He said he took the requisition to JCHX thinking he had done the right thing.

CW2 went on to testify about what later transpired leading to his dismissal. He talked about how he was later taken to Mine Police after which he was charged, attended a hearing, was consequently dismissed and unsuccessfully appealed against the dismissal.

CW2 repeated some of the evidence which was already in the Affidavit in Support of Notice of Complaint that he was threatened by Mine Police that



he would be jailed for 30 years if he did not sign the statement that they had prepared and that they forced him to sign it.

CW2 testified that at the first appeal the administering official did not say anything but just told him to leave the room. According to CW2, the manager, without hearing him, told him to go and see Mr. Chungu.

It was CW2's testimony that Mr. Chungu told him about his right to appeal for the second time which he did and the said appeal was unsuccessful.

CW2 averred that Mr. Chungu told him that he had refused to be a company witness and hence he had a right to appeal elsewhere. CW2 like CW1 also said he went to the Labour Office and finally came to this Court.

Under cross-examination CW2 maintained that he delivered 50 bags of cement to JCHX. He also confirmed that he signed the statement at page 18 in the Respondent's Bundle of Documents.

Under further cross-examination, CW2 confirmed that he attended a hearing. He was referred to page 21 of the Respondent's Bundle of Documents which showed that he did not want the union to represent him and that he went to appeal without a representative from the union. CW2 was further referred to his second appeal exhibited at page 23 of the Respondent's Bundle of Documents.

Under-re-examination CW2 reiterated what he had said during his examination in chief that he was told by the administering official at the first hearing to leave his office before he could explain anything and that

he was asked to appeal to Mr. Chungu where the matter started and was told that is where it would end. He said he appealed to M. Chungu but before he could say anything he was told to get out because he had told lies at NFCA.

According to CW2 he told the manager that he had been unfair to him and that is why he came to this Court.

The third witness for the Complainants was Jercup Simuchimba, hereinafter referred to as "CW3". CW3 testified that he started work in 2011 as a Jack Hammer Operator.

CW3 gave a detailed account of events leading to his summary dismissal. He repeated some evidence which had been given by CW1 and CW2, including the evidence deposed by CW1 in the Affidavit in Support of Notice of Complaint.

CW3 testified that on 12 September 2014 he was called by Mr. Chungu, the manager, to his office. He testified how he was asked about 430 bags of cement and later referred to Mine Police to go and give a statement. He confirmed giving a statement to Mine Police. Like the other two, CW3 also confirmed the case hearing and the unsuccessful appeals.

Under cross-examination CW3 was referred to pages 27 to 29 in the Respondent's Bundle of Documents which was the statement he gave to Mine Police. CW3 testified that he made another statement at Human Resource Department and that the statement at Mine Police was the first one.



During further cross-examination, CW3 was referred to page 32 and he confirmed that he did not appeal for the second time.

This marked the end of the Complainants' case.

The Respondent called one witness, Detective Inspector Feetman Mwale whom we shall refer to as "RW". He testified that he joined the Respondent in 2009 and he is responsible for interrogating those who commit crimes especially within company premises. He said he is also there to preserve the lives of miners.

RW testified that he was approached by Mr. Sing the man in charge of Jack Hammer and Support sections. Mr. Sing complained that his subordinate, a clerk was tampering with requisitions by changing figures when instructed to collect cement.

RW said he advised Mr. Sing to wait and monitor the subordinate in the next requisition. According to RW it took only about three or four days when another requisition of 50 bags of cement was given to Teddy Mundela (CW2). He was sent to collect the cement from NFCA main stores. RW explained to the Court the procedure for collecting cement from the NFCA main stores.

It was RW's testimony that when CW2 came back from collecting the cement the Chinese man (Mr. Sing) was surprised to discover that the figures were changed, instead of 50 bags of cement it was changed to 150 bags.

RW testified that they informed his boss Mr. Kalando about it and he picked up CW2 in the Company of a Chinese national from Administration Office Mr. Wang, who wanted to know what was happening because the figures for cement from his section were too much.

It was RW's further testimony that on their way to NFCA stores Mr. Mundela excused himself and disappeared only to be seen later coming from NFCA stores. According to RW he had reached there before them and was now coming towards them.

RW averred that he picked up CW2 so that he could go to their office so that they could continue with their discussion. It was RW's testimony that CW2 agreed to have altered the requisition. According to RW, CW2 in his statement mentioned the other colleagues. He said he worked with CW1 and CW3. RW referred to CW2's statement at pages 14 to 18 of the Respondent's Bundle of Documents. He confirmed that he is the one who recorded the statement and that the same was read to CW2 before he signed it.

RW also confirmed that he got statements from CW1 and CW3 which statements he said were at pages 3 to 5 and 27 to 29 respectively, in the Respondent's Bundle of Documents.

RW averred that in CW3's statement he admitted to have helped CW2 deliver cement to his section by using a fork lifter.



RW further referred to a statement of Mr. Sing which was at page 40 of the Respondent's Bundle of Documents. RW testified that after getting the statements they found that there was overwhelming evidence and they decided to charge the Complainants in accordance with the Disciplinary Code of Conduct.

During cross-examination RW reiterated that they got the requisitions and discovered that the figure one (1) was added to one of the requisitions for cement.

RW testified during further cross-examination that the Respondent paid for 150 bags of cement although only 50 bags reached JCHX. This was so because the documentation showed that 150 bags had been collected by CW2 from NFCA stores.

Asked whether he had seen the Sino trucks, RW testified that even CW1 himself confirmed in his statement that a Sino truck took cement to his home. He said that the Sino truck is black and white.

RW averred further during cross-examination that the Complainants took advantage of the porous boom which was usually left open to transport the cement out of the plant. He said the driver of the truck knew the weak points which were not manned and drove through those.

Asked about the CCTV, RW said the television cameras were not clear. He said they seemed to have been tampered with and were showing black and white pictures.

In further cross-examination RW reiterated that CW2 admitted that it was him who altered the figures in the requisition. CW2 did not dispute this statement when he was cross-examined. RW went on to say that the figure one (1) was later deleted from the requisition when they reached NFCA after CW2 had gone ahead of them. However the person who deleted the one forgot to indicate the remaining balance. According to RW, CW2 in his statement admitted that he was at fault.

This marked the end of the Respondent's case.

At the close of the case the Complainants undertook to file written submissions but Counsel for the Respondent indicated that he would rely on the oral and written evidence available before the Court. We have since received the submissions from the Complainants for which we are appreciative.

The undisputed facts as they emerge from the record are as follows:

1. The Complainants were employed by the Respondent at different times and held different posts.
2. Following an anomaly on a requisition concerning bags of cement investigations were conducted and disciplinary proceedings were instituted against the Complainants.
3. Statements were taken from the Complainants and Mr. Sing.
4. The Complainants were charged with the offences of misappropriation under clause 3.4.5, falsifying and altering under clause 3.4.3 and giving false evidence under clause 3.4.2 of the Respondent's Disciplinary Code.



5. On 18 September, 2014 the Complainants were summarily dismissed and informed about their right to appeal against the decision.
6. The Complainants did appeal against their dismissals but the said appeals were unsuccessful.

The question for determination by this Court is whether or not the Complainants were unlawfully and wrongfully dismissed as they claim in their Notice of Complaint. The answer to this question will determine whether the Complainants are entitled to the relief sought or not.

We have carefully analysed the evidence on record. We have taken into consideration the heart of the mandate of the Industrial Relations Court which is to do substantial justice, which we must hasten to point out, must ensue for both parties.

In addition, we caution ourselves that the burden of proof is on the Complainants to prove their case against the Respondent.

It is our view that the Complainants have not discharged the burden of proof. On the contrary the Respondent has shown that the Complainants were properly dismissed for their dishonest conduct.

We are fortified in our finding by the Supreme Court Judgment in **Zambezi Ranching and Cropping Limited v Lloyd Chewe (1)** where Ngulube CJ stated:

*The IRC misdirected themselves when they glossed over the wrong doing by the Complainant thereby coming to a conclusion on a view of the facts and the evidence which could not reasonably be entertained.*

In this case we do not want to gloss over the Complainants' wrong doing. Further, in the case of **Attorney-General v Richard Jackson Phiri (2)** the Supreme Court held that where disciplinary action is taken by a company the duty of the Court is to examine if there was the necessary disciplinary power and if it was exercised in due form.

The Supreme Court went on to state further that:

*Once the correct procedures have been followed the only question for consideration of the court- - - would be whether there were facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same- - -.*

In another case, **Chimanga Changa Limited v Stephen Chipango Nyambe (3)** the Supreme Court held that:

*an employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.*

We are of the view that the Respondent acted reasonably in coming to a decision to summarily dismiss the Complainants on the basis of the available evidence.

Further, we stand by our decision in the case of **Mary Musole v Borassus Estates Limited (4)** in which we stated as follows:

*"We have not been requested to decide the Complainants guilt or otherwise regarding the alleged theft from the Respondent. Our sole*



*function is to determine whether or not the Complainant was unlawfully dismissed as claimed--.*

In the instant case, it is our considered view that the Complainants were not unlawfully dismissed.

Gwyneth Pitt, the author of Employment Law (Sixth Edition) at page 216 has stated that there are two conditions to be fulfilled for a successful action for wrongful dismissal: firstly, that the employer terminated the contract without notice or with inadequate notice, and secondly, that the employer was not justified in doing so.

Further at page 218 discussing justified summary dismissal, the same author says even if the employer terminates the contract with no notice or with inadequate notice, the employee will not be able to claim wrongful dismissal if the employer is justified in summarily dismissing him or her. She asks a very important question that is, "when is summary dismissal justified?" and answers as follows: "If the employee has committed an act of gross misconduct." The author goes on further and states that generally speaking, things like disobedience, dishonesty and violence are regarded as gross misconduct.

In the case in casu, the Respondent has shown that the Complainants were charged in accordance with the company's disciplinary code. They were given the opportunity to be heard in their defence, although they claim that this was an academic exercise. It is therefore, our considered view that the claim of wrongful or unlawful dismissal cannot be sustained.

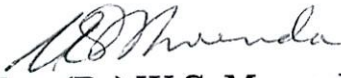
There is evidence to support the charges and dismissals of the Complainants. In their statements they admitted wrong doing. In our opinion there is overwhelming evidence against them.

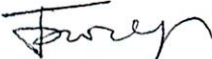
On the facts and evidence before us and going by the Supreme Court decisions in the cases cited herein, we find and hold that the Complainants were properly dismissed and are not entitled to any of the relief sought.

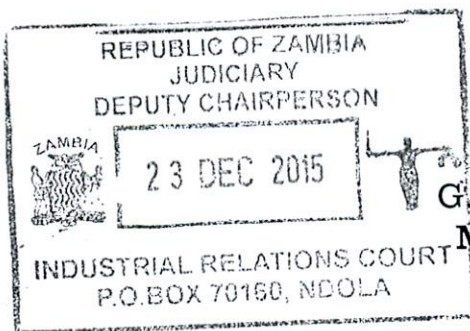
We find no merit in the complaint and we dismiss it accordingly.

We make no order as to costs.

Delivered and signed at Ndola this 23<sup>rd</sup> day December, 2015

  
Judge (Dr) W.S. Mwenda  
**DEPUTY CHAIRPERSON**

  
J.M. Bwalya  
**MEMBER**



  
G.M. Samusungwa  
**MEMBER**