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IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

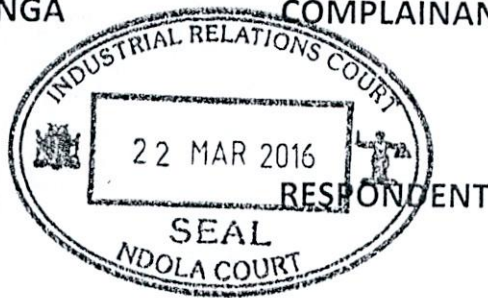
COMP. 23/2003

BETWEEN:

OBBIELLY MULAME BWANGA COMPLAINANT

AND

KAGEM MINING LIMITED



CORAM: J. CHINYAMA, ACTING CHAIRMAN

J.M. BWALYA, HON MEMBER

W.M. SIAME, HON. MEMBER

For the Applicant: In Person

*For the Respondent: Mr. E. C. Banda, State Counsel, Messrs ECB Legal
Practitioners*

JUDGMENT

Legislation referred to:

1. Industrial and Labour Relations Act, Chapter 269, Laws of Zambia, section 85(4).

Cases referred to:

1. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 172.
2. *Khalid Mohamed v Attorney General* (1982) ZR 49.
3. *National Breweries Limited v Phillip Mwenya* (2002) ZR 118.
4. *Mulungushi Investments Limited v Gradwell Mafumba*, SCZ Appeal No. 141 of 1997.
5. *Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango* (2006) ZR 22.
6. *Attorney General v Richard Jackson Phiri* (1988-1989) ZR 121.

Works referred to:

1. W. S. Mwenda, *Employment Law Revised Edition*, UNZA Press, Lusaka, 2011, page 105.

The Notice of Complaint in this matter was lodged by the Complainant on 11th March, 2003 pursuant to the **Industrial and Labour Relations Act(1)** on the ground that his dismissal from employment by the Respondent on 31st January, 2003 for the disciplinary offence of Refusal to Obey Instructions was unfair. He averred that at no time was there any instruction which he refused to obey, that the Respondent did not specify the particular instruction, as we understand the claim, in the charge sheet or anywhere; that he believed that his dismissal was as a result of an action he intended to take against an employee named Kalawela who had uttered defamatory statements against him; further, that his dismissal was also a result of bias against him by the Mine Manager, at the time Mr. F. Yombi, who accused the Complainant of having insulted him. He concluded that

the charges were not substantiated or proved. He came to court seeking the following reliefs:

1. reinstatement;
2. further or in the alternative, damages;
3. costs.

The Notice of Complaint was accompanied by an Affidavit deposed to by the Complainant himself.

An Answer was filed on behalf of the Respondent on 1st April, 2003 in response to the Notice of Complaint in which it was denied that the Complainant was unfairly or wrongfully dismissed from his employment on 31st January, 2003. It was contended that the dismissal was effected after the charge of refusal to obey lawful instructions was proved against the Complainant; that a disciplinary hearing was convened on 12th November, 2003 to determine the charges laid against the Complainant and the panel (disciplinary committee) recommended summary dismissal; that the summary dismissal was not on account of any action the Complainant was going to take against Kalawela or the alleged insult against Mr. F. Yombi. The Respondent denied that the charges were not proved or unsubstantiated.

An affidavit in support of the Answer deposed to by Mr. Gibson Mathew Banda, the Respondent's Manager, Human Resources at the time was lodged together with the Answer.

It is evident that this matter has taken a long time to conclude, particularly in terms of hearing the parties' evidence. The reasons are within the record. Suffice to state that on 19th September, 2003 the case was by consent of the parties referred to mediation. It seems that the mediation was inconclusive and the case file was allegedly not returned to the court registry by the mediator. The file was reconstructed using documents in the Complainant's advocates' hand. By letter dated 16th May, 2011 conveying the reconstructed file to the court, the learned advocates sought a date of hearing. On 21st November, 2011 we took cognizance of the matter. Several long adjournments followed mostly because the Complainant was living out of jurisdiction in the United Kingdom and continued to do so even at the time of the hearings. Other times the adjournments were on account of absence by the advocates on either side. The Complainant was at the time being represented by Counsel of Messrs Kitwe Chambers. On 28th June, 2012, however, an order was granted allowing the Complainant's advocates to withdraw from representing the Complainant. The order was perfected on 17th July, 2012. Thenceforth the Complainant proceeded in person.

On 29th November, 2012 the advocates for the Respondent sought to have the matter dismissed for want of prosecution on the ground that the matter had been in abeyance for too long largely due to the Complainant's residence in the United Kingdom, that the delay in disposing off the matter was highly prejudicial to the Respondent, a corporate entity which had undergone numerous corporate transformation and that all intended witnesses of fact who could have been relied upon had left employment, could not be contacted or had died; that in the

circumstance it would be impossible to have a fair trial in the light of the inordinate delay and that the demands of substantial justice could only be achieved if the action was dismissed.

The Complainant did not file an affidavit in opposition to the application. However, at the hearing he attended in person and verbally resisted the application. He gave reasons that even attacked his former advocate's conduct in the intervening period.

We ruled that the delay in concluding the matter could not be solely blamed on the Complainant and refused to grant the application.

After a couple more adjournments, hearing commenced and was concluded. The Complainant for himself and the learned advocates for the Respondent filed written submissions and hence this judgment.

At the hearing, the Complainant gave oral evidence in support of his case and in addition to the affidavit evidence. Mr. Gibson Mathew Banda, who was still in the Respondent's employment, now as Head-Human Resource, gave oral evidence on behalf of the Respondent.

Evidence which is common to the parties or on which there is no dispute is that the Complainant was employed as a Mine Superintendent at the Respondent's Fwaya Fwaya mine site with effect from 29th June, 1992. On 4th October, 2002 the

Acting Mine Manager, Mr. F. Yombi sent a memo (exhibit "OM1" in the affidavit in support of Complaint) to the Complainant set out in the following terms:

"To : Pit Superintendent – O Bwanga
From : Acting Mine Manager
Date : 4 October, 2002
SUBJECT : GROSS MISCONDUCT – O BWANGA

I refer to the conversation I had with you on 30th September, 2002 in my office concerning your conduct since I came back from leave. During our conversation I informed you that:-

- 1) On 23rd September, 2002 you did not attend the meeting in which work is distributed instead you chose to go to a pit of your choice.*
- 2) On 24th September, 2002 I saw you in the camp as early as 11.00 hrs, and in the afternoon you left work at 15.00 hrs without my permission.*
- 3) On 25th September, 2002 at about 07.30 hrs, I saw you walking in camp while work had started at 06.45 hrs.*
- 4) On 27th September, 2002 I found you sitted and discussing with a security officer without paying attention to myself and Mr. Dey for about 30 minutes. I decided to send you back to camp so that I could have a conversation with you. You decided to leave camp without my permission.*
- 5) On your way to camp, you met the Assistant Acting Mine Manager, Mr L. Mukuma to whom you said "Yombi is going to fuck himself for what he has done". Mr. Mukuma and you were called by myself and he proved that you had said those word.*

I consider you a very senior Superintendent, whose conduct is supposed to be exemplary. I therefore have no option but to request you to exculpate yourself as to why disciplinary action should not be taken against you.

You are required to reply to this memo within 48 hours of its receipt.

(signed)

F. YOMBI – MINE MANAGER" (sic)

There is no record of the Complainant's response to the memo. On 14th October, 2002 the Complainant was charged with three disciplinary offences, namely: refusal to obey instructions, poor work supervision and leaving place of work without permission. On the same day he was suspended from work pending investigations and placed on a half salary until further notice. In a statement dated 15th October, 2002 the Complainant responded to the charges as follows:

"STATEMENT ON THE ALLEGED OFFENCES

I deny the allegations labeled against me on the charge dated 14-10-2002.

1. REFUSAL TO OBEY INSTRUCTIONS

On 27-09-2002 when the Mine Manager came in the pit he did not give any instructions, but instead he exposed his anger in the presence of Mr. Dey to the reasons known to himself that I don't know.

REFUSE means: Say or show that one is unwilling to accept or give or do (what is asked or required) REFUSAL. But nothing was asked or required from to do which I refused.

2. POOR WORKING SUPERVISION

I do not agree to the Mine Manager's allegations.

- *Him and I started work together as Mine Superintendents in 1992.*
- *I opened "Kanchule Mine" from a virgin land and produced emerald stones.*
- *I worked in "Fwaya – Fwaya East Central" and the results were positive.*
- *In 1996: Fwaya – Fwaya East" was re-opened by myself after being declared barren and this pit produced a lot of emerald stone which did good to the development of the company.*
- *I opened "Libwente Mine" from a virgin land under the administration of the late Dr. Garcia.*
- *Libwente Mine was re-opened for the second time under the supervision of Mr. Dey.*
- *I opened "F10" under the supervision of Mr. Dey and F10 to date is producing emeralds.*
- *I was once again given Fwaya – Fwaya East on 21 – 03 – 2001 up to date is producing emeralds.*

I have never received any complaints about poor supervision from my boss, he has never cautioned or advised me, if at all my performance was poor for the time I have worked under his supervision. This has taken me by surprise for him to just put it in his charge without any verbal warning.

3. LEAVING PLACE OF WORK WITHOUT PERMISSION

On this day 24 – 09 – 2002 I was in pain while in the pit, I tried to radio him but I couldn't manage due to communication problem we experience from time to time in Fwaya Fwaya . I informed the expatriate working with me in the pit and left at 11:40. I past through Gate B and went to the clinic for treatment (refer to register book at Gate B and the register book at the clinic).

(Signed) 15/10/02

O.M. BWANGA"(sic)

On 12th November, 2002 a case hearing for the three charges was convened and the Complainant appeared before a three member disciplinary panel. Upon verification of the charges, it was decided to substitute the charge of Poor Work Performance with that of Idling/Loitering On Duty and the Complainant was informed about it. The Complainant was asked to plead to the three charges and he pleaded not guilty. His attention was drawn to the allegations made by his supervisor, Mr. F. Yombi, regarding his failure to attend the early morning meeting on 23rd September, 2002; his leaving camp for work at 07:30 hours instead of 06:45 hours on 25th September, 2002; and his leaving camp without permission on 27th September, 2002, respectively.

On the first allegation the Complainant replied that on 23rd September, 2002, after breakfast he spoke to his boss, Mr. Yombi who told him that he was going to work at Fwaya Fwaya pit. He then found it unnecessary to go for the meeting, although it was a requirement; that he had to pass through the clinic and did mention it to Mr. Yombi.

Regarding the 25th September, 2002, he explained that he had permission from the Acting Assistant Mine Manager, Mr. Mukuma that he would be delayed a bit because he wanted to talk to Mr. Mushingi, the Computer Operator. He stated that he left the camp through Gate "B" at 07:20 hours and went to the mine.

He stated that on 27th September, 2002 when Mr. Yombi arrived, he had already started the shift and planned for the day; that he was at the time waiting for the blaster man, Mr. J. Mulala, whom he had sent to get transport and to arrange for explosives to be taken to the pit, to return. He did not see the Acting Mine Manager. He was concentrating on the people who were chiselling. He just heard Mr. Yombi shouting and accused him of not recognizing his presence.

The Complainant informed the panel that Mr. Yombi ordered him out of the mine and told him that he would talk to him later. He left for camp. Mr. Yombi found him at the camp but refused to talk to the Complainant.. Later, he found transport going to town and got permission from Mr. Yombi to go. He left for town.

The minutes did not show that the panel did also direct the Complainant on the particulars of the other two charges of idling/loitering and leaving place of work without permission. It did, however, go on to inquire on the issue of differences between the Complainant and his superiors. The Complainant explained to the panel that it all started when he complained about Kalawela and that on 23rd September, 2002 he had spoken to Mr. Yombi about Kalawela's letter. He stated that Mr. Yombi accused him of insulting him and threatened to charge him.

In the course of the hearing when the Complainant raised the issue of Kalawela's letter, the chairman told him that Kalawela's letter was not part of the evidence. The Complainant insisted that the problem started at security (where Kalawela worked) and expressed his reservation and discomfort with the chairman.

At the end of the hearing, the panel voted on the outcome of the hearing using a scoring system. On the charge of refusal to obey instructions based on the three incidents he was found not guilty for the incident on the 23rd September, 2002; he was found guilty for the incidents on 25th September, 2002 and 27th September, 2002. The overall result recorded for the offence of refusal to obey instructions was, therefore, guilty on account of the scores recorded for the 25th and 27th September, 2002.

On the substituted charge of idling/loitering, he was found not guilty. We note, however, that the minutes did not specify the date(s) on which the alleged idling/loitering occurred.

On the charge of leaving place of work without permission, he was found guilty. The matter was adjourned to the following week to enable the panel review the case and make recommendations.

On 19th November, 2002 the panel again met, now in the absence of the Complainant and reviewed the evidence. It is notable that in this meeting which was called to (i) prepare a summary of the evidence, and (ii) to pronounce the verdict, one member felt that the Complainant may have been charged in anger because of the issues relating to Kalawela alluded to by the Complainant. The panelist felt that the summary dismissal was "stiff" and suggested the imposition of a lesser punishment (see item 5.0 *et seq* in the minutes of 19th November, 2002 at page 15 in the exhibits attached to the Respondent's Affidavit in Support of Answer). Another panelist observed that there seemed to be some personal grudges and wondered if there was something else at stake. The panelist suggested that the charge of Refusal to Obey Instruction be reviewed and possibly substituted for another offence. The chairperson of the panel, however, observed that the scoring had found the Complainant guilty but that consultations should be made with "higher authorities" before the verdict was given. The panel later resolved that the idea of consulting be abandoned and that the verdicts be recommended. It resolved and recommended that the Complainant be dismissed for the offence of Refusal to Obey Instructions and that he be penalized with a three days suspension without pay for the offence of leaving place of work without permission. He was found not guilty on the offence of idling/loitering. The same day a letter under the hand of RW1 who attended the disciplinary hearing in the capacity of recorder was written to the Complainant advising him

that he had been summarily dismissed from employment as of that day but that he could appeal to the Deputy General Manager.

On 21st November, 2002, the Complainant wrote his appeal letter to the Deputy General Manager on the grounds that in relation to the offence of leaving place of work, he had informed a Geologist who was a senior official of his departure. As to the offence of Refusal to Obey Instructions the ground of appeal appeared to be that he had already communicated with his supervisor, the Acting Mine Manager about the day's work; that on 27th September, 2002 the Acting Mine Manager did not give him any instructions but merely exposed his anger, that when he was sent out of the pit, he later sought the permission of the same Acting Mine Manager to leave camp and he allowed him. He thus wondered what instructions were given to him which he refused to follow.

The appeal was heard on 3rd January, 2002 by the Deputy General Manager who sat with RW1 as the recorder. The Complainant attended the hearing. At the close of the hearing the chairperson consulted with the Acting Mine Manger and decided to endorse the decision to summarily dismiss the Complainant. The Complainant was informed of his right of appeal to the General Manager.

The Complainant appealed to the General Manager repeating the same grounds as he had in his appeal to the Deputy General Manager. He also complained that the Deputy General Manager had to consult the Acting Mine Manager before arriving at the decision.

The appeal hearing took place on 30th January 2003 before the General Manager who sat with a Mr. S Lesa, Senior Personnel Officer as recorder.

On 31st January, 2003 the Complainant was written to informing him of the endorsement of the earlier summary dismissal. The foregoing are the facts of this case.

The Complainant's complaint is that the Respondent did not state what instructions he was given which he refused to obey. He gave an account of his alleged poor relationship with Mr. Yombi. He alleged that Mr. Yombi wanted people to steal emeralds for him but he (Complainant) objected since their job was to protect the stones. He reiterated in relation to the 23rd September, 2002 meeting that he had informed the Acting Mine Manager that he would go to the clinic before attending the meeting. When he returned he found the meeting over. He went to the pit where he found a group of security people one of whom was Kalawela. Kalawela told him that if he (Complainant) did not want to work with them he would ensure that the Complainant got arrested because he did not want to comply with Mr. Yombi's request for assistance in removing stones from the mine. The Complainant said that he told Kalwela that he was being insubordinate and that he would charge him so that he could explain why he wanted him to steal stones. He stated that he proceeded to charge Kalawela.

The Complainant testified that Mr. Yombi went to the pit later and accused him of not attending the 23rd September, 2002 meeting and that he did not want other people to benefit from his production. Mr. Yombi also told him that he would

charge him for not attending the meeting unless he withdrew the charge against Kalawela. The witness maintained that he was dismissed because of his action against Kalawela. He recalled that, that was not the first time disciplinary action was being taken against him. He complained also that he objected to Mr. Mukanga chairing the initial hearing because he used to use Kalawela as one of his "boys" as we understand for removing stones from the Respondent's mine.

The Complainant did talk about an incident, in the year 2000 when he was allegedly forced to take two days leave instead of the one day he had applied for. He stated that he was instructed to report to head office upon his return. He did so when he returned from leave and continued to do so for fifteen days. The fifteen days were not paid with his November, 2000 salary and he was charged with a disciplinary offence for the alleged absence. He also referred to an earlier incident of 1995/1996 when he was dismissed from the Respondent's employment and later reinstated. The Complainant took the incidents as demonstrating the poor working relationship in the company.

When cross-examined the Complainant replied that he had problems with the panelists of his initial case hearing. He stated that the outcome was planned. He replied that (disciplinary) procedure was followed but not everything was recorded. He stated that the Deputy General Manager told him to resign but it was not recorded. He reiterated that his dismissal was because of the action that he took against Kalawela. He stated that he could not raise the complaint (of Mr. Yombi's alleged conspiracy to fix him) because nothing was going to be done

about it. He replied that the insult he allegedly made to Mr. Yombi was never part of the disciplinary proceedings.

In re-examination he explained that he charged Kalawela but did not know what happened to the case. He reiterated that the alleged instructions which he refused to obey were not stated to enable him exculpate himself properly. He clarified that when the (Deputy) General Manager advised him to resign it was outside the disciplinary process.

For the Respondent's part the affidavit and oral evidence of RW1 was that a three member panel was appointed because the Complainant was a senior official and in order to promote transparency. He stated that he was the fourth member of the panel as a recorder. He stated that the Complainant was given ample opportunity to state his case and he was given a fair hearing. He stated that the panel was not in a hurry to arrive at the verdict but took time to consider the case and even adjourned for that purpose.

The witness could not recall what the Complainant's complaint about Kalawela was. The witness then explained, based on assumption, that some of the Respondent's employees pilfered gemstones from the Respondent's mine and acquired wealth which made them become big headed. They became insubordinate, were bullish and would intimidate others. He stated that if management became aware of any criminality on the part of an employee the employee was dealt with. He stated that he was not involved in any syndicate otherwise he would not have survived the twelve years that he had been at the

mine. He stated that people in production such as the Complainant were the ones who could steal the gemstones but could not do so without the involvement of security. He was unable to confirm though that the Complainant was involved. RW1 explained that the 2002 charges against the Complainant were not motivated by the incidents alluded to of 1995 and 2000. He stated that the Respondent had a succession of management officials and it was not possible that all could have borne a grudge against the Complainant. He explained in relation to the absenteeism charge of 2000 that the Complainant was a mining person and there were no mining activities at head office.

In cross-examination RW1 replied that before joining the Respondent he had worked for a company called SAKIZA Spinning, a sister company to Sambro where the Respondent's Deputy General Manager, Mr. Bhattacharia had worked up to around 1988. He replied that he had not connected the dismissal of 1995 to the charges in 2002. He stated that the Complainant may have made statements at the hearing which were not recorded. RW1 replied that it was unlikely that all senior officials would connive against the Complainant. He replied that the refusal to obey instructions lay in the fact that the Complainant did not attend the meeting on 23rd September, 2002. He denied that the charges were influenced by Mr. Kalawela.

In re-examination RW1 explained that he recalled an issue relating to a house the Respondent rented for the Complainant. He stated that it turned out that he was the owner of the house the company was renting for him. This closed the parties evidence.

The Complainant is his own behalf and counsel for the Respondent did file written submission for which we are grateful. We would, however, like to highlight that an amount of evidence not adduced during the trial before us crept into the Complainant's submissions. Such evidence is inadmissible as it should have been adduced during the hearing when the Respondent had the opportunity to cross-examine it. It is highly irregular to adduce additional evidence in the submissions. We will accordingly take no account of such evidence and expunge it from the record.

The thrust of the Complainant's submission was that the events of 1995, 2000 and the charges in 2002 were planned moves aimed at securing his dismissal from employment. He stated that the intention was to remove him from the pit because he was strict and could not allow anyone to steal emeralds and from which resulted his difference with Kalawela and the charges for which he was eventually dismissed.

On the issue of the house alleged to be his which was rented for him by the Respondent, the Complainant submitted that he bought it from the former landlady, from whom the Respondent had been renting it for him.

On the conduct of the disciplinary hearings, the Complainant submitted that the Chairman of the panel, Mr. L. Mukanga had ignored his complaint that he was not comfortable with him because he wanted to please management. He stated that he had requested for the Gate B log book and the clinic register to prove his

movements at the material times but the request did not reflect in the notes. He concluded that he be compensated for loss of employment.

For the Respondent, the learned advocate's submissions addressed three issues as follows: (1) Whether the Complainant has proved that his dismissal was as a result of the action he had intended to take against Kalawela; (2) whether in the face of the evidence (if any) adduced by the Complainant it could be said that the Complainant was not fairly treated and to render his dismissal wrongful or unlawful; and (3) whether in the face of the evidence adduced the Complainant was guilty of insubordination.

On the first issue the learned advocate submitted to the effect that the Complainant had not proved the existence of a connection between the difference he had with Kalawela and the charges for which he was dismissed such that he cannot be entitled to judgment as per decision of the Supreme Court in the two cases of **Wilson Masauso Zulu V. Avondale Housing Project Limited (1)** and **Khalid Mohamed V. Attorney General (2)**.

On the second issue, it was submitted that the Respondent's management followed the disciplinary code. The Complainant was charged and given time to respond to the charges. A panel of three officials was constituted to hear the Complainant's case. The Complainant was given time to exculpate and defend himself. The three panelists individually scored the Complainant on each offence. The final verdict was that the Complainant was dismissed. There was, therefore,

no shred of bias or indeed any premeditated position taken by the three adjudicators.

The learned advocate submitted that the question in a case of wrongful dismissal is not why but how the dismissal was effected (i.e the form and not the substance) and relied on the definition of the term as stated in the text book **Employment Law in Zambia (1)** at page 105 by (Dr.) W.S. Mwenda. Counsel also relied on the case of **National Breweries Limited V. Philip Mwenya (3)** for the assertion that where a dismissal is done according to procedure, no claim for wrongful dismissal would be entertained. It was further submitted, in any case, that where it is clear that the employee has committed an offence or done an act or made an omission which is in breach of contract any dismissal resulting there from is not wrongful or cannot be declared null and void.

Learned counsel submitted that in the present case the Respondent had patiently afforded the Complainant a hearing, exhausted the appeal stages and observed the rules of natural justice even though the Complainant had clearly breached the disciplinary code which could have resulted in his summary dismissal without a hearing.

Turning to the third issue the learned advocate submitted that the Complainant was guilty of the offence of insubordination (rather, Refusal to Obey Lawful Instructions) on the basis that he blatantly refused to obey instructions. Counsel highlighted the incident in 2000 when the Complainant was reporting to head office to illustrate the allegation of insubordination. Learned counsel concluded with the case of **Mulungushi Investments Limited V. Gradwell Mafumba (4)** in

which it was held that once a court finds that a dismissal is on the facts justified, the respondent was not entitled to damages. It was submitted that the dismissal in the present case was justified as the punishment meted out was provided for in the Disciplinary and Grievance Procedure of the Respondent.

In summing up the submission counsel stated that the Complainant had failed to prove his case and is not entitled to the reliefs sought. Counsel urged us to dismiss the complaint with costs.

We have considered the facts as found, the contending evidence of the parties and the submissions on either side. It is common cause in this case that the Complainant was dismissed for the offence of Refusal to Obey Instructions. Premised on the argument that the disciplinary procedure laid down in the contract was not followed, it was held in the case of **Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (5)** that:

"(1) It is not the duty of the court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done. The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised properly.

(2) Where it is not in dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity."

And premised on the argument that the disciplinary procedure laid down in the contract was followed it was held in the case of **Attorney General v Richard Jackson Phiri (6)** that:

"(1) Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case, is whether there were in fact facts established to support the disciplinary measures since any exercise of power will be regarded as bad if there is no substratum of facts to support the same."

On the same footing as the second part of the holding in the **Muyambango (5)** case, the court in the **Phiri (6)** case had held that:

"2. 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, such powers were validly exercised."

In the case at hand, the Complainant's contention is seemingly that the dismissal was contrived given the disciplinary history of the incidents in 1995 and 2000 and the decision he took to charge Kalawela. His contention is further that the offence of Refusal to Obey Instructions was not proved as the Respondent had not shown the instructions which he had refused to follow. He also attacked the fairness of the disciplinary proceedings by pointing out that he had objected to Mr. Mukanga chairing the initial disciplinary panel on the ground that he would be biased because he used to use Kalawela as one of his "boys" to steal emeralds from the Respondent's mine; that the Deputy General Manager who dealt with the first

appeal had at one point told him to resign in the wake of the disciplinary charges; and that the same Deputy General Manager also consulted with the acting Mine Manager, Mr. Yombi, before determining the appeal.

Against the foregoing contentions the Respondent's position is that there was no connection between the incidents of 1995 and 2000 to the offences charged in 2002 because it was not possible for successive members of management to have all held a grudge against the Complainant. It was stated that the offence of Refusal to Obey Instructions was established by the fact that the Complainant did not attend the morning meeting on 23rd September, 2002. There were no direct responses to the other issues relating to the chairing of the initial disciplinary hearing by Mr. Mukanga and the conduct of the Deputy General Manager.

We have considered the parties' opposing positions. We recall that the verdict of the disciplinary committee was that the Complainant was not guilty of the particular allegation relating to his failure to attend the meeting on 23rd September, 2002. His guilt was founded on the other two incidents of 25th September, 2002 and 27th September, 2002. The Complainant's dismissal was clearly not on account of not attending the meeting of 23rd September, 2002 but for reporting for work late on 25th September, 2002 and for leaving camp allegedly without permission on 27th September, 2002 after he was ejected from the mine by his supervisor. In the cases of **Muyambango (5)** and **Phiri (6)** recited above we are enjoined not to conduct ourselves as an appellate court to review what others (the disciplinary body) had done. Our duty is to *"to examine if there was the necessary disciplinary power and if it was exercised properly"* or *"examine*

whether there were in fact facts established to support the disciplinary measures" because *"any exercise of power will be regarded as bad if there is no substratum of fact to support the same"* . In this case it is not in dispute that the offences charged were provided for in the Respondent's disciplinary code or that the offence of refusal to obey instructions was punishable by summary dismissal. The issue is whether the disciplinary power was exercised properly against a backdrop of facts establishing that the offences had been committed. This, in our view, is the demand that the two authorities impose. In this vein it then becomes necessary to examine whether such facts existed before the tribunal.

We have accordingly applied ourselves to the events of 25th September, 2002 and 27th September, 2002. One relates to the Complainant reporting for work late while the other related to the Complainant leaving camp for town without permission. There is no evidence of a specific instruction to the Complainant to report at a specific time which he refused to comply with in the one case or a similar instruction not to leave camp in the other case. The Complainant's explanation in the first case was that he had gotten permission from the Acting Assistant Mine Manager; Mr. Mukuma that he would report late. In the disciplinary hearing the panel purported to have read a statement by Mr. Mukuma in which he denied giving the permission. In the second case the Complainant's explanation was that he got permission from Mr. Yombi himself to go to town. Yet again the panel relied on a purported denial by Mr. Yombi that he had given the Complainant such permission. The statements are, in our view of doubtful existence. The minutes do not show that they were shown to the Complainant so that he could answer them. Better still neither Mr. Yombi nor Mr.

Mukuma were called to the hearing so that they could face the Complainant with their purported denials. We reiterate our doubt in the veracity of the denials. The better evidence which is not rebutted is the Complainant's assertion that in both cases he had the permission of his superiors.

On the evidence before us, we share in the disquiet of the two members of the panel that the dismissal of the Complainant may have been precipitated by desire on the part of his supervisors to get rid of him particularly in relation to the issue of Kalawela.

With regard to the Complainant's complaint against Mr. Mukanga, it is our view that the disciplinary committee should have dealt with it and if need be, Mr. Mukanga should have been replaced. Similarly, the Respondent did not rebut the assertion that the Deputy General Manager made his decision after consulting Mr. Yombi, the architect of the disciplinary charges against the Complainant. This conduct was highly irregular and the Complainant was entitled to be suspicious because inevitably, Mr. Yombi is seen as having influenced the appeal decision. In the result the conduct of the disciplinary proceedings did not meet the minimum standards of a fair hearing. Suffice, however, to state that we have found that the dismissal was not justified.

On the foregoing bases we find that there were really no facts to support the disciplinary action of summary dismissal meted out against the Complainant. We are further fortified in this conclusion by the obvious uncertainty in the observations and reservations of the two members of the panel as to the

appropriateness of their conclusions and the verdict of the Complainant's guilt. We find accordingly that the dismissal of the Complainant from his employment was wrongful and most unfair in the circumstances of this case.

In the Notice of Complaint the reliefs sought by the Complainant are reinstatement and alternatively, damages. We would, without belabouring the principles relating to orders for reinstatement, simply state that such an order would not serve any meaningful purpose. The Complainant has been out of employment for over 14 years. He has certainly moved on in life, if his stated occupation in the United Kingdom is anything to go by. It would also be burdensome on the Respondent to force them to take on an employee in such a senior position especially when there is no evidence that the current circumstances of the Respondent would accommodate the Complainant. In the result the proper relief would subsist in an award of damages.

In assessing the appropriate quantum, we take into account the fact that the Complainant was summarily dismissed from his employment wrongfully and in unfair circumstances. He was not given notice. He, however, appears to have mitigated his circumstance; he is working in the United Kingdom. No evidence of when he got employed was, of course, given. We award him 24 months' salary as damages at the rate of his last earned salary in 2003 as Pit Superintendent. We do realise that more than 14 years have elapsed since the Complainant left the Respondent's employment. It should thus go without saying that the value of the said salaries will have to be assessed (actualised) to realise its true value as at the date of the judgment. Again bearing in mind the period that the case has taken to

conclude we can only allow interest for a limited period. We, accordingly, award interest on the sum to be found due at the average short term commercial bank deposit rate for a period of 12 months and then at the average commercial bank lending rate from the date of judgment until full settlement. The Complainant will have his costs in this action.

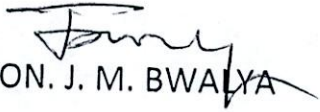
Any party aggrieved with this judgment may appeal to the Supreme Court from the date of the judgment.

Delivered at Ndola this...^{10th}.....day of^{March}.....2016



J. CHINYAMA

CHAIRMAN



HON. J. M. BWALYA

MEMBER



HON. W. M. SIAME

MEMBER