

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA**

**Appeal No. 005/2014  
SCZ/8/378/2013**

(Civil Jurisdiction)

*BETWEEN:*

**LASTON PHIRI**

**APPELLANT**

**AND**

**TROPICAL DISEASES RESEARCH CENTRE**

**RESPONDENT**

**Coram:       Muyovwe, Malila and Kajimanga, JJS**

on 7<sup>th</sup> June, 2016 and 13<sup>th</sup> June, 2016

*For the Appellant:*       Mr. T. T. Shamakamba of Messrs Shamakamba &  
Co.

*For the Respondent:*     Mr. D. B. Mupeta of Messrs D.B Mupeta & Co.

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## **J U D G M E N T**

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**Malila, JS, delivered the judgment of the court.**

**Cases referred to:**

1. *Attorney General v. Jackson Phiri (1988/89) ZR 123.*
2. *Zambia Electricity Supply Corporation Limited v. Muyambango (2006)ZR 22.*

**Other works:**

1. *National Pension Scheme Act, chapter 256 of the laws of Zambia.*
2. *Order 40 Rule 6 of the High Court Act chapter 27 of the Laws of Zambia.*

This is a very short appeal. It has its genesis in the removal by the appellant of a motor vehicle diff belonging to the respondent's Toyota Hiace mini-bus, registration number GRZ 260 BK, parked in the respondent's transport yard, and the conveyance of that diff to Nsanda's garage for treatment or repair. The respondent questioned the circumstances under which the diff was removed and suspected wrongdoing by the appellant. The appellant, for his part, pleaded good faith and innocence in his action, which he claimed was intended to get the diff repaired and consequently benefit the respondent.

The uncontroverted background facts are that the appellant was a driver/mechanic in the respondent's employment. On a Saturday in December 2010, the appellant, in the company of his son, and driving in a personal mini-bus, went to the respondent's transport yard as early as 06:30 hours, and was allowed into the yard by two security guards on duty. The appellant explained to the security guards that the diff he had come to collect had been given to him by the respondent. With the assistance of the security guards, the appellant and his son thereupon loaded the diff into his mini-bus and drove away.

The respondent later came to learn of the disappearance of the diff from its yard, and on the information of one of the security guards, established that it was the appellant who had taken the diff.

Subsequently, on the 14<sup>th</sup> January 2011, the respondent's Human Resources Officer, wrote to the appellant, asking him to show cause why disciplinary action should not be taken against him. In his written response dated 17<sup>th</sup> January 2011, the appellant laconically stated that the diff in issue was at Nsanda's garage and was due for collection, but omitted to make reference whatsoever to his having collected the diff from the yard, in the first place, or when the diff was delivered to Nsanda's garage. The respondent was unhappy with the appellant's explanation.

On the 20<sup>th</sup> January 2011, the respondent's Human Resources Officer wrote to the appellant, charging him for removing the diff from the transport yard without following due procedure under Clause 7.22 and 7.23 of the Disciplinary Code for Non-Unionised staff and for knowingly making false statements. The appellant was suspended, investigated, heard in a disciplinary hearing, found guilty, and consequently dismissed

from employment. He initially appealed unsuccessfully to the respondent's Executive Director on grounds, among others, that he was a unionised employee not amenable to the disciplinary procedure applicable to non-unionised employees. Subsequently, he contested the dismissal in the Industrial Relations Court.

There, he claimed as against the respondent:

- (i) damages for loss of employment;
- (ii) leave days;
- (iii) gratuity and salaries for the uncompleted period;
- (iv) one month's salary in lieu of notice;
- (v) salary for February, 2011;
- (vi) loan deductions for five (5) months and the whole amount to be paid by the respondent;
- (vii) NAPSA contributions; and
- (viii) interest and costs.

The court entertained no misgivings whatsoever that the appellant was properly charged and dismissed on a dismissible offence in terms of Clauses 7.22 and 7.23 of the Disciplinary Code for Unionised Employees. As he took the diff without authorization, his explanation that he had the necessary authority when he did not, amounted to knowingly giving a false statement.

As regards the claim for leave days, gratuity and salaries for the uncompleted period of the contract and the one month's salary in lieu of notice, the court found that although the respondent did not answer to these items of claim, the appellant did not adduce any evidence to enable the court determine whether or not the appellant was owed any monies in that respect.

In regard to the claim for payment of salary for the month of February 2011, the court found that the appellant did not adduce any direct evidence to show how that claim arose and that, in any case, the pay statement exhibited by the respondent did indicate that the appellant had been paid his salary for the month of February, 2011.

On the claim for a refund of loan deductions, the court, again, held that there was insufficient evidence adduced by the appellant to prove that claim.

The court equally dismissed the claim for a refund of NAPSA contributions, holding that contributions to NAPSA are a statutory requirement under the National Pension Scheme Act, chapter 256 of the laws of Zambia. That Act regulates the manner

in which benefits are to be paid out. In claiming a refund of his contribution from the respondent, the appellant had in effect, taken issue with a wrong party.

Disconsolate with the judgment of the Industrial Relations Court, the appellant launched the present appeal on five grounds structured as follows:

**Ground 1**

**The court below erred in law and in fact by dismissing the case with costs to the respondent without considering the fact that the appellant is living in extreme poverty.**

**Ground 2**

**The lower court erred in law and in fact without giving reasons for disregarding the appellant's persuasive evidence on record. (sic!)**

**Ground 3**

**The lower court erred in law and in fact that it is on record that the case cited between National Breweries Plc vs. Phillip Mwenya, SCZ Judgment No. 28/2002 that he was placed on final warning and that he had a string of disciplinary offences which was not related to the matter at hand at all and I was not at anytime placed on final warning as I was a unionised employee. (sic!)**

**Ground 4**

**The court below erred by not considering the falsehood of Chanda "RW3" reason being that on 10<sup>th</sup> January 2011, he assigned the appellant to go to Nchelenje on duty to take the Scientists for the Research work surprisingly on the 11<sup>th</sup> January, 2011 he wrote a memorandum stating that he had called me to his office on the matter at hand notwithstanding the fact that on the very day, I was in Nchelenje and Chanda's statement of falsehood can't be relied on.**

**Ground 5**

**The lower court erred by stating that they based their decision from the documentary evidence but the same was not availed to them in terms of minutes of the disciplinary hearing.**

**Any other grounds to be adduced at the hearing of this matter.”**

The appellant filed in some self-authored heads of argument which, not surprisingly, appear to address the five grounds of appeal globally. At the hearing of the appeal, Mr. Shamakamba, learned counsel for the appellant, adopted and relied on the appellant's home-grown heads of argument already filed before us. Mr. Mupeta, learned counsel for the respondent, was allowed up to Thursday 9<sup>th</sup> June 2016 to file in the respondent's heads of argument. He instead promptly filed in these on Wednesday, 8<sup>th</sup> June, 2016.

The submission in the appellant's home-grown heads of argument focused on whether or not the appellant had permission to remove the diff from the appellant's transport yard and convey it to Nsanda's garage. He quoted from the evidence of Joseph Chanda, the respondent's head driver whom the appellant referred to erroneously as RW3. In cross-examination, the witness stated, at page 165 of the record, as follows:

**“I saw you remove the diff from the vehicle GRZ 260BK. You removed the diff with my permission.”**

It was the appellant's argument that the aforestated evidence confirms that the diff was removed from the respondent's yard with the respondent's permission.

In his submissions in response to the heads of argument in support of the appeal, Mr. Mupeta gratuitously opted to respond to each of the grounds of appeal, notwithstanding that the appellant made no arguments in respect of each of them. He was succinct, lucid and straight to the point. He dismissed the first ground of appeal on the basis that the award of costs is within the discretion of the court as provided for under Order 40 Rule 6 of the High Court Act, chapter 27 of the laws of Zambia. According to Mr. Mupeta, the appellant, as a fairly enlightened individual, ought to have known that the respondent survives on Government grants. He ended his response on ground one of the appeal by invoking the adage that those who live in grass-thatched houses should not play with fire. This, according to Mr. Mupeta, applies aptly to the appellant.

In reaction to ground two of the appeal, the learned counsel for the respondent defended the position taken by the lower

court, contending in effect, that the court was circumspect in the reception of evidence from witnesses and that the appellant's evidence was anything but persuasive. In fact, according to Mr. Mupeta, the appellant was 'skillfully evasive.'

Mr. Mupeta impugned the argument advanced under ground three of the appellant's heads of argument, submitting that the offences the appellant faced were all, according to the Disciplinary Code, dismissible, and no question of any warning arose.

The learned counsel for the respondent countered the appellant's argument in relation to grounds four and five on the basis that Joseph Chanda, CW3, was the appellant's own witness in the court below and was not, as portrayed, by the appellant in his submissions, RW3. Furthermore, the trial court was entitled to believe this witness in preference to any other witness for that matter.

Having responded to each of the appellant's heads of argument as aforestated, Mr. Mupeta went on to submit that the issues in the appeal revolve around the two offences leading to the appellant's dismissal, namely removing property and

knowingly making a false statement. He identified for our benefit, evidence in the record of appeal pointing to the folly of the appellant's insistence that he removed the diff with the permission of Joseph Chanda, CW3. We were urged to uphold the trial court's judgment and dismiss the appeal.

We have given due consideration to the grounds of appeal and to the arguments advanced. Mr. Shamakamba, who represented the appellant in this appeal, adopted and relied on the heads of argument drawn and filed by the appellant in person.

We pause here to observe that grounds of appeal should be concisely drafted and straight to the point so that the error complained of, be it of fact or law, is apparent on its face. A perusal of the grounds of appeal in the present case reveals that they do not accurately accentuate the appellant's grievance with the lower court. They could have been drafted more elegantly with greater precision as to the misdirections and errors of law that, in the view of the appellant, afflicted the lower court's judgment. The heads of argument, for their part, should speak to each of the grounds of appeal raised.

The heads of argument submitted by the appellant did not speak to each of the five grounds of appeal. Having been authored by the appellant in person, these lapses were understandable. The adoption of these grounds of appeal and heads of argument hook, line and sinker, by the learned counsel for the appellant, however, gives the whole appeal before us a somewhat different complexion. We do not want to say it is an indictment on the appellant's counsel, but we can say he owed the appellant, and this court some input.

As we have stated already, in his brief heads of argument in support of the five grounds of appeal, the appellant merely focused on the issue whether or not he had authority to remove the diff from the respondent's transport yard and convey it to Nsanda's garage and ended at answering this issue in the affirmative. This clearly does not allow us much latitude to carefully appraise each of the five grounds of appeal he raised against the relevant legal arguments in respect of each of those grounds of appeal.

The thrust of the appellant's case is that he removed the diff with the permission of CW3, Mr. Joseph Chanda, for purposes of

having the diff repaired at Nsanda's garage. As we understand the appellant, his action in taking the diff from the respondent's transport yard to Nsanda's garage, was an action intended for the overall benefit of the respondent. Therefore, the appellant deserved plaudits rather than excoriation.

We have examined the record of appeal, particularly the record of proceedings in the court below. The appellant, in his cross-examination stated the following:

- “- According to “LPI” my supervisor told me to take the diff to Nsanda where there were spanners.**
- I agree that I removed the diff. I was authorized by Chanda. He had instructed me.”**

(page 157 of the record of appeal)

Mr. Joseph Chanda, who testified as a subpoenaed witness, stated as follows in cross-examination:

- “ - Mr. Phiri did not tell me about any problem with the diff. I did not authorize him to take the diff to Nsanda's Garage.”**

And in re-examination, he stated the following:

- “- I saw you remove the diff from the vehicle GRZ 260BK.**
- You removed the diff with my permission.**
- It is a complete lie that I told you to take the diff to Nsanda.**
- You should have taken permission from me to take the diff to Nsanda's garage.”**

(page 165 of the record of appeal).

It is clear from the record of proceedings that the statement of CW3, Joseph Chanda, which the appellant isolated and converted into the basis of his submission that he had authority to remove the diff, was picked out of context. What emerges from a reading of the evidence on record is that no authority was given to the appellant to pick the diff from the respondent's transport yard and deliver it to Nsanda's garage. This is a factual question upon which the court correctly made a finding which we are not inclined to reverse.

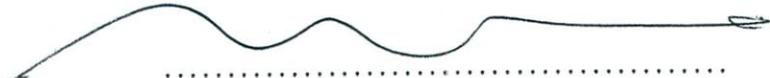
The appellant was given an opportunity to exculpate himself, and he did so in writing. He was duly heard, and found guilty, and consequently dismissed. It is not his argument before us that due process was not followed or denied him, nor is it his argument that the charges he faced did not constitute dismissible offences. In **Attorney General v. Jackson Phiri**<sup>1</sup> we stated that:

**“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, would be whether these were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same ...”**

While in **Zambia Electricity Supply Corporation Limited v. Muyambango**<sup>2</sup> we stated as follows:

**“It is not the function 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.”**

On a proper conspectus of the circumstances that culminated into the appellant’s dismissal, we are satisfied that the holding of the trial court cannot be faulted. We find no merit in the appeal and are inclined to dismiss it in its entirety. Each party to bear its own costs.



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**E. N. C. MUYOVWE**  
**SUPREME COURT JUDGE**



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**M. MALILA, SC.**  
**SUPREME COURT JUDGE**



.....  
**C. KAJIMANGA**  
**SUPREME COURT JUDGE**