IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 75/2013
SCZ/8/16/2013

(CIVIL JURISDICTION)

BETWEEN:

BORNIFACE SIAME **APPELLANT**

AND

MOPANI COPPER MINES PLC **RESPONDENT**

Coram: Mwanamwambwa, DCJ, Hamaundu and Kaoma, JJS
on 4th June, 2014 and the 3rd February, 2016

For the Appellant : In Person

For the Respondent: Mr H. Pasi-Inhouse Legal Counsel

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Kankomba and Others V Chilanga Cement Plc [2002] ZR, 129**
2. **Attorney-General v Achiume [1983] ZR 1**
3. **Chimanga Changa Limited V Ng'omber [2010] 1 ZR 208.**

This is an appeal against the Judgment of the Industrial Relations Court dated the 5th January, 2012, in which the Court dismissed the Appellants claim, challenging the termination of his employment by the Respondent.

The background to this appeal is as follows:

The Appellant was at the material time employed by the respondent as workshop foreman. In June, 2000 some engines belonging to the respondent went missing from its plant. The respondent decided to search the houses of the appellant and two other employees. A search at the appellant's house resulted in the recovery of two engine-blocks that belonged to the respondent. The two items were not those that had been reported missing. The appellant explained that the two items had been brought to him for repair by two people; one was an employee of the respondent while the other was a former employee. The employee was interviewed. He confirmed having taken one engine block to the appellant. However, the other person mentioned by the appellant could not be found. The respondent absolved the appellant from liability for one engine block but charged him for being in unauthorized possession of company property in respect of the other.

At the disciplinary hearing that was held in respect of the charge, the appellant maintained his position that he had innocently received the engine blocks for repair. At the end of the disciplinary hearing, the appellant was dismissed from employment.

The appellant took the matter to the Industrial Relations Court where he sought a declaration that his dismissal was void and he demanded either re-instatement or damages.

In his testimony at the hearing, the appellant maintained his position that the two engine blocks were brought to his home for repair by the two people that he had mentioned.

The respondent did not adduce *viva voce* evidence but relied on the documents that had been filed on record.

The trial court concurred with the reasoning of the respondent that, on receipt of the engine blocks the appellant should have been circumspect and, therefore, should have scrutinized their ownership, especially that similar engines were stocked by the respondent.

The trial court, therefore, found that on the facts of the case the respondent acted reasonably in coming to the decision to

dismiss the appellant. The trial court came to the conclusion that the appellant was lawfully dismissed.

Before us, the appellant advanced three grounds of appeal, namely;

(i) that the court below erred in law and fact when it held that the complainant ought to have known that the engine blocks belonged to the respondent and that by virtue of his position in the company, he should have inquired about the ownership of the engines in question.

(ii) that the court below erred in law and fact when it held that the appellant was lawfully dismissed from employment, and;

(iii) that the court below erred in law and fact when it held that the respondent acted fairly and that there was no evidence of victimization.

The appellant filed written heads of argument which he relied on entirely at the hearing. The respondent did not file any heads of argument and was therefore barred at the hearing from presenting any oral argument.

In his heads of argument, the appellant only argued the first two grounds. Making submissions on the first ground, the appellant

took issue with the trial court's holding that the complainant ought to have known that the engines belonged to the respondent. The appellant argued that since the respondent was the one that was alleging that the items belonged to it, the onus to prove that allegation lay upon the respondent. For that argument, the appellant referred us to a passage in the case of **Kankomba and Others V Chilanga Cement Plc**[1] where we said that it is trite law that he who asserts must prove.

Submitting on the second ground, the appellant agreed with the trial court's observation that the respondent's disciplinary code was not availed to the court to enable it determine whether there was any fundamental abrogation of procedure which the respondent may have been bound to follow. The appellant argued that the onus to avail the court with the disciplinary code was upon the respondent as the employer. The appellant added that the failure by the respondent to produce that document in court should have been fatal to its case.

The appellant went on to argue that it was a contradiction on the part of the trial court to hold that the non-production of the disciplinary code was unfortunate but failing to decide in favour of

the appellant on that score. In support of that argument the appellant referred us to the case of **Attorney-General v Achiume**[2] where we held, inter alia, that an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere.

Those were the arguments advanced.

We shall deal with the second ground first. In that ground the appellant has raised issue with the trial court for not penalizing the respondent for omitting to produce the Disciplinary Code by deciding the action in favour of the appellant. At Common Law, the overriding factor in a case of dismissal is whether or not an employee is given an opportunity to be heard and exculpate himself before the decision to dismiss him is taken. In this case, it was not in dispute that the appellant appeared before a disciplinary hearing and presented his side of the story. Clearly he was given an opportunity to be heard and exculpate himself. Therefore, the non-production in evidence of the Disciplinary and Grievance Procedure Code was immaterial.

We, therefore, find no merit in the second ground of appeal.

In the first ground of appeal, the appellant alleges that the trial court held that he ought to have known that the engines belonged to the respondent. He takes issue with that alleged holding and argues that the trial court was shifting the burden to him instead of the respondent.

In considering the appellant's argument in this ground, we wish to quote a passage from the case of **Chimanga Changa Limited V Ng'ombe**[3]. The passage was also quoted by the trial court in its judgment. The passage reads:

> **"According to the learned authors of** *Selwyn's Law of Employment*, **the 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. The rationale behind this is clear; an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens. In this case we are satisfied that the appellant carried out its investigations on the basis of which the respondent was dismissed".**

A perusal of the judgment in this case shows that the trial court did not hold that the appellant ought to have known that the engines belonged to the respondent; that was the reason which the respondent had used for finding that the appellant was guilty of the offence charged. The trial court was merely examining whether the reasoning by the respondent was reasonable, in line with the passage that we have quoted in the case of **Chimanga Changa Limited V Ngombe**[3]. In the end, the trial court found the reasoning to be reasonable and that, therefore, the respondent had acted reasonably in arriving at the decision to dismiss the appellant.

We agree with the trial court on this score. Looking at the position that the appellant held and its functions, namely, maintenance of the respondent's buses, the appellant was familiar with the types of engines that the respondent's fleet of motor vehicles used. He ought, therefore, to have been very circumspect when he received the two engine blocks. Clearly, his lack of vigilance eroded the trust that existed or ought to have existed between him and the respondent. Therefore, we too find that the

respondent acted reasonably in coming to the decision to dismiss the appellant.

We, therefore, find no merit in the first ground of appeal.

All in all, the appeal has no merit. We dismiss it. This being a matter that came from the Industrial Relations Court, we make no order for costs.

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M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE