IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 111/2013**

HOLDEN AT LUSAKA **SCZ/8/399/2012**

(Civil Jurisdiction)

BETWEEN:

KEDRICK SIKAZWE	APPELLANT
AND	
PROXY LIMITED	1ST RESPONDENT
DANA HOLDINGS LIMITED	2ND RESPONDENT

CORAM: Mwanamwambwa, D.C.J., Muyovwe, Wood, J.J.S.
On the 8th October, 2015 and 7th January, 2016

For the Appellant: *In person..*
For the Respondents: *Mr. K. Kaunda of Messrs. Ellis and Company.*

JUDGMENT

Mwanamwambwa, D.C.J., delivered the Judgment of the Court.

Legislation referred to:

1. **Section 2 and 43(3) of the Companies Act, Chapter 388 of the Laws of Zambia**
2. **Articles 14(2) and 21 (1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia**

Cases referred to:

(a) **Zambia National Provident Fund V. Yekweniya Mbiniwa Chirwa (1986) Z.R. 70.**

(b) **Wilson Masauso Zulu V. Avondale Housing Project Limited (1982) Z.R. 172.**

(c) **Waghorn V. George Wimpey and Company Limited (1970) ALL ER 74**

(d) **Mususu Kalenga Building Limited and Another V Richman's Money Lenders Limited (1999) Z.R. 27.**

This is an appeal from a Judgment of the Industrial Relations Court, which dismissed the appellant's claim for damages for wrongful dismissal.

The events leading to this appeal are that, by a letter dated 08th October, 2008, the appellant was offered employment by the 2nd respondent to work at the 1st respondent, as Business Manager. According to the letter of offer, management reserved the right to transfer the appellant at short notice, to anywhere else where the 2nd respondent had operations, depending on operational requirements and in line with the 2nd respondent's conditions of employment and service. The letter further stated that the appellant's conditions of service would be according to a contract of employment that the appellant was to sign, as well as the 2nd respondent's conditions of service under Grade D2. In this regard, the appellant accepted the offer of employment by signing a contract between himself and the 2nd respondent. The contract was for a two year fixed term, from the 20th October, 2008. It was to expire on the 19th October, 2010.

In the scheme of things, the appellant was assigned to work at the 1st respondent, which was paying his remuneration. On 26th August, 2009, he received a memorandum from the 1st

respondent's General Manager stating that he was under performing in his role as Business Manager and that he was being given a final warning which was to last for a month, failure to which his contract would be reviewed. By a memorandum dated 28th August, 2009, the appellant challenged this allegation of underperformance. At the month end of September, 2009, he submitted a monthly report to the 1st respondent's General Manager.

What followed was that on 14th October, 2009, the 1st respondent's manager invited him to a business meeting at Serenity Lodge in Kabulonga, Lusaka. And when he went to that meeting, he found the 1st respondent's General Manager with the 2nd respondent's Executive Director, by the name of Mrs. Joyce Shula Nama. During the meeting, he was informed by the 2nd respondent's Executive Director that, based on the monthly report he had submitted, management had decided to transfer him from the 1st respondent to another company called Dana Oil Corporation, as Sales and Marketing Manager. This transfer was with immediate effect. He was further instructed to collect the letter of transfer from the 2nd respondent's Human Resource Officer. The appellant obtained the letter of transfer, but he contested the

transfer. He wrote to the 1st respondent over the issue. His lawyers, Messrs. Kalokoni and Company, also wrote to the 1st respondent over the same matter. However, the issue remained unresolved.

On 26th October, 2009, there was a separate incident in which the appellant was charged with the offence of unauthorized use of the company motor vehicle. Subsequently, he appeared at a disciplinary hearing where he was found guilty of the offence as charged. As a result, he was suspended from duty for ten days from the 30th October, 2009 and he was given a final written warning. This in effect, meant that the appellant's suspension from duty was to end on Friday, 13th November, 2009. He was expected to report back on duty at his new station on Monday, 16th November, 2009. But he never reported back on that day. He only showed up on 19th November, 2009, to meet the Human Resource Officer at the 2nd respondent. Unfortunately for him, it was on that same day, on the 19th of November 2009, that the 2nd respondent terminated his employment. He was dismissed on the grounds that he failed to report for work for four consecutive days without permission which amounted to desertion, contrary to the 2nd respondent's disciplinary code.

It was against this background that the appellant took out a complaint against the respondents seeking damages for wrongful dismissal together with costs. The grounds upon which he brought his complaint were that, the 2nd respondent purported to transfer his contract of employment with the 1st respondent to Dana Oil Corporation without his consent, and that whilst he was still challenging the transfer of contract, he was summarily dismissed from employment for absenteeism.

After hearing and considering all the evidence before it, the Industrial Relations Court, in determining the question of whether the appellant was wrongfully dismissed, identified two issues that had to be resolved. The first was whether or not the appellant's transfer from the 1st respondent to Dana Oil Corporation Limited was wrongful. The second issue was whether or not the appellant absented himself from duty for four consecutive days without authority.

In resolving these issues, the trial court found as a fact that the appellant was employed by the 2nd respondent and was deployed at the 1st respondent as Business Manager. It also made a finding that the 1st respondent was a subsidiary of the 2nd respondent. The trial court came to this conclusion because, the offer-letter was

issued by the 2nd respondent, which offer the appellant accepted by executing a contract of employment between himself and the 2nd respondent. Most importantly, the Industrial Relations Court took the view that the appellant's transfer from the 1st respondent to Dana Oil Limited was not wrongful. According to the trial court, this was so because the letter of offer of employment clearly stated in the first paragraph that the 2nd respondent's management reserved the right to transfer the appellant, at short notice, to anywhere else where it had operations. Further, that the appellant consented to such transfer by executing the contract of employment between himself and the 2nd respondent.

When it came to the issue of whether the appellant absented himself from work, the Industrial Relations Court found from the evidence before it, that the appellant did not report on duty for four consecutive days, from the 16th to the 19th November, 2009, without permission. Further that, the 2nd respondent's failure to timely deal with the appellant's grievance over his transfer to Dana Oil Corporation Limited, was not reasonable cause for the appellant to absent himself from duty. And relying on the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[1], the trial court was of the view that, since the appellant committed a

dismissable offence, any failure by the 2nd respondent to comply with the laid down procedure in the contract of employment, did not occasion any injustice and the appellant's dismissal was not wrongful. The trial court therefore dismissed the appellant's complaint.

The appellant was not happy with this judgment. He appealed to this court advancing the following three grounds of appeal:-

GROUND ONE

That the court below erred in law and in fact when it found as a fact that Proxy Limited, the first respondent was a subsidiary of Dana Holdings Limited, when legally this is incorrect and not in accordance with the legal definition of a subsidiary company, as provided by section 43 of the Companies Act, Chapter 388 of the Laws of Zambia, and when there was no legal evidence adduced before it to support that finding.

GROUND TWO

That the court below erred in law and fact when it found that the transfer of the appellant to another company, without his consent, was not wrongful and that the second respondent reserved the right to transfer the appellant anywhere else where the second respondent had operations, and that the appellant had consented to such transfer when he signed the contract of employment between himself and the 2nd respondent. The transfer to a separate legal entity not legally a subsidiary of the second respondent was lawful without the consent of the appellant.

GROUND THREE

That the court below erred in law and fact when it found that failure by the second respondent to deal with the appellant's grievance over the transfer to another entity was not reasonable ground to absent himself from duty. The court failed to see that the circumstances leading to the dismissal of the appellant constitute constructive dismissal of the appellant.

The parties filed written heads of argument based on these grounds of appeal. Since counsel for the respondents argued grounds one and two together, we shall address the two grounds one after the other, before we proceed to deal with ground three.

The gist of the appellant's submissions on ground one is that the 1st respondent is not a subsidiary of the 2nd respondent, as it can be deduced from the documents produced in court below. To support this argument, he cited the definition of subsidiary as defined under Sections 2 and 43 (3) (b) of the Companies Act, Chapter 388 of the Laws of Zambia. According to section 2, a subsidiary means a body corporate that is a subsidiary of another body corporate for the purpose of section forty three. And section 43(3) (b) provides that a subsidiary of a company is any company of which the holding company is a member and the composition of whose board of directors is controlled by the holding company. From the two provisions, the appellant argued that the court below

erred when it found that the 1st respondent was a subsidiary of the 2nd respondent.

And in support of the second ground of appeal, the appellant submitted that the 1st respondent and the 2nd respondent were two separate legal entities. He argued that where one has been employed by one legal entity, he could not be coerced to work in another legal entity without his consent. The appellant further argued that he had a constitutional right to demand that he associates with those he chose to associate with, including an employer. At this stage, he drew our attention to Article 21 (1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, which in part provides that, except with his own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to associate with other persons. He also submitted that his transfer was contrary to the provisions of Article 14 (2) of the Constitution, Chapter 1 of the Laws of Zambia, which forbids forced labour. He argued that just because there was money to be paid, there was no way he could be forced to work for any other entity with which he had no agreement. According to him, the trial court therefore erred when it

found that his transfer to another company without his consent was not wrongful.

Mr. Kaunda, counsel for the respondents, opposed both grounds one and two. He started by submitting that even assuming that the 1st respondent was not a subsidiary of the 2nd respondent, that alone would not be enough to overturn the judgment of the Industrial Relations Court. This was because, counsel argued, the offer of employment was made by the 2nd respondent. He drew our attention to the first paragraph in the offer-letter which stated that the 2nd respondent's management reserved the right to transfer the appellant, at short notice, to anywhere else where the 2nd respondent had operations in line with the 2nd respondent's conditions of service. We were also referred to paragraph three of the letter which stated that the appellant's conditions of employment would be according to the contract of employment and the 2nd respondent's conditions of service under Grade D2.

From there, Mr. Kaunda pointed out that the contract of employment which the appellant signed was between himself and the 2nd respondent. He added that it could also be seen from the testimonium clause in that contract, that the appellant was an employee of the 2nd respondent. Counsel also referred us to clause

5.10 of the 2nd respondent's conditions of employment and service, and argued that the 2nd respondent retained the right to transfer the appellant to any different company pursuant to that clause. The clause was to the effect that the 2nd respondent could at its discretion transfer an employee from one job to another in a different station, department, section or company. He argued that the appellant's own testimony was that he was employed by the 2nd respondent. In this regard, counsel supported the findings of the lower court that the appellant's transfer from the 1st respondent to Dana Oil Corporation Limited was not wrongful because the 2nd respondent had the right to transfer the appellant to any other company.

It was further submitted that the appellant's contention that he did not consent to the transfer was misconceived, because he gave consent at the time he accepted the offer of employment by the 2nd respondent and signed the contract. Counsel submitted that the appellant had no reasonable cause to absent himself from duty, without permission for four consecutive days following his transfer. Mr. Kaunda also argued that such conduct amounted to a dismissable offence under clause 2(d) of the 2nd respondent's Disciplinary Code, because it fell under offences carrying summary

dismissal. For this reason, he argued that the appellant was rightly dismissed. He urged us dismiss grounds two and three for lack of merit.

We have anxiously considered the arguments advanced under the first ground of appeal. From the outset, we must mention that we agree with the appellant's submission that there was no evidence to support the finding of fact by the lower court that the 1st respondent is a subsidiary of the 2nd respondent. We think that it was speculative for the lower court to make a finding which was not substantiated by evidence. The mere fact that the 2nd respondent had employed the appellant to work for the 1st respondent, does not in itself, mean that the 1st respondent is a subsidiary of the 2nd respondent. The record of appeal, shows that the 1st respondent does not fall within the definition of a subsidiary as defined under section 2 as read with section 43 (3) of the Companies Act, Chapter 388 of the Laws of Zambia. It was therefore a misdirection for the trial court to make a finding which was unsupported by evidence. In the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd.**[2], we held as follows:

> **"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings**

in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."

On the strength of the this authority, we hereby reverse the lower court's finding of fact that the 1st respondent is a subsidiary of the 2nd respondent, because it is not supported by any relevant evidence. Ground one has merit, and it is hereby allowed. We will now address ground two.

On the second ground of appeal, the appellant contended that the trial court was wrong to have found that his transfer to Dana Oil Corporation, without his consent, was not wrongful. We have considered the arguments advanced by the parties on this ground. Although we have found in ground one, that the 1st respondent is not a subsidiary of the 2nd respondent, there was undoubtedly a special relationship that existed between the two companies, whereby the 2nd respondent employed the appellant to work as Business Manager for the 1st respondent. In the view that we take, the appellant was for all intents and purposes, an employee of the 2nd respondent. The evidence on record shows that, it was the 2nd respondent who offered the appellant a job. It also shows that the two parties to the contract of employment were the 2nd respondent

and the appellant. Further, the offer letter clearly states that the 2nd respondent's Conditions of Service would apply to the appellant. In the face of this evidence, we are satisfied that the appellant was an employee of the 2nd respondent, notwithstanding that he worked for the 1st respondent.

It follows therefore, that the 2nd respondent had power to transfer t the appellant as its employee in line with the conditions of service. The appellant has argued that it was against his constitutional right for the 2nd respondent to force him to work for another legal entity with which he had no agreement and without his consent. In our view, this argument overlooks the fact the appellant was initially employed by the 2nd respondent to work for another company, the 1st respondent, with which he had no agreement. In fact, the conditions of service empowered the 2nd respondent to transfer the appellant to another company. For instance, the employment offer letter categorically states that the 2nd respondent reserved the right to transfer the appellant to anywhere else where it had operations and in line with its Conditions of Employment and Service. Most importantly, Clause 5.10 of the 2nd respondent's Terms and Conditions of Employment and Service shown in the record of appeal, states as follows:

his submission on this ground was that, the aspect of constructive dismissal could not be raised or argued on appeal, because it was not raised in the court below. He drew our attention to the appellant's pleadings and submissions in the court below and stressed the point that none of those documents raised the issue of constructive dismissal. In support of this argument, counsel relied on the cases of **Waghorn v George Wimpey and Company Limited**[3], and **Mususu Kalenga Building Limited and Another v Richman's Money Lenders Limited**[4]. He accordingly submitted that ground three is incompetent and as such, it must also be dismissed. He concluded by urging us to dismiss this whole appeal with costs, for lack of merit.

We have pondered on the arguments advanced by the parties on this ground. We would like to start by addressing one particular issue which has been raised by the appellant on this ground. He has argued that the lower court failed to see that the circumstances leading to his dismissal amounted to constructive dismissal. Mr. Kaunda has correctly observed that the issue of constructive dismissal was not pleaded in the court below, and it was not adjudicated upon. In the case of **Mususu Kalenga Building Limited and Winnie Kalenga v Richman's Money Lenders**

Enterprises[4], which has been cited by counsel for the respondent, we stated as follows:

> **"We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court."**

We respectfully agree with the principle in the case. It is still good law. We entirely agree with Mr. Kaunda that the issue of constructive dismissal cannot be raised at this stage because it was never pleaded in the court below. The appellant had an opportunity to raise it in the court court, but he slept on his rights. We cannot therefore entertain it at this stage. It is hereby dismissed.

We now wish to take the liberty to address the issue of whether the appellant's dismissal was wrongful. On this issue, the appellant has contended that it was wrong for the trial court to have found that the 2nd respondent's failure to deal with his grievance over the transfer to another entity, was not reasonable ground to absent himself from duty. We have already found in ground two, that the 2nd respondent had power to transfer the appellant to Dana Oil Corporation. As such, the appellant was bound to comply with his employer's decision to transfer him.

Even though he had a grievance over his transfer, we are of the firm view that, he was under obligation to report for work at his

new station, while waiting for his employer to address that grievance. But the record shows that he protested by not reporting for work at his new station from the 16th November, 2009 to the 19th November, 2009. This conduct amounted to a dismissable offence under Clause 2 (d) of the 2nd respondent's Disciplinary Code. The clause provides that absenteeism for four consecutive days without permission or reasonable cause is a dismissable offence. Accordingly, the 2nd respondent summarily dismissed appellant from employment.

During his oral submissions, the appellant complained that he was not heard before his dismissal. For our part, we cannot declare his dismissal wrongful on grounds that he was not heard or that procedure was not followed, because he committed a dismissable offence. The law on this point is settled. It was aptly held, in the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[1], that:

> **"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, but the employer dismisses him without following the procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow the procedure and he has no claim on that ground either for wrongful dismissal or for a declaration that the dismissal was a nullity."**

In our view, the principle which was set in this case applies to the present case with equal force. The appellant clearly committed a dismissable offence and we agree with the trial court that there was no injustice occasioned to him and also that his dismissal was not wrongful. We agree with the lower court, that the delay in resolving his grievance over the transfer was not reasonable cause to absent himself from duty. Further, we think that there is absolutely no merit in his argument that the computation of the four consecutive days was erroneously done, since he was dismissed right on day four, the 19th of November 2009. It remains a fact that he did not report at his new station from the 16th to the 19th of November, 2009, a period of four days. The mere fact that he paid a casual visit at the 2nd respondent, to meet the Human Resource Officer, cannot help him. We fully support the decision of the lower court to dismiss the appellant's claim for wrongful dismissal. Ground three is frivolous. It is hereby dismissed for lack of merit.

Although ground one has succeeded, the net result is that this whole appeal has no merit. It is therefore dismissed. The parties shall bear their respective costs.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

E. C. Muyovwe
SUPREME COURT JUDGE

A.M. Wood
SUPREME COURT JUDGE