IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 240/2013
SCZ/8/309/2013

(Civil Jurisdiction)

BETWEEN:

RABSON SIKOMBE **APPELLANT**

AND

ACCESS BANK (ZAMBIA) LIMITED **RESPONDENT**

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

On 7th June, 2016 and 13th June, 2016

For the Appellant: No appearance

For the Respondent: Ms. J. Mutemi, Theotis Mataka & Sampa Legal Practitioners

---

JUDGMENT

Malila, JS, delivered the judgment of the court

Cases referred to:

1. *Zambia National Provident Fund v. Chirwa (1986) ZR 70.*
2. *National Breweries Limited v. Phillip Mwenya (2002) ZR 118.*
3. *Zambia Electricity Supply Corporation Limited v. Muyambango (2006) ZR 22.*
4. *Zambia Sugar Plc v. Gumbo, Appeal No. 91 of 1996.*
5. *L'Estrange v. Grancob Limited (1934) 2LLB 394.*

Other work

1. *Section 26A of the Employment Act chapter 268 of the laws of Zambia.*
2. *Section 36(1)(c) of the Employment Act chapter 268 of the laws of Zambia.*
3. *Employment Law, 2nd Edition, London, Sweet and Maxwell, 1995, at page 61.*
4. *Norman Selwyn, Law of Employment, 13th Edition, page 370, paragraph 16.23.*

The appellant was employed by the respondent as Transaction Officer with effect from the 17th of November, 2008. He was suspended from duty on the 15th of May, 2009 following an investigation into the sum of K804 million, unauthorized overdraft on an account held in the respondent's Bank by a company called ZCON, it being alleged that the appellant failed to manage the credit portfolio by not constantly reviewing the overdrawn account, leading to the customer's overdrawn position exceeding the approved limit of K350 million.

It was further alleged that the appellant had provided false information that the client had an approved facility of K1.2 million and, thereby, misleading the Operations and Branch staff to action the transactions. This conduct, according to the respondent, amounted to gross misconduct in terms of Clause 11.3.1 of the Staff Handbook. The appellant was, accordingly, suspended for ten (10) working days without pay. He was informed to resume duties on the 2nd of June, 2009.

On the 1st of June, 2009 the respondent, through its Head Human Capital Development, wrote to the appellant summarily dismissing him from employment with effect from the 2nd of June,

2009 pursuant to Clause 11.4 of the Staff Handbook. The dismissal was said to be based on the alleged charge of violating the bank's processes, procedures and controls.

Following his dismissal, the appellant lodged his appeal against the dismissal on the 5th of June, 2009. The respondent through its Head Human Capital Development, wrote to the appellant on the 4th of August, 2009 advising him to appear before the disciplinary appeals hearing scheduled for the 24th of August, 2009.

The appellant contended that he was dismissed without being afforded an opportunity to answer to any charges that led to his suspension and subsequent summary dismissal through an exculpatory letter, but was merely heard at appeal stage and, therefore, that the respondent had violated the procedure code and the Employment Act, chapter 268 of the laws of Zambia, for inflicting the penalties of both suspension and summary dismissal without specifying any charges against the appellant. The appellant accordingly, took out court process against the respondent claiming the following:

(i) A declaration that the plaintiff's dismissal was null and void.

(ii) Accrued annual basic salaries plus other emoluments as guaranteed pay as per the letter of offer at the rate of K68,370,252.00 for all the years the plaintiff would have remained in employment up to the pensionable age of fifty-five (55) years.

(iii) Compensatory damages for unlawful dismissal.

(iv) Interest thereupon.

(v) Costs of this action.

(vi) Any other relief the court may deem fit.

In the lower court, the respondent denied the appellant's claim, maintaining that the dismissal of the appellant was lawfully done following an infraction by the appellant, of the code and procedures of the respondent company.

The learned High Court judge, following the trial of the matter, was satisfied that the dismissal of the appellant on the evidence available was properly done. She accordingly, dismissed all the appellant's claims in her judgment dated 3rd October, 2013. It is from that judgment that the appellant has now appealed on seven grounds structured as follows:

1. **The learned trial judge erred in law and fact when she held that there was no doubt in her mind that the charge of gross misconduct was made against the appellant without verifying whether the charge existed under Clause 11.3.1 of the Staff Hand Book or not.**

2. **The court below misdirected itself when it held that section 26A of the Employment Act Cap 268 of the Laws of Zambia was not contravened by the respondent without indicating how the respondent complied with the provision of the Act before inflicting the penalty of dismissal on the appellant.**

3. **The learned trial judge erred in law and fact, and fell in grave error when she held that the appellant's termination of employment fell within Subsection (c) of Section 36 Cap 268 of the Employment Act and was effected in accordance with Clause 11.4 of the Staff Hand Book which provided for summary dismissal for certain offences covered under the broad heading "gross misconduct" without highlighting any specific offence the appellant committed to which he exculpated himself in writing before the summary dismissal was effected.**

4. **The learned trial judge erred in law and fact, and was biased towards the respondent when she erroneously found that the appellant having been suspended from work for gross negligence under Clause 11.3.1 of the Staff Hand Book to which he exculpated himself meant that the rules of natural justice were satisfied, notwithstanding the fact that the offence of gross negligence does not exist under Clause 11.3.1 neither was there evidence of the exculpatory letter by the appellant on record.**

5. **The court below misdirected itself and was biased towards the respondent when it held that the summary dismissal was only effected upon thorough investigations including the engagement of the appellant, or gross misconduct which committed the respondent to K804,000.00 unauthorised overdraft on the ZCON Account causing the respondent heavy losses, contrary to the testimony of the respondent that the overdraft was regularized after the suspension of the appellant.**

6. **The learned trial judge erred in law and fact when she found that the appellant by appending his signature to the contract was bound by the terms of the contract including the term which provided for summary dismissal, notwithstanding the provisions of the letter of offer indicating that either party may give the other one month's notice to terminate or one month pay in lieu of notice.**

7. **The learned trial judge misdirected herself and was biased towards the respondent when she made an award of costs to the respondent for overlooking the fact that both parties had incurred costs, and that such order for costs could only be made in interlocutory applications.**

At the hearing of the appeal, the appellant was not present while Ms. Mutemi represented the respondent. Having satisfied ourselves from the Court Clerk that service of the notice of hearing was effected on the appellant personally on 9th May, 2016, we decided to proceed with the appeal in the absence of the appellant. In doing so, we took into account the heads of argument which the appellant had filed into court on the 2nd December, 2013. Ms. Mutemi, for her part, relied on the written heads of argument filed on behalf of the respondent on 30th May, 2016.

In regard to ground one of the appeal, the appellant submitted that in order for the court to establish whether the charge against the appellant was made out or not, clause 11.3.1 ought to be construed carefully. That provision refers to suspension of an employee for "dishonest or any other serious misconduct" whereas by the letter of suspension, the appellant was suspended for "gross negligence" and or "gross misconduct." It was submitted that, as Clause 11.3.1 relates to "dishonesty" or

"serious misconduct" it did not apply to the appellant given the charge he was facing, i.e. "gross misconduct".

It was further contended that even assuming the charge of gross misconduct could hold against the appellant under Clause 11.3.1, which it was contended could not, the learned trial judge ought to have addressed herself to the question whether the appellant had been asked to exculpate himself on the charge in keeping with the rules of natural justice. According to the appellant, the charge of gross misconduct does not exist under Clause 11.3.1.

The learned counsel for the respondent countered the argument made in respect of ground one of the appeal. She maintained that the trial court could not be faulted for holding that the charge of gross misconduct had been made against the appellant. She referred to the letter of suspension of the appellant dated 15th May, 2009 which referred to the suspension being based on "gross negligence" and went on to charge the appellant with gross misconduct in accordance with Clause 11.3.1 of the respondent's Staff Handbook of 2008. It was the learned counsel's submission that the evidence on record supported the finding of

the court below that a charge of gross misconduct had been leveled against the appellant. It was also contended that a charge of gross misconduct laid against the appellant fell within the ambit of Clause 11.3.1 which allows for suspension for dishonesty or any other serious misconduct.

We have carefully considered the arguments of the parties advanced in respect of ground one of the appeal. It seems to us that the contestation of the parties in regard to this ground revolves around the use of terminology – whether the appellant was charged with gross negligence or gross misconduct, and whether this charge could be brought within the ambit of Clause 11.3.1 of the respondent's Staff Handbook.

The appellant's argument was that the charge of gross-misconduct differed from that of gross negligence which appeared in his letter of suspension.

The learned authors of **Employment Law,** 2nd Edition, London, Sweet and Maxwell, 1995, at page 61, state that:

> **"an employer is entitled to dismiss an employee summarily if the employee has committed an act of gross misconduct."**

Furthermore, the author, Norman Selwyn, **Law of Employment**, 13th Edition, page 370, states at paragraph 16.23 that:

> **"the breach of an express term of the contract or a provision in the work rules may justify summary dismissal, provided it has been brought expressly to the attention of the employee that there is certain conduct which the employer will on no account tolerate."**

In our view, it matters not what terminology or semantics are used to describe misconduct. As long as it can be shown that the employee engaged in discreditable conduct warranting dismissal, the employer will be entitled to invoke the power to dismiss the employee. In the present case, therefore, it matters not whether the charge against the employee was misstated or not, provided the charge warranted the exercise by the employer of the power to summarily dismiss the employee, the employer will be entitled to take the action taken. Ground one has no merit.

Under ground two, the appellant contended that the learned trial judge misdirected herself when she held that section 26A of the Employment Act, chapter 268 of the laws of Zambia was not contravened by the respondent without indicating how the

respondent complied with the provision of the Act before inflicting the penalty of dismissal on the appellant.

The appellant quoted section 26A of the Employment Act which states that an employer shall not terminate the services of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the charges laid against him. After referring to section 36 (1)(c) of the Employment Act which allows for the termination of an employment contract in any other manner in which a contract of service may be terminated, the appellant submitted that according to the letter of termination of employment by way of summary dismissal, the dismissal was due to the breach of trust that ensued from the handling of the ZCON facility. The said letter of termination stated that the appellant had violated the bank's processing procedures and controls. The thrust of the appellant's argument, as we understood it, was that the appellant was not charged with that offence before termination of his employment and did not, therefore, have an opportunity to exculpate himself in respect of that allegation. Counsel further submitted that section 25 of the Employment Act suggests that where an employee is summarily dismissed, such dismissal

should take into account the employee's exculpatory statement. According to the appellant, it was a misdirection on the part of the trial judge to have held that the respondent did not violate section 26A of the Employment Act when there was no opportunity afforded to the appellant to exculpate himself prior to his dismissal.

It was the appellant's further argument that there was no disciplinary committee that was set up and no minutes to show that the appellant was heard.

In responding to ground two of the appeal, Ms. Mutemi argued that a perusal of the lower court's judgment shows that the court did indicate how the respondent complied with the provisions of the Act. The learned counsel pointed to the internal memo from Majingo Nyoka to David Chewe dated 11th May, 2009 appearing in the record of appeal, which shows that an investigation in the matter was conducted and the appellant, among other individuals, was interviewed and a written statement recorded from him. We were also referred to the lower court's judgment where at J22 and J23, the learned judge stated that:

"There is no doubt in my mind that this was a charge made against the plaintiff and as such I cannot accept the plaintiff's argument on this point. The meetings that were held with the investigations team afforded the plaintiff an opportunity to be heard."

The judge accordingly held that section 26A of the Employment Act was not contravened.

We have considered the parties arguments relative to this ground. Section 26A does embody a cardinal principle of natural justice, namely that a party should not be condemned unheard. Before an employee is dismissed on conduct related grounds, he should be afforded an opportunity to say something in his own defence. In the present case, whether the appellant was afforded an opportunity to be heard or not, is strictly a factual question. The respondent's position is that the appellant was given an opportunity to be heard while the appellant maintains that he was not.

We have examined the Internal Memo of 11th May, 2009 relating to the investigation into K804 million unauthorized overdraft on ZCON account. It states under the subheading "Work Done" as follows:

- **Constituted a panel of inquiry that interviewed the Head of Credit, Feston Sikani, the Relationship Manager on the account, Rabson Sikombe, the Branch Service Head, Mumba Ngulube, Domestic Operations ....**

- **Obtain written statements from all parties above."**

It is clear to us that if the appellant was interviewed by the panel of inquiry and he gave a written statement to the panel by the date of the memo, i.e. 11th May, 2009, prior to his suspension and dismissal, an opportunity was accorded him to be heard on the anomalies relating to the ZCON account under investigation. Naturally, such statement as was given by the appellant could only be expected to cover the appellant's role in the subject of the inquiry. We do not, therefore, believe that the trial court could be faulted for holding that the provisions of section 26A of the Employment Act were not contravened. In any case, as it was the appellant who was alleging that the provisions of section 26A had been violated, it was incumbent upon him to show in what respects it was violated, and not for the respondent to demonstrate how the provision was complied with.

We wish to note in passing that section 26A as formulated does not prescribe the procedure in which the employee is to be afforded the opportunity to be heard on a charge laid against him.

In these circumstances, the provisions of that section are sufficiently complied with if an employee has had an opportunity in whatever way, to ventilate his views on an issue touching on his conduct or performance prior to the termination of his services. According to the Internal Memo, the appellant was afforded an opportunity before May 11, 2009. He was only dismissed on 1st June, 2009. We have no reason to interfere with the factual finding of the learned trial judge in this regard. Ground two fails accordingly.

Under ground three, it was the appellant's contention that by holding that the appellant's termination of employment fell within subsection (c) of section 36 of the Employment Act and was effected in accordance with Clause 11.4 of the Staff Handbook, the trial judge fell into error as the specific offence committed by the appellant was not highlighted before exculpating himself before the summary dismissal.

The appellant's argument is that the termination of his employment could not be said to have fallen within subsection (c) of section 36 of the Employment Act in view of the fact that, that section applies only to contracts of service expressed in writing

with a fixed term of expiry. In the present case, the appellant was employed on permanent and pensionable terms as is clear from his letter of employment exhibited in the record of appeal.

The appellant submitted that having been summarily dismissed under Clause 11.4 of the Staff Handbook, that dismissal fell under section 25(1) of the Employment Act which requires an employer to deliver to a Labour Officer within four days of dismissing the employee, a written report of the circumstances leading to, and the reasons for such dismissal. It was the appellant's view that it was section 25(1) and not section 36(c) of the Employment Act, which applied to the appellant's situation. We were urged to uphold this ground of appeal.

In reacting to the arguments advanced in regard to ground three, Ms. Mutemi defended the position taken by the trial judge. She argued that a contract of employment, being a voluntary relationship, allowed either party to resile from it. Section 36(c) merely states that such a contract could be terminated in any other manner in which a contract of service may lawfully be terminated, or deemed to be terminated whether under the Employment Act or otherwise.

The respondent's argument was simply that section 36(c) applied and the appellant's employment contract was lawfully terminated in accordance with the tenor of Clause 11.4 of the respondent's Staff Handbook.

Having examined the parties' arguments in respect of ground three, it is unclear to us how ground three advances the appellant's interests in this appeal. Whether it is section 25 or section 36 that applies to the termination, or indeed both provisions, would appear to make no difference to the fact that the appellant's employment was terminated on grounds of performance or misconduct. We do not perceive any argument on the part of the appellant that if section 25 of the Employment Act applied, then the termination of his employment was unlawful. The ground is purely academic and adds no value to the appeal. We dismiss it.

In ground four of the appeal, the appellant assigns misdirection and error on the part of the trial judge when she held that the appellant, having been suspended from work for gross negligence provided for under Clause 11.3.1 of the Staff Handbook to which he exculpated himself, meant that the rules

of natural justice were satisfied. This is because, according to the appellant, the offence of gross negligence does not exist under Clause 11.3.1, neither was there any evidence of the appellant's exculpatory letter on the record.

The learned counsel for the respondent opted to respond to grounds four and five together as she was of the view that the two grounds were related. We shall therefore set out the appellant's arguments under ground five of the appeal before setting out the respondent's global response.

Under ground five, the appellant argued that the trial court misdirected itself and was biased towards the respondent when it held that the summary dismissal was effected after thorough investigations. The appellant maintained that prior to the dismissal, there were no investigations that were undertaken. He pointed to the letter of suspension in the record of appeal as confirmation that he was not suspended to pave way for investigations. According to the appellant, the lower court misdirected itself when it held that thorough investigations were undertaken. He challenged the contents of the Memo of 11th May,

2009 arguing that no panel of inquiry was constituted, nor was any written statement obtained from him.

In response to the two grounds of appeal, the respondent's learned counsel contended that the appellant was accorded an opportunity to be heard before he was dismissed and further that there was a disciplinary appeal hearing on Monday the 24th of August, 2009 and on 9th December, 2009. This means that the appellant was given a second right to be heard, and that there was no mention of the decision makers being biased or interested in the process.

The learned counsel for the respondent referred to numerous authorities in restating obvious positions of the law. More significantly, Ms. Mutemi referred us to the case of **Zambia National Provident Fund v. Chirwa**[1] and quoted a passage from our judgment as follows:

> **"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 procedures, and he has no claim on that ground either for wrongful dismissal, or for a declaration that the dismissal was a nullity."**

We appreciate the opposing positions taken by the parties on grounds four and five of the appeal. It is clear to us that the issues raised in these two grounds of appeal repeat substantially, the issues covered in the grounds of appeal already dealt with. More significantly perhaps is the question of failure by the employer to comply with the rules of procedures set out in its own disciplinary code.

In the view of the appellant, there was a clear failure by the respondent to follow strictly the Staff Handbook when it dealt with the appellant's disciplinary case.

The position of the law on failure to follow procedural rules is well settled. It is that an employer is not humstrung by procedural requirements in disciplining, by way of dismissal, an erring employee. The position is as aptly quoted by the learned counsel for the respondent from the case of **Zambia National Provident Fund v. Chirwa**[1]. Similar sentiments were also carried in the cases of **National Breweries Limited v. Phillip Mwenya**[2] and in **Zambia Electricity Supply Corporation Limited v. Muyambango**[3].

What this translates to is that the arguments advanced by the appellant under grounds four and five cannot possibly

succeed. We must, however, stress that the position that we have taken with regard to an employer's failure to follow procedural imperatives, is predicated on the commission by the employee of a dismissible offence or a transgression which the employee admits, or is otherwise established by unimpeacheable evidence. Where an employee has not committed any identifiable dismissible wrong, or such wrong cannot be established, the employer shall not be allowed to find comfort in the principle we expounded in the **Zambia National Provident Fund v. Chirwa**[1] case.

The position we have taken should not be viewed as panacea for allowing all forms of disregard of procedural imperatives. Those rules which go to the very core of the right to be heard and other due process requirements, will not easily be discountenanced on the basis of what we stated in the **Chirwa**[1] case. Ground four and five fail.

Ground six of the appeal raises a somewhat unusual issue. The appellant assigns error and misdirection to the trial judge in her holding that by appending his signature to the contract the appellant was bound by the terms of the contract including the terms which provide for summary dismissal, notwithstanding the

provision in the letter of offer of employment indicating that either party may give the other one month's notice to terminate, or one month pay in lieu of notice.

The argument the appellant makes under this ground, as we understand, it is that he had never entered into a contract which specified terms including how the respondent would handle any disciplinary matter. He argued that what he signed, and what, therefore, binds him, is the letter of offer of employment dated 17th November, 2008 and not the procedural rules set out in the Staff Handbook. He also invoked the spirit of substantial justice, arguing that the court below did not do substantial justice in relation to himself.

The learned counsel for the respondent opposed the arguments made in support of ground six. It was Ms. Mutemi's submission that the court below was right in holding, as it did, that a party is bound by the terms of the agreement which he freely enters into. The case of **Zambia Sugar Plc v. Gumbo**[4] and that of **L'Estrange v. Grancob Limited**[5] were cited and relied upon.

We quite frankly do not think that this ground of appeal is worth much of the appellant's time, let alone that of this court.

The law is trite that a party is bound by the terms of any agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of contract in this regard. Suffice it to state that we agree with the submissions of the learned counsel for the respondent on this point.

The question that arises is whether the provisions on summary dismissal, which were invoked by the respondent in respect of the appellant were applicable to the appellant.

We have examined the letter of offer of employment of 17th November, 2008. That letter constitutes the primary contractual document in regard to the appellant and the respondent. It sets out numerous contractual terms, including of moment to the present ground of appeal, a provision on determination of employment. It does indeed provide that after confirmation, each party may give to the other, one month's notice to terminate, or payment in lieu of notice. It equally has provision for summary dismissal on grounds of misconduct.

The appellant argues, rather strangely, that the letter of 17th November, 2008 cannot be a contract which specifies terms including how the respondent would handle any disciplinary matter. This stunning submission, however, flies in the teeth of a clear provision in the same letter which states in the penultimate paragraph, that:

> **"Please note that your contract shall also be governed by the terms and conditions in the Staff Handbook amended from time to time and any other policy (i.e.) that may be in force in the Bank."**

Clearly the provisions of the Staff Handbook were incorporated into the appellant's employment contract and applied with full force and effect as if the appellant had signed them specifically. Ground six is bereft of merit and it is dismissed.

Ground seven challenges the award by the lower court of costs against the appellant. We can state right away that this ground is bound to fail. Although costs are awarded in the discretion of the court, it emerges that the award of costs should normally be guided by the principle that costs follow the event, the effect being that a party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this

party shows legitimate occasions by successful suit, then the defendant or respondent will bear the costs.

The vital factor in settling the preference is the judiciously exercised discretion of the court, accommodating the special circumstances of the case while being guided by the ends of justice.

We do not see any reason for faulting the exercise by the trial court of its discretion on the award of costs against the appellant in this matter. We agree with the submissions of the respondent's learned counsel that ground seven has no merit. We dismiss it accordingly.

The sum of our judgment is that the whole appeal is destitute of merit. The judgment of the lower court is credible and properly rationalized, wholly consistent with the terrain of employment law jurisprudence that has been established by this court over the years. The whole appeal is dismissed with costs to be taxed if not agreed.

.....

E. N. C. MUYOVWE
SUPREME COURT JUDGE

.....

M. MALILA, SC
SURPEME COURT JUDGE

.....

C. KAJIMANGA
SUPREME COURT JUDGE