IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

Appeal No. 94/2013
SCZ/8/111/2011

BETWEEN:

MANDA YOTAM — **Appellant**

And

NFC AFRICA MINING PLC — **Respondent**

Coram : Mwanamwambwa, DCJ, Hamaundu and Kaoma, JJS

On the 3rd June, 2014 and 3rd February, 2016

For the Appellant : Messrs Nkana Chambers (Not present)

For the Respondent : Mr A. Imonda, Messrs A. Imonda & Co

JUDGMENT

Hamaundu JS, delivered the Judgment of the Court:

Cases referred to:

1. **General Medical Council V Spackman(1943) A.C. 627**
2. **Matale V Zambia Privatisation Agency [1995/1997] ZR 157**

This is an appeal against a judgment of the High Court which dismissed the appellant's action for wrongful dismissal.

The facts of this case as can be discerned from the documents and testimony on record are largely undisputed and are these. The

appellant was engaged by the respondent on the 22nd September, 2009 as Acting Shift Boss-RBS, on an oral contract of service. On the 24th March, 2010, the appellant was charged for late reporting or poor time-keeping. He was given a recorded warning for twelve months, with effect from the 29th March, 2010. On the 30th March, 2010, the appellant was charged, on a charge sheet written in a Chinese language, for poor performance. He was given a severe warning for 12 months and was also suspended for seven days, both penalties effective the 1st April, 2010. On the 2nd September, 2010 the appellant was charged for giving false information and failing to report a breakdown. He was given a final warning for twelve months, with effect from the 9th September, 2010. Before that case had been concluded, the appellant was on the 7th September, 2010, charged for poor performance. It was alleged that he had failed to arrange his men to hang up the vent tube at the 770 East foot wall drive and had failed to blast any end. He was again placed on final warning for twelve months, with effect from the 24th September, 2010. On the 4th October, 2010, the appellant was charged for failing to follow the Mine Captains instructions. It was alleged that, as a consequence thereof, production was delayed.

This time a disciplinary hearing was held. At the end of the hearing, the appellant was dismissed from employment for poor work performance.

The appellant commenced this action, stating that while his dismissal was based on his allegedly being on final warning, no communication had ever been made to him that he was on final warning or any warning at all.

In defence, the respondent contended that the appellant was dismissed because of poor work performance and his poor disciplinary record. The respondent set out the charges which we have cited above.

At the hearing, the appellant acknowledged having been charged at least on three occasions; the first one being the charge of the 30th March, 2010, the second one being the charge of the 7th September, 2010, and the third one being that of the 4th October, 2010 which led to his dismissal. The appellant said that he had never been notified of any final warning at all. He acknowledged that he had attended a disciplinary hearing for the charge of the 4th October, 2010.

The respondent said that the appellant was dismissed because he had other previous cases of poor performance. According to the respondent, the appellant had been verbally informed of the written warnings. The respondent produced the appellant's disciplinary record sheet on which the warnings were recorded.

The trial court found as a fact that the appellant was charged and given an opportunity to exculpate himself. The court found as a fact and took important note that the appellant had committed several disciplinary offences in 2010 alone for which he was severely warned, suspended for seven days and eventually placed on final warning. For that reason, the court was satisfied that the respondent had had the necessary disciplinary power and had exercised it validly in dismissing the appellant. Consequently, the appellant's action was dismissed.

The appellant has appealed on two grounds, namely;

(i) that the trial court erred both in law and fact when it failed to appreciate that the appellant's dismissal was based entirely on the respondent's allegation that the appellant had been placed on final warning, and;

(ii) that the trial court erred in law and fact when it held that the respondent validly exercised its disciplinary powers against the appellant.

The parties filed written heads of argument which their respective counsel relied on entirely at the hearing.

In his heads of argument, the appellant argued the two grounds of appeal as one.

It was submitted on behalf of the appellant that according to the Disciplinary Code the offence of poor work performance did not attract the penalty of dismissal but that an employee who committed an offence while on final warning could be dismissed. It was argued that the appellant could not have been dismissed for the offence of poor workmanship for which he was charged because on its own, it attracted only the penalty of a reprimand. The appellant contended therefore that the only reason that he was dismissed was because he was alleged to have committed the offence when he was allegedly on final warning. According to the appellant, the offence for which he was allegedly on final warning was that of the 2nd September, 2010, namely for giving false information and failing to report a breakdown. The appellant went

on to attack the way the respondent had handled that particular charge. According to the appellant, no disciplinary hearing was held in respect of that charge and no verdict was passed to place him on final warning. The appellant argued that according to clause 4.5.2 of the Disciplinary Code, it was a requirement that he be advised in writing that he had been placed on final warning for twelve months and that the commission by him of any offence within that period would lead to his dismissal. The appellant argued that the respondent never issued to him such correspondence. The appellant went on to argue that, in any event, the alleged final warning was null and void on the ground that it had been arrived at contrary to the rules of natural justice; there had been no disciplinary hearing in respect of the charge of the 2nd September, 2010. In support of that proposition, the appellant cited the case of **General Medical Council V Spackman**[1] where it was emphasized that a violation of the principles of natural Justice renders a decision void even if the same decision would have been arrived at had the principles been adhered to. The appellant also referred us to the case of **Matale V Zambia Privatisation Agency**[2] where we

emphasized the need for the principles of natural justice to be followed.

Those were the arguments by the appellant.

In its heads of argument in response, the respondent argued that the evidence on record showed that the respondent was dismissed because he was found guilty of the offence charged at that particular time and he had many previous cases of poor work performance and not because he was on final warning. The respondent went on to argue that the parties had a disciplinary code; that unsatisfactory work performance was an offence under the disciplinary code and so was the offence of failing to obey an instruction. It was further argued that the appellant attended a disciplinary hearing, after which she was dismissed. All that went to show that the respondent had validly exercised the disciplinary powers.

Those were the submissions by the respondent.

We have considered the arguments on both sides. The appellant's argument is that he was dismissed for being on a final warning for the offence of the 2nd September, 2010. We, however agree with the respondent's contention that there was no evidence

to support that position. The evidence by the respondent in the court below was that the appellant was dismissed because of his poor disciplinary record. Indeed, as the trial court found, the appellant had a string of disciplinary offences. For example in September, 2010 alone he had two disciplinary offences within a space of five days; one committed on the 2nd and the other on the 7th. For both those offences, the appellant was placed on final warning. Clearly the trial court cannot be faulted for finding that the respondent had validly exercised its power to dismiss the appellant. We agree with the trial court on that conclusion.

Therefore we find no merit in this appeal. We dismiss it accordingly.

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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