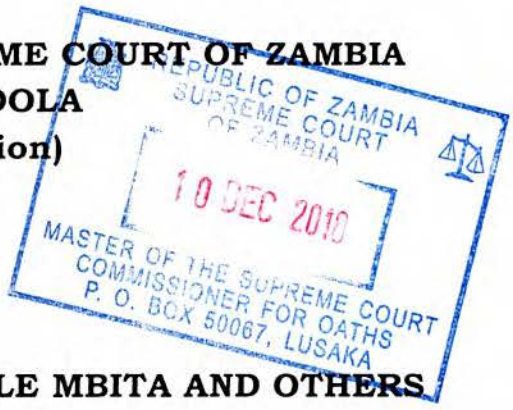
IN THE SUPREME COURT OF ZAMBIA **Appeal No.149/2014**
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

JONES SILUYELE MBITA AND OTHERS **APPELLANT**

AND

KONKOLA COPPER MINES **RESPONDENT**

CORAM: **Hamaundu, Kaoma and Kajimanga, JJS**

On 4th December 2018 and .... December 2018

For the Appellants: Mr. B. Luo of Messrs Palan & George Advocates

For the Respondent: Not in Attendance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (1986) Z.R. 70**
2. **Nkhata and 4 Others v Attorney General (1966) Z.R. 124**
3. **Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1**
4. **Mobil Oil Zambia v Ramesh M Patel (1988-1989) Z.R. 12**
5. **Indo-Zambia Bank Limited v Lusaka Chemist Limited (2003) Z.R. 32**
6. **Robson Banda (Suing as Administrator of the estate of the late Rosemary Phiri) v Varisto Mulenga (Sued as Administrator of the estate of the late Steven Kabamba) (2003) Z.R. 121**
7. **Attorney General v Richard Jackson Phiri (1988-89) Z.R. 121**
8. **Ridge v Baldwin (1963) 2 All ER 66**

9. **Kunda v Konkola Copper Mines Plc - Appeal No. 48 of 2005**
10. **Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
11. **Malloch v. Aberdeen Corporation (1971) 2 All ER 1278**
12. **Shilling Bob Zinka v Attorney General (1990-1992) Z.R. 73**
13. **Customised Clearing and Forwarding Limited v Zambia Revenue Authority (2014) Z.R. 201**

Legislation and referred to:

1. **Employment Act, Chapter 268 of the Laws of Zambia; section 26A**
2. **Constitution, Chapter 1 of the Laws of Zambia; article 18(2)(c)**

Introduction

1. This appeal emanates from a judgment of the Industrial Relations Court delivered on 22nd May 2015, which held that the appellants' dismissal from employment was proper.

2. The appeal calls upon the court to discuss whether there was impropriety in the appellants' dismissal on the basis that they were neither charged by their immediate supervisors nor given reasons why their appeals were dismissed.

Background

3. The brief facts of the case are that the appellants were employees of the respondent who were engaged on various dates and serving in various categories of employment. Between 10th and 12th November 2009, against a background of collective bargaining

between the respondent's management and the unions representing the employees, there was industrial unrest and an illegal strike at the respondent's premises. The appellants were subsequently served with disciplinary letters charging them with inciting and intimidating their fellow employees to participate in the said illegal strike. Upon receiving these letters, they each attended disciplinary hearings following which they were summarily dismissed and thereafter accorded an opportunity to appeal but the same was unsuccessful. The appellants then filed a complaint against the respondent in the Industrial Relations Court challenging their dismissal.

Pleadings before the Industrial Relations Court

4. In their notice of complaint the appellants sought:

    a) A declaratory judgment that they were unfairly and wrongfully dismissed from employment;
    b) Damages for unfair and wrongful dismissal;
    c) Interest;
    d) Costs;
    e) Any other relief the court may deem just.

5. The appellants contended that the respondent had refused to furnish the appellants with reasons for their dismissal on appeal as required under clause 7.5.5 of the disciplinary code and

grievance procedure; that their disciplinary letters were received directly from the human resource department without any charge forms from their respective departments; that some of the appellants' supervisors submitted written statements to the human resource department stating that their subordinates were actually on duty during the period of the strike contrary to the charges of misconduct preferred against them by the human resource department; that some appellants were on night shift during the strike but they were dismissed from employment; that others who were on day shift and played no part in the strike were still dismissed despite their pay slips showing their presence on duty on these days; and further, that one appellant who did not report for duty on one of the alleged days of the strike due to non-availability of company transport was also dismissed.

6. The respondent denied the claim and contended that the charges against the appellants were proved at their respective disciplinary hearings and thus they were summarily dismissed; and that subsequent to their dismissal, they were accorded two appeals in accordance with the respondent's disciplinary procedure both of which were rejected.

Evidence of the parties in the Industrial Relations Court

7. The appellants' first witness (CW1) was Jones Siluyele Mbita. His evidence was that between 10th and 12th November 2009, there was a strike at the respondent's premises in Chingola. On 11th November 2009 at around 11:00hrs, union shop stewards ordered all miners to gather at shaft premises. The message was that management was going to brief the employees regarding salary increment. Management, however, did not show up. CW1 was among those who gathered but when management did not show up, he was called back by his supervisor to continue working. Days later, he was shown a video footage by the respondent's security personnel. The video footage showed CW1 at the scene of the strike.

8. Lackson Kanchebele (CW2) testified that on 10th November 2009, there was a strike at the mine and he did not report for duty that day as there was no transport to pick him up for work. According to the respondent's rules, when there is no transport to pick employees for work and subsequently the affected employees do not report for work, such employees are marked present as if they have reported for work and actually worked.

9. On 11th November 2009, CW2 reported for work because there was transport on that day and the strike was still on. He and other employees gathered to be addressed by management except for essential employees who reported for work. However, no one from management addressed the employees and around 09:00hrs, he left and went to his home. When he reported at the mine the following day, he found that the situation had worsened. He remained on the respondents' premises only up to 09:00hrs and left for his home and he did not work. On 17th November 2009, he was dismissed for inciting and intimidating fellow employees to strike which he denied. He, however, admitted that there was video footage capturing him in a group of striking employees.

10. Fred Chabala (CW3), testified that on a date he could not remember, he assembled with fellow employees at the concentrator on the respondents' premises, waiting to be addressed by union officials and the respondents' management but management never addressed them. Further, that he was dismissed on 7th December on a charge of inciting and intimidating fellow employees to strike. He admitted, however, that in his

further appeal, he pleaded for leniency and also admitted that he was captured on video footage in a group of striking employees.

11. The respondent called three witnesses. RW1 was Joyce Kapijimpanga, the respondent's human resource manager. Her evidence was that a group of employees were charged with the offence of inciting and intimidating others to participate in an illegal strike. This happened on 6th November 2009 and briefly ended but recommenced on 10th November 2009 and ended on 12th November 2009. On 10th November 2009, the employees gathered at the concentrator on the respondent's premises and were addressed by their union officials who requested them to return to work but the employees refused to do so. The employees, who were in a mob, then marched from the concentrator and proceeded to the underground department where they urged fellow employees in that department to join the strike.

12. When they were directed by their union officials to resume work the employees defied this directive and in the process, they threw stones at their own union officials, the respondent's management and security personnel.

13. Peter Mulenga (RW2), assistant group security manager for the respondent, testified that on 6th November 2009, he received information that employees at the respondents' concentrator had stopped working and gathered awaiting to be addressed by their union leaders on the status of the negotiations between their union and the respondents. RW2 got a camera and went to the scene where he got a video film of what was happening. This process continued on 10th November 2009 and also on 11th November 2009. Stones were thrown at fellow employees who did not join the strike. When they found a truck loaded with lime they ordered the driver to tip off on the ground and this was done.

14. Mary Mungawa (RW3) a mechanical technician also testified on behalf of the respondent. It was her testimony that when she reported for work on 6th November 2009 all was well until around 10:00hrs when word went round that all employees were to gather at the workshops which are at the concentrator and she was one of the employees who gathered there. A human resource officer later asked the employees to disperse and go back for work stating that the gathering was illegal. Union officials also arrived and equally asked the employees to go back to work which they did.

15. On 10th November 2009, RW3 reported for work. While she worked, other employees gathered in the workshop waiting to be addressed by union officials. When she reported for work on 11th November 2009, she found Zambia Police Officers who advised her to go back home because some employees were on strike. When she reported for work on 12th November 2009, she was unwell and got permission from her supervisor to go to the clinic where she was given 3 days off duty.

16. She later reported for work on 19th November 2009 and was charged with inciting and intimidating other employees to strike. She then appeared before a disciplinary committee which found her liable and she was dismissed from employment. Following her appeal, she was acquitted and reinstated.

Consideration of the matter by the trial court and decision

17. After considering the evidence and submissions of the parties, the trial court found that there were salary negotiations going on between the respondent's management and the union at the material time and that the employees went on strike demanding to know the status of those negotiations. That this strike was illegal

and all the appellants participated in the strike. The trial court also found that participating in an illegal strike even where there is no evidence of inciting or intimidating others to strike is a dismissible offence at the respondent company. Further, that the striking employees who included the appellants went to the underground department of the mine and ordered their fellow employees to join the strike using intimidation in that stones were thrown at the employees who did not join the strike.

18. The trial court accordingly found that the respondent was on firm ground when it dismissed the appellants from employment. The complaint was consequently dismissed but it was ordered that the appellants be paid their accrued leave days and days worked for before dismissal and not yet paid to them.

The grounds of appeal to this Court

19. Displeased with that decision, the appellants have now appealed to this Court advancing two grounds as follows:

    1. **The learned trial judge erred in law and in fact when he held that he was satisfied that the disciplinary procedure was adequate and in dismissing the appellants it was followed;**
    2. **The learned trial judge erred in law and fact when he held that he was satisfied that the rules of natural justice were followed**

by the respondent in the manner the case was handled by them before it came to court.

The arguments presented by the appellants

20. The appellants filed written heads of argument which their learned counsel briefly augmented at the hearing, at which the second ground of appeal was abandoned. The respondent neither filed heads of argument nor attended the hearing although the notice of hearing was duly served on its legal counsel on 12th October, 2018.

21. In support of the sole ground of appeal, the learned counsel for the appellants submitted that the charges against the appellants should have been initiated by the specific immediate supervisor of each particular appellant as required by the disciplinary code. He then referred us to clause 2.5.3 of the code which provides that:

"A formal charge should not be delegated to another supervisor except in criminal cases."

22. He argued that the disciplinary code also required the person administering the appeal to state the reasons for dismissing the appeal and that this was provided for in clause 7.5.5 which states

as follows:

> **"[Whenever an appeal is dismissed] the administering official shall state in writing reasons for dismissing the appeal."**

23. According to counsel, the disciplinary procedure adopted by the respondent clearly flouted the provisions of the disciplinary code because evidence given by CW1 reveals that instead of being charged by his supervisors, namely Moses Chimamba and Steward Chiboni, he was charged by the human resource person.

24. He submitted that it was also CW1's position that he was not given an opportunity to give his explanation when he appeared before the disciplinary committee and further, that he should have been furnished with reasons for rejecting his appeal as per clause 7.5.5. of the disciplinary code but this did not happen.

25. Similarly, the charge relating to CW2 was initiated by a person other than his immediate supervisor and he was not formally charged. It was his contention that the testimonies of CW1 and CW2 on this issue were not rebutted by the respondent and, therefore, the procedure outlined in the disciplinary code was flouted and the trial court wrongly held that the respondent followed the said procedure.

26. Counsel submitted that dismissals should be handled in accordance with a laid down disciplinary procedure and disciplinary action is to be considered as a procedure for the purpose of correcting inappropriate work behaviour. Further, that disciplinary action should be administered reasonably throughout an organization and the power to administer such action should be exercised properly by employers.

27. Counsel contended that he was alive to the decision 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, and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract, and the employee has no claim for a declaration that the dismissal is a nullity. He submitted however, that the respondent provided no proof establishing that each and every one of the appellants committed the offence that they stood charged with both during the disciplinary process as well as during the trial in the court below.

28. Specifically, counsel contended, the respondent did not adduce any evidence to show that the appellants were inciting and intimidating other employees to strike and, therefore, it was a misdirection for the court below to make findings of fact to that effect without any proof of the same. The cases of **Nkhata and 4 Others v Attorney General,[2] Attorney General v Marcus Kampumba Achiume,[3] Mobil Oil Zambia Limited v Ramesh M Patel,[4] Indo Zambia Bank Limited v Lusaka Chemist Limited,[5] Robson Banda (Suing as Administrator of the estate of the late Rosemary Phiri) v Varisto Mulenga (Sued as Administrator of the estate of the late Steven Kabamba)[6]** and **Attorney General v Richard Jackson Phiri[7]** were cited in support of this argument.

29. On the strength of these authorities, counsel submitted that the trial court failed to consider whether there were facts establishing the charge which the respondent preferred against the appellants during the disciplinary process. He contended, therefore, that in the circumstances of this case, the respondent's exercise of the disciplinary powers was bad because there were no facts to support the same and the trial court should have found so had it

acted correctly. That as such, this is a proper case where this court must interfere with the findings of fact by the court below.

Consideration of the matter by this court and decision

30. We have considered the record of appeal, the judgment appealed against and the appellants' arguments.

31. Ground one, which is now the only ground of appeal, attacks the trial court's finding that the disciplinary procedure was followed in dismissing the appellants from employment. The thrust of the arguments in support of this ground is that the disciplinary procedure adopted by the respondent breached clauses 2.5.3 and 7.5.5 of the disciplinary code as the charges against the appellants were not initiated by their respective supervisors and the respondent did not furnish them with reasons for rejecting their appeals against dismissal. Further, that the respondent did not adduce any evidence to show that the appellants were inciting and intimidating other employees to strike.

32. We must state from the outset that it is trite law that he who alleges must prove his allegation. As we held in the case of **Kunda**

v Konkola Copper Mines Plc:[9]

> **"This principle is so elementary, the Court has had on a number of occasions have to remind litigants that it is their duty to prove their allegation."**

33. In the case of **Masauso Zulu v Avondale Housing Project Limited,**[10] we held further that:

> **"Where a complainant alleges that he has been wrongfully or unfairly dismissed as indeed in any other cases where he makes an allegation it is generally for him to prove the allegations. A complainant who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

34. From the tone of the appellants' submissions, it appears to us that the appellants are shifting the burden on the respondent to prove that the appellants were guilty of the charges laid against them which the respondent failed to do in the court below. Needless to emphasize, and on the authorities cited above, the burden was not on the respondent to prove that the appellants were inciting and intimidating other employees to strike. The appellants have alleged that they were unfairly and wrongfully dismissed from employment. It was, therefore, their responsibility to prove that allegation in order to be entitled to the relief they sought in the

court below. The respondent had no obligation to prove the allegation for the appellants.

35. In any event, the evidence on record indicates that the appellants attended a gathering at the respondent's premises at which employees marched in a mob that set out to incite and intimidate fellow employees into taking part in an illegal strike and that the same was captured on video footage recorded by RW2 which the court below watched. The three witnesses for the appellants all confirmed in their testimony that they were at the scene of the strike and that they were captured on the video footage as being part of the group of striking employees. Although not all the appellants appeared in the video footage that was produced in the court below, our view is that the appellants have failed to challenge the fact that they were part of the mob that was going around the respondent's premises mobilizing other employees to participate in the industrial unrest. It is not enough that the appellants allege that some of them were on duty or worked in the night shift during the period of the strike and that some supervisors even gave written statements to the human resource department to that

effect. The appellants should have called these supervisors as witnesses to support their allegations.

36. The appellants were charged and subsequently dismissed for the offence of inciting and intimidating other employees to strike. We opine that the appellants have not proved that they did not commit the offence for which they were charged. At the heart of the appellants' ground of appeal is the assertion that they were neither charged by their immediate supervisors nor given reasons why their appeals were dismissed. In our view, the appellants' assertions are inconsequential. On the basis of the principle we enunciated in **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa**[1] cited by the appellants' counsel, it is immaterial that the appellants were not charged by their immediate supervisors or furnished with reasons why their appeals were rejected as there was evidence to sustain the charges levelled against them and for which they were dismissed. Stated differently, the respondent had facts to support the disciplinary measures taken against the appellants. Consequently, we do not see any injustice in the insignificant disciplinary procedure lapses

attributed to the respondent as the end result would not have been any different. We find, therefore, that this ground lacks merit.

Conclusion

37. For these reasons, we conclude that the appellants' sole ground of appeal has failed and consequently, we uphold the decision of the lower court. The net result is that this appeal must be dismissed. We, however, order that the parties shall bear their own costs of the appeal.

E. M. HAMAUNDU
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE