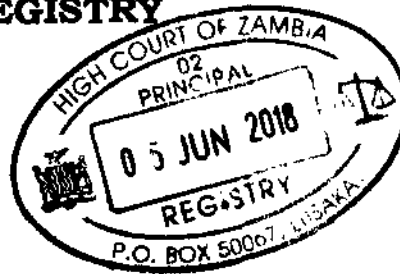


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2013/HP/929



BETWEEN:

DOMINIC CHANDA

1ST PLAINTIFF

JUSTIN MADABBWA

2ND PLAINTIFF

MUNALI AKAMANDISA

3RD PLAINTIFF

AND

KONKOLA COPPER MINES PLC

DEFENDANT

**BEFORE THE HON. MRS JUSTICE S. M WANJELANI IN
CHAMBERS ON THE 5TH DAY OF JUNE, 2018**

*For the Plaintiffs: G. Lungu, Messrs Muleza Mwiimbu and
Company*

*For the Defendant: G. Kumwenda, with H. Zulu, Messrs ECB Legal
Practitioners*

JUDGMENT

Case referred to:

1. *Zeded Mwiche V Lumwana Mining Company Limited – Appeal No. 107 of 2014 (unreported)*
2. *Bank of Zambia V Kasonde (1995-1997) ZR 28*
3. *Wood V Bradford Corporation (1971) 70 LG 27*
4. *Stockdale V Woodpecker Inn Limited and Spooner (1967) ZR 128 (HC)*
5. *Chimanga Changa Limited V Stephen Chipango Ngumbe (2010) ZR Vol 1, 208*
6. *Agholor V Cheesebrough Ponds (Z) Ltd (1976), ZR 1(HC.)*

7. *Zambia Electricity Supply Corporation Limited V David Lubasi Muyambango* (2008) ZR 22
8. *Attorney General V Richard Jackson Phiri* (1988-1989) ZR 121 (SC)
9. *Holmes Limited v Buildwell Construction Company Limited* (1973)ZR 97
10. *Pamodzi Hotel V Godwin Mbewe* (1987) ZR 56
11. *Kariba North Bank V Zambia State Insurance Corporation Limited* (1980) ZR 94
12. *Anderson Mazoka and Others V Levy Mwanawasa and Others* (2005) ZR 138.

Materials referred to:

1. *Black's Law Dictionary, 10th Edition, edited by Bryan A. Garner.*
2. *Disciplinary Code and Grievance Procedure – Konkola Copper Mines Plc.*
3. *Disciplinary Code and procedures for Handling Offences in the Public Service Handbook issued by Service Commission, June, 2003*
4. *Jill Poole – Textbook on Contract Law, 8th Edition.*
5. *John Sprack – Employment Law and Practice, 1st Edition (2007), Sweet and Maxwell.*

The Plaintiffs commenced this action by way of Writ of Summons and Statement of Claim seeking the following reliefs:

- i. *Terminal benefits for wrongful dismissal in the following sums:*
 - a) *Dominic Chanda - KR 608,295.50*
 - b) *Justin Madabbwa - KR 2,277,127.63*
 - c) *Munali Akamandisa – KR 2,273,123.05*

- ii. *Damaged for trauma, mental distress, anguish and embarrassment;*
- iii. *Any other relief the Court may deem fit;*
- iv. *Interest on all the monies found due; and*
- v. *Costs*

The Defendant filed a Defence denying the claims, stating that the Plaintiffs were dismissed after complying with the Defendant's Disciplinary Code and Grievance Procedure for Employees. All the three Plaintiffs gave evidence and did not call any witnesses while the Defendant called two witnesses.

PW1 was Dominic Chanda, who informed the Court that he started working for the Zambia Consolidated Copper Mines (ZCCM), for the forerunner to the Defendant, as an Electrical Engineer on 1st April, 1985 in Chiliabombwe. He added that after working for twelve (12) years, he was transferred to Nampundwe Mine, where he was appointed Sectional Engineer in charge of all engineering equipment and he was wrongfully dismissed on 19th April, 2013, after being charged with the offence of fraud for falsifying and uttering documents which had anomalies.

PW1 testified that the Defendant contracted Tonlex Company (hereinafter referred to as "*Tonlex*") to provide labour to the Defendant. He added that he was accused of having uttered an invoice to the Defendant, asking for payment for Tonlex employees, which invoice had anomalies and it was prepared by Tonlex. PW1 insisted that he was wrongly dismissed due to the fact that the

process of payment for Tonlex employees involved three (3) Departments which were Engineering, to which he belonged, Concentrator and Human Resources. PW1 informed the Court that the process of payment started with Tonlex preparing the Invoice, then the Stores Department of the Defendant under Contracts, who received the same and then sent them to the Accounts Department. He added that Accounts Department would stamp the Invoice, after which it would be taken to respective Heads of Departments such as Concentrator, Engineering then Human Resources.

PW1 added that being under Engineering, he signed where it was written "*approved by*" but that the "*authorized by*" part was signed by the Mine Manager for the month of October, 2012. For the month of September, 2012, PW1 told the Court that he signed where it indicated "*checked by*" and that authorization was done by the Mine Manager. On the overtime, PW1 said that he was never involved as the Contract in issue, was between the Contract Manager, the Mine Manager and the Accountant, adding that the employees who worked overtime were never under his supervision.

Under cross-examination, PW1 told the Court that he had a written Contract of Employment which he signed in 1985, and that he had never seen the Contract between Tonlex and the Defendant. He stated that his role in the Contract between Tonlex and the Defendant was to check on the Invoices for the number of days an employee worked in his Department as well as the calculations done by Accounts on the Time Card, which was attached to the documents/invoices from the Accounts Department. He added that

he personally verified the Time Cards, while conceding that he did not personally verify as reflected on Page 21 of the Defendant's Bundle of Documents. PW1 testified that he was charged for fraud, falsifying and uttering the document which was an Invoice, and that he had gone through the Appeals process as provided by the Defendant's Disciplinary procedures. He maintained that his dismissal was wrongful and he was entitled to his terminal benefits.

In re-examination, PW1 said that the Defendant had the Time Cards which were not produced before Court.

PW2 was **Justin Madabbwa**, who told the Court that he was employed by the Defendant as a Metallurgist in 1990. He added that he was dismissed by the Defendant in 2012 on allegation of fraud and authorizing payment of the 7th cheque while giving day offs to Tonlex Contract employees, allegedly resulting in the Defendant losing K8,963 to Tonlex. PW2, informed the Court that as a Plant Metallurgist, he had no power to authorize payment of overtime and that not even the Head of Department was allowed to authorize payment of overtime. PW2 explained that at the Concentrator, he dealt with two types of employees, comprising those from the Defendant and some from Tonlex and the two groups had different conditions of service.

In his continued testimony, PW2 told the Court that although the officials from the Defendant were satisfied with his explanation during the disciplinary hearing, some of the Defendant officials still insisted on wanting to know on the alleged loss of K244 Million

Kwacha which PW2 did not know about. PW2 averred that his failure to explain where the K244 Million Kwacha went led to his dismissal from the Defendant Company. PW2 disclosed that during the appeal hearing the official administering the said appeal, a Maimba Mundia, told him that there was no case against him but that the General Manager, Field Kondowe, had directed the official to dismiss PW2. He added that it was the said official who even advised PW2 to appeal to the General Manger, and that during the time of the hearings, the Defendant officials had known that there was no loss to the Defendant.

PW2 further informed the Court that during his appeal to the General Manger, the Committee comprised the General Manager, the Human Resource officer and another official but that immediately the Human Resource Officer was sent out of the meeting, the General Manager told PW2 that he should be dismissed for not having asked for invoices which had led to the loss of the alleged K244 Million.

PW2 further explained that although there was an issue of fraud, the Defendant never reported the matter to the State Police for investigations. PW2 concluded by stating that Tonlex realized its mistake and quickly paid back the money to the Defendant.

Under cross-examination, **PW2** told the Court that Tonlex Company was contracted by the Defendant to provide labor on hire basis. **PW2** explained that only the Mine Manager had power to authorize payment of overtime. **PW2** further told the Court that he was

charged and exculpated himself, but that during hearing of his matter, another allegation of fraud was raised that he had misappropriated the Defendant's money.

PW3 was **Munali Akamandisa**, who told the Court that he was employed by the Defendant in Nampundwe as a Plant Fitter and later elevated to the position of Maintenance Planner. He stated that at the time of his dismissal, he was Acting Section Engineer, Underground Mechanical. PW3 further told the Court that he was dismissed on 7th March, 2013 on allegation of fraud, in which it was alleged that the Defendant had paid three Tonlex employees namely, **Linda Kumwenda**, **Lucy Muwowo** and **Mathias Kambuya**, who did not deserve any payment but that they had been included on the Invoice for October, 2012 under No. T399.

During cross-examination, **PW3** stated that his employment was governed by a Contract from the Defendant and that it was right for him to sign the Invoice. He added that he was the initial person who should have signed the Invoice which needed to have had supporting documents but that on this day he signed the Invoice without supporting documents. He added that it was Tonlex employees who collected the money on behalf of the three (3) employees as stated in the Defendants' Security's Report at page 18 of the Plaintiffs' Supplementary Bundle of Documents, particularly Paragraph 4 and 5 from the top.

DW1 was **Bernard Mwanza**, who told the Court that he did not know the Plaintiffs prior to the Court's proceedings. Upon perusing

page 4 of the Plaintiffs' Bundle of Documents, DW1 informed the Court that the Plaintiffs were entrusted with the Contract of Laborers, payment processing and monitoring the Contract performance. DW1 added the Defendant outsourced 3 skills at the Concentrator, Sanitation and Engineering. He explained that Concentrator Labour was under the 2nd Plaintiff and that the 1st Plaintiff was in charge of Engineering while Sanitation was under Human Resource. DW1 elaborated the process of Contract payments of the Defendant as alluded to by PW1. He added that on page 1 of the Defendants' Supplementary Bundle of Documents, and according to the Stamp, the 3rd Plaintiff did the checking, the 1st Plaintiff approved while the Mine Manager authorized. DW1 averred that the Stamp was the final authority for payment to be effected to the Contractor, Tonlex.

DW1 further told the Court that the 1st Plaintiff was charged with the offence of authorizing payments which had wrong rates and false information, and that the 2nd Plaintiff was charged with the offence of authorizing payment of 7th day overtime and giving days offs within the same week, while the 3rd Plaintiff was charged with a similar offence to the 1st Plaintiff and for signing documents which had false information. DW1 continued by informing Court that during the Defendant's investigations, the Defendant found that the Plaintiffs' exculpatory statements indicated that the 1st Plaintiff had signed the Invoice with anomalies on the basic rate and that some employees such **Lucy Muwowo** and **Mathis Kambunya** had either left employment or were on leave but were nonetheless paid.

DW1 indicated that the Plaintiffs were also charged with the offence of fraud and that the procedure was followed in accordance with the Defendant's Disciplinary Code.

Under cross-examination, DW1 admitted that he was not in the first disciplinary tribunal hearing but that his colleague, a Mr. **Masongo Philemon**, was. DW1 further admitted that Tonlex was contracted by the Defendant and that Tonlex initiated the payment for all its employees who were working for the Defendant. DW1 further admitted that "*authorization*" was the biggest authority above checking and approving and that fraud was a crime in Zambia.

DW1 conceded that on the Stamp shown to the Court, the 1st Plaintiff did not authorize, but only signed for "*checking*" while **Andrew Mukupa** approved and that the authorization was done by the Mine Manager. It was DW1's further testimony that he was not aware whether the Mine Manager who authorized payment was disciplined or not. DW1 disclosed that his Office was sidelined during the payment process.

DW1 further told the Court that he was not aware whether the Defendant reported the matter of fraud to the State Police but that with the Security's report, the Defendant knew that fraud was a crime. When referred to page 53 of the Defendants' Supplementary Bundle of Documents, DW1 averred that the document was fraudulently prepared by Tonlex in favour of Linda Kumwenda and the "*Checker*" signed for wrong information. He added that there was no document showing that the Plaintiffs were working with the

Tonlex employees, and further that he sat throughout the disciplinary hearings.

During re-examination, DW1 stated that the Defendant charged the Plaintiffs for approving Invoices that had anomalies.

DW2 was **Godfrey Lungu**, a Security Superintendent in the Defendant's employ, who told the Court that his duties were to collect information pertaining to illegal activities, to either approve or disapprove the allegations leveled against the Defendants/Contract employees. DW2 informed the Court that on 19th November, 2012, he received information through the whistleblower that Tonlex which had been awarded a Contract by the Defendant at Nampundwe Mine, was awarding its employees 7th day and overtime within the same week and that he consequently instituted investigations.

DW2 stated that after a thorough investigation, he established that the rates in the Contract and the rates in the Pay Sheets were not tallying as the rates in Pay Sheets were inflated as indicated from pages 59 to 63 of the Defendants Supplementary Bundle of Documents.

DW2 added that the 1st Plaintiff was supposed to ensure that he supervised the employees on Site and described him as the checker of the 'checkers' and referred to the invoices for the September, 2012 and October, 2012 from Tonlex.

According to DW2, the Stamp appearing at pages 1 and 8 the Defendants Supplementary Bundle of Documents, the Invoices were "*checked by*" the 3rd Plaintiff, "*approved by*" the 1st Plaintiff and "*authorized by*" the Mine Manager. DW2 contended that all the officials who appended their signatures on the Invoices gave power to the Accounts Departments to effect payments on the inflated rates and that as a result, the Defendant was deprived of its income. DW2 further informed the Court that the 2nd Plaintiff misapplied the Company policy by signing overtime forms.

In his continued testimony, DW2 told the Court that the Defendant was not obligated to report the matter to the State Police and that the Defendant decided not to report the alleged fraud for fear of losing the money completely.

Under cross-examination, DW2 told the Court that he was not aware that a Criminal matter could get side by side with a civil matter in the Courts of Law and further admitted that based on the page 50 of the Defendant's Further Supplementary Bundle of Documents, the data was obtained from the Tonlex Time Book and not the Defendant's book. DW2 stated that despite the authorization being done by a **Steven Banda**, the said official was never dismissed by the Defendant. With regard to the Leave Form for **Linda Kumwenda**, DW2 told the Court that the recommendation was done by S. Kunda who was not a Plaintiff in this matter.

During re-examination, DW2 told the Court that S. Kunda was not an employee of the Defendant but that the 2nd Plaintiff approved the Leave Form. He contended that charging the Plaintiffs was not within the jurisdiction of Security Department but a responsibility of the Human Resources Department of the Defendant Company.

At the close of the matter, both Parties filed in detailed written submissions. The gist of the Plaintiffs' submissions was that the three Plaintiffs were wrongly dismissed when the Defendant failed to follow the procedure laid in the Disciplinary Code of Conduct. It was submitted that according to the Defendants' Disciplinary Code and Procedures, "Summary Dismissal" should only be used *"when an employee is found guilty of cases related to theft, fraud or unauthorized possession of explosives or explosive material."*

It was submitted that consequently, the Defendant should have first reported this matter of fraud to the State Police who have the means of investigating such crimes, then have the Plaintiffs charged and arrested, tried by the Courts of Laws and if found guilty and convicted, then the Defendant would have used the conviction to invoke the disciplinary process under its Disciplinary Code.

Reference was made to the case of **Zeded Mwiche V Lumwana Mining Company Limited**⁽¹⁾ where the Supreme Court upheld the decision of the High Court that:

"the employees dismissal was wrongful and unlawful on account of the fact that there was nothing on record to justify the disciplinary action against them and the

employee was dismissed for an undefined offence...the Court could not be faulted for finding that the employer neglected to provide evidence such that the Court was unable to say whether or not the offence were established."

It was contended that a dismissal based on a non-existing offence is unlawful and there was no evidence on record to show that there was rational ground or any explicable basis which was reasonable in the circumstance to warrant a dismissal of the three (3) Plaintiffs as they never committed any offence especially that it is on record through DW2 who confirmed that Tonlex Company was never sincere in its dealings with the Defendant and that it had remitted the money back to the Defendant, without suffering any penalty.

It was further argued that the record shows that all the authorizations were done by the Mine Managers and not any of the three Plaintiffs. Thus it was wrong for the Defendant to charge the Plaintiffs with the offence of authorization when they did not do so and further that the 1st Plaintiff never supervised personnel from the Concentrator nor did he make their Time Cards as the Supervisors for each Section marked their employees' Time Cards and verified the works. It was therefore contended that the charge letters were all wrong as they were premised on unfounded allegations of fraud and authorization.

Reliance was placed on the case of **Bank of Zambia V Kasonde⁽²⁾**, for the proposition that dismissal for dishonest conduct is a stigma

which cannot be atoned by damages and that the fate of the other players such as Andrew Mukupa and Mine Manager, Steven Banda, who had authorized all the payments was unknown to the Plaintiffs, making it unfair as all the employees should have enjoyed equal treatment under the same code of conduct.

It was further submitted that the application of Leave, claims for over-time and other requests were fraudulently done by Tonlex which had its own Human Resource Officer responsible for its staff contracted out to the Defendant and that the blame cannot therefore be shifted to the Plaintiffs who could not tell why a Tonlex employee was proceedings on leave.

It was contended that the Plaintiffs had nothing to do with the issue of rates which was under the Jurisdiction of the Accounts Section of the Defendant.

In conclusion, it was contended that the charges preferred on the Plaintiffs were wrong and not proved and that the procedure was not followed conclusively, before dismissing the plaintiffs, and thus the Plaintiffs were entitled to their claims in the Statement of Claim with costs.

In response, the Defendant submitted that there is no strict rule within this jurisdiction that commands that the offence of fraud should only be prosecuted by the Courts of law, hence the existence of institutional disciplinary codes of conduct that help run the institutions effectively. It was contended that once an investigation is thoroughly conducted yielding incriminating evidence against an

employee and a fair disciplinary hearing conducted, having given an employee a chance to exculpate himself, then the Courts should not interfere in the penalty imposed by such a disciplinary committee.

It was submitted that the Defendant has Disciplinary Code of Conduct which was readily available to all the employees specifying the offences and the penalties. It was contended that the Defendant carried out the fraud investigations and the Plaintiffs were subjected to the Disciplinary Code, hence the Court should be slow to interfere and relied on **Lord Denning** who was cited as having stated in the case of **Wood V Bradford Corporation**⁽³⁾ that:

“we must not force these disciplinary bodies to become entrammeled in nets of legal procedure. So long as they act fairly and justly, their decision should be supported.”

It was further submitted that the offence of fraud (falsifying and uttering) as stipulated in the Defendant's Disciplinary Code of Conduct, justified the dismissal, and reliance was placed on the case of **Stockdale V Woodpecker Inn Limited and Spooner**⁽⁴⁾ for the position that misconduct which is inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal.

It was argued that the 1st Plaintiff was tasked to ensure that the money paid to the employees tallied with what was in the Contract and Payment Schedule, yet he authorized payments that had anomalies as he did not verify the documents/invoices before appending his signature.

With regard to the 2nd Plaintiff, it was submitted that he wrongly authorized payment of 7th day overtime while the Contract provided for normal shift and further that he put the Contract laborers on continuous overtime.

In relation to the 3rd Plaintiff, it was contended that he was tasked with verifying the Time Sheets and invoices for Tonlex employees but he signed for payment to the Contractor that had anomalies and false information.

It was argued that as the Plaintiffs where supervising the Tonlex employees, they were in a position to know who was and who was not working, but due to their reckless conduct, the Defendant lost a substantial amount of money.

Reference was made to the case of **Chimanga Changa Limited V Stephen Chipango Ngumbe⁽⁵⁾** for the position that an employer does not have to prove that an offence took place to satisfy himself beyond reasonable doubt that the employee has committed the act but to act reasonably in coming to a conclusion.

It was submitted that the Plaintiffs were properly charged under the Disciplinary Code, that the correct procedure was adopted and that therefore the Defendant was justified in dismissing them. It was further contended, even if the Plaintiffs were to succeed, they would not be entitled to terminal benefits but only to damages as per the holding in the various authorities including in the case of **Agholor V Cheesebrough Ponds⁽⁶⁾**.

I am indebted to respective Counsel for their submissions, which I have carefully considered together with all the evidence before me.

According to **Black's Law Dictionary**, "fraud" is:

"a knowing misrepresentation, a knowing concealment of a material fact made to induce another to act to his or her detriment"

Whereas "actual fraud" has been defined in the same Dictionary as:

"a concealment or false representation through an intentional or reckless statement or conduct that injures another who relies on it in acting."

Uttering on the other hand has been defined as:

"the crime of presenting a false or worthless instrument with intent to harm or defraud."

As regards the definition of summary dismissal, it is trite that it is the immediate termination of employment contract by an employer due to the employee's conduct as also alluded to by the John Sprack in his book titled "*Employment Law and Practice*".

In addition to the above definitions, and in dealing with this matter, I also bear in mind the guidance of the Supreme Court in the **Zambia Electricity Supply Corporation Limited V David Lubasi Muyambango**⁽⁷⁾ where it was held, inter alia, that:

"it is not the function of the Court to interpose itself as an Appellate Tribunal within the domestic disciplinary procedures to review what others have done. The duty of

the Court is to examine if there was the necessary disciplinary power and if it was exercised properly.”

Similarly, in an earlier case of the **Attorney General V Richard Jackson Phiri⁽⁸⁾**, the Supreme Court stated:

“The Court cannot be required to sit as a Court of appeal from the decision of the Public Service Commission to review its proceedings or to inquire whether its decision was fair or reasonable. The Court ought to have regard only to the question whether the Public Service Commission had disciplinary powers and, if so, whether such powers were validly exercised”.

In the case in casu, it is not in dispute that the Plaintiffs were all employees of the Defendant having joined on different dates but all based at Nampundwe Mine at the time of their dismissal;. It is not also in dispute that the 1st and 3rd Plaintiffs did sign on the invoices relating to Tonlex for the months of September, 2012 and October, 2012, which invoices had anomalies and that the 1st and 3rd Plaintiffs did, in their exculpatory letters admit making that mistake and that the final authorizing person for payments to be effected was the Mine Manager. It is also not in dispute that the 2nd Plaintiff admitted to authorizing the 7th day payment as per page 4 Defendant’s Bundle of Documents, which he contended was in line with the Contract provision, and further that he approved the Leave Form for Lucy Kumwenda, which was originated by Tonlex.

It is also not in contention that all the Plaintiffs were charged for fraud for falsifying and uttering documents which had anomalies and with respect to the 2nd Plaintiff, an additional charge of authorizing payment of 7th day off and giving day offs in the same week to Tonlex employees. It is also not in dispute that the Plaintiffs were asked to exculpate themselves and hearing held where in the first instance, they were dismissed. They, then were advised to appeal that decision and their appeals to two higher offices were lodged, heard but their appeals were unsuccessful and the dismissals upheld.

The Plaintiffs contend that the disciplinary procedures were not followed in view of the fact that the charge of fraud was not reported and investigated by the State Police or tried by any Court of law. It was contended that the procedure would only have been proper if the Plaintiffs had been found guilty by the Courts and thereafter the Defendant proceeded to invoke the disciplinary procedures based on the "*guilty verdict*" from the Courts of law. The Defendant contends that there is no law that required it to report the matter to the State Police or await a Court verdict before invoking its internal Disciplinary Code of Conduct.

I have perused the Disciplinary Code of Conduct on Pages 11-30 of the Plaintiffs' Bundle of Documents and note that it does not specifically state that for an allegation of fraud or any criminal offence, an employee can only be charged after state police has investigated and a Court has pronounced a guilty verdict.

It is my view that the Disciplinary Code of Conduct is part of an Employment Contract and the law is very clear on the issue of introducing extrinsic or parole evidence when there is a written contract in place. The author Jill Poole in her book entitled "**Textbook on Contract Law**, at Page 208 writes:

"The Parole evidence Rule states that if a contract is written, then that writing is the whole contract and the parties cannot adduce extrinsic evidence, and especially oral evidence to add to, vary or contradict that writing".

See also the case of **Holmes Limited v Buildwell Construction Company Limited**⁽⁹⁾, where the same views on extrinsic evidence were expressed. It is, therefore, not this Court's role to read procedures into the Defendant's Disciplinary Code that are not provided therein and further the Plaintiffs have pointed out where it is or may be statutorily provided.

In addition and for comparison purposes, I perused the "*Disciplinary Code and Procedures for Handling Offences in the Public Service Handbook*", whose provisions are more detailed in that it specifically provides that the "Disciplinary Authority" has an option of either taking a criminal offence to Court or instituting internal disciplinary procedures, particularly under **Clause 56 (d)** which states in part, that:

"where Criminal proceedings or disciplinary proceedings have been instituted against an officer..."

Further the said Code, explicitly provides that where criminal proceedings have been instituted, against an officer, disciplinary proceedings cannot be instituted and if they have, they have to be suspended until determination of the criminal proceedings and the determination of any appeal therefrom (see Clause 57).

The above example, further fortifies my view that the Defendant was not obligated to first report the matter to the State Police and await for the determination of the Courts of law before instituting the disciplinary proceedings, otherwise, it would have been stated in the Code.

I, therefore find that the disciplinary procedure was correctly invoked by the Defendant.

In view of the forgoing, the next issue to consider as guided in the case of **Attorney General V Richard Jackson Phiri⁽⁸⁾** is:

“once the correct procedures have been followed, the only question which can arise for the consideration of the Court, based on the facts of the case, would be whether there were in fact, facts established to support the disciplinary measures since any exercise of the powers will be regarded as bad, if there is no substratum of fact to support the same.”

Again, it is not in dispute that the Invoices for September, 2012 and October, 2012, had anomalies in that the rates in the Contract and the rates in the Pay Sheets were not tallying; that some employees

who had left Tonlex employment were appearing on the said Invoices and were paid and that **Lucy Kumwenda** who was on leave was also paid. In addition, there was payment of 7th day while giving day offs to Tonlex employees.

In relation to the 1st and 3rd Plaintiffs, it had been argued that they were not the ones who authorized the payments as they either merely checked or approved while the final authority for invoice payment on all the invoices was the Mine Manager, who did sign to authorize the payments.

The 2nd Plaintiff denied the charge against him and according to his exculpatory letter on page 4 of the Defendant's Bundle of Documents, *"the awarding of shifts and Sunday labour payments were done according to the contract Number NAM 002"*. In addition, it was submitted that the Leave Form for Lucy Kumwenda was initiated by Tonlex and my perusal of the said Form on page 52 of the Defendants' Supplementary Bundle of Documents shows that it was *"approved by"* the 2nd Plaintiff.

The Plaintiffs did sign documents that had anomalies recklessly without verifying and these documents were presented, thus falling into the definitions of fraud and uttering that had to be subjected to investigations, to prove or disprove the allegations as alluded to by DW2.

The evidence from the Defendant's Witnesses was that the Defendant suffered loss as a result of the Plaintiffs' actions,

amounting to K244,597,371.36, albeit the money was not received by the Plaintiffs themselves and it was repaid by Tonlex.

All the above facts, in my view show, that some offences were committed that resulted in the Defendant suffering some monetary loss, prior to the discovery of the offences. I, therefore find that there was a basis for the Defendant to invoke the disciplinary proceedings against the Plaintiffs, as there was something on record to justify the disciplinary action against them as per the case cited by the Plaintiffs, of **Zeded Mwiche V Lumwana Mining Company Limited**⁽¹⁾. Consequently that there was "*substratum of fact to support*" the institution of the proceedings as alluded to in the cited case of **Attorney General V Richard Jackson Phiri**⁽⁸⁾.

In addition, there has been no argument that the Disciplinary Committees, including those to which the appeals were made, had no jurisdiction to exercise those powers. I, therefore find that the Committees had the jurisdiction to conduct the disciplinary proceedings and those powers were validly exercised, given my findings herein.

The next question then is, should the Plaintiffs should have continued working as the Defendant had in essence, not suffered any loss and there was no personal gain by the Plaintiffs? Can the Court question the decision to dismiss? As alluded to earlier in the cases of **Zambia Electricity Supply Corporation Limited V David Lubasi Muyambango**⁽⁷⁾ and **Attorney General V Richard Jackson Phiri**⁽⁸⁾ and having found that the disciplinary procedures were

properly invoked, this Court's function is not to act as an appellate tribunal of the Defendant's internal procedures or to inquire whether the decision was fair or reasonable. However, in the case of **Pamodzi Hotel V Godwin Mbewe**⁽¹⁰⁾, it was held inter alia, that:

"the decision to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion."

PW2 had testified that during the appeal hearing and following his failure to explain where the K244 Million went, a Mr. **Maimba Mundia** had told him that there was no case against him but that the General Manager, **Field Kondowe** had directed the official to dismiss PW2. However, no evidence was led to show this alleged instruction. It is trite that he who alleges must prove and in the circumstance, I have no basis to believe that indeed there was malice in the decision that was made to dismiss the Plaintiffs.

The Plaintiffs have alleged in the submissions, as confirmed by their oral testimonies that the fate of the Mine Managers who authorized the payments was unknown. Reference was made to the case of **Bank of Zambia V Kasonde**⁽²⁾ for the position that all employees should enjoy equal treatment under the Ruling regulations. It was contended that it was very unfair that the fates of **Steven Banda** and **Andrew Mukupa**, who had approved some of the Invoices and authorized payment were unknown.

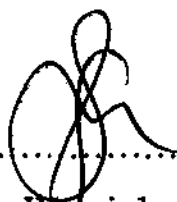
The record shows that allegation of unfair treatment was not referred to in the Pleadings to have afforded the Defendant an

opportunity to respond. The function of pleadings has been stated in a number of authorities, including in the cases of **Kariba North Bank V Zambia State Insurance Corporation Limited**⁽¹¹⁾ and **Anderson Mazoka and Others V Levy Mwanawasa and Others**⁽¹²⁾ that the pleadings are supposed to give fair notice of the case to be defended; to limit and define the issues to be tried and to tie the hands of the Parties so that a Party cannot without leave go with any matter not fairly included. . I am therefore constrained from making a pronouncement on an allegation that was not pleaded and on which the other Party has not had an opportunity to respond.

Thus on the totality of the facts, evidence submissions and the authorities referred to herein, I find that the Plaintiffs have failed, on a balance of probability, to prove their claims. I consequently dismiss all the Plaintiff's claims. Each Party to bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka this 5th day of June, 2018.



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S. M. Wanjelani

HIGH COURT JUDGE