IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 004 OF 2018**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

E. C. MINING LIMITED **APPELLANT**

AND

BRIAN MWAMBA AND 13 OTHERS **RESPONDENT**

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 23rd May and 23rd August 2018

For the Appellant: *K. Kaunda (Ms.), Messrs K. N. Kaunda Advocates*

For the Respondent: *V. Michelo, Messrs V. N. Michelo and Partners*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Swarp Spinning Mills Plc v Sebastian Chileshe (2002) ZR, 23***
2. ***Zesco Limited v Salimu Banda and Twelve Others – SCZ Judgment No. 211 of 2013***
3. ***Philip Mhango v Dorothy Ngulube and Six Others (1983) ZR, 61***
4. ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises (1999) ZR, 27***

Legislation referred to:

1. ***The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***

This appeal is against the Judgment of the learned Judge of the High Court, Industrial and Labour Division which was delivered on 30th October 2017 in favour of the complainants who are now the Respondents in this appeal.

The back ground to this case is that, the complainants, whom we shall refer to as the Respondents, were employed at divers dates, by ECM Engineering, EC Mining Limited and EC Grifo Zambia Limited, which companies belonged to one group of companies known as ECM Group and were all managed by the same directors.

On 22nd December 2015, the Respondents were dismissed from employment following their demand for the 13th cheque (christmas bonus). As a result, the Respondents commenced proceedings in the court below seeking the following reliefs:

1. A declaration that the dismissals were unfair, wrongful, null and void.
2. Payment of the 13th cheque.
3. Damages for breach of contract.
4. A declaration that they were discriminated against, as Darius Kasongo who was facing a similar charge was reinstated to work; and
5. In the alternative, reinstatement to their respective position.

According to the Respondents, they were charged with the offence of leaving the work place without permission, which according to the disciplinary and grievance handling procedure code, which they produced, appearing at pages 46 – 57 of the record of appeal (the record) attracted a verbal warning as a penalty.

The Respondents alleged that, some of their letter of dismissal contained the offence of inciting unconstitutional industrial action and leaving the work place without permission during a strike, which offences they were not charged with.

The Respondents alleged that, they left work during lunch hour to go and make representations at the labour office over the Appellant's withdrawal of the christmas bonus. They were, as a consequence, charged and given two days within which to exculpate themselves. They all made statements on the first day and on the second day, they were all dismissed on the charge of leaving the work place without permission and some for that offence and/or inciting unconstitutional industrial action.

In their answer to the complaint, the Appellant stated that the christmas bonus was not a basic condition of service, as such the Respondents were not entitled to the same as of right. That, it was previously paid, out of goodwill as an added incentive. However, on 25th January 2015, the Appellants published a notice, informing all its employees that the christmas bonus would only be paid upon reaching a sales turnover of US$30,000,000.00 which they did not reach that year and the Respondents were accordingly advised.

According to the Appellant, the Respondents were charged with one or both offences of leaving the place of work without permission or/ and inciting unconstitutional industrial action, which offences attracted the penalty of summary dismissal according to the disciplinary code and grievance procedure for non-management employees appearing at page 221 of the record, which the Appellant produced.

Further, according to the Appellant, the Respondents were given an opportunity to exculpate themselves and subjected to disciplinary procedures as laid out, paid all their dues including terminal benefits and signed disclaimers.

At the trial, it became evident that, some of the Respondent's letters of employment contained payment of the christmas bonus as a term of the conditions of service, especially those who were employed in 2009, whilst this was not the case with others.

There is also uncontroverted evidence that EC Grifo Zambia Limited, no longer exists as it changed to ECM Engineering Limited in 2013.

It is also evident that the letters of dismissal were written under the letter heads of EC Mining Limited and ECM Engineering Limited which companies both fell under ECM group.

After considering the pleadings and the evidence before him, the learned Judge in the court below opined that, he was being called upon to determine the following issues:

(1) Whether the Respondents' dismissals from employment by the Appellant were unfair, wrongful, null and void.

(2) Whether the Respondents are entitled to the payment of the christmas bonus.

(3) Whether to declare that the Respondents were not charged with offences of inciting unconstitutional industrial action; and

(4) Whether the complainants were discriminated against considering that one Jack Chineva who was facing a similar charge with the Respondents, was reinstated.

As regards the first claim, the first issue the learned Judge was faced with, was to determine which disciplinary code was applicable in the matter; whether it was the one which was produced by the Respondents or the one by the Appellant. In determining the issue, the learned Judge addressed the status of the companies which employed the Respondents from the documents which were produced in evidence, in particular the Notice at page 106 of the record signed by Iain-Anderson Slight addressed to all employees of ECM group which stated that:

> *"For purposes of this payment, ECM group comprises, EC Mining Limited and ECM Engineering Limited."*

Further that, the letters of offer of employment under the letter head of EC Grifo Zambia Limited and EC Mining Limited at pages 64 – 96 were all signed by Iain-Anderson Slight as managing directors.

Lastly, the learned Judge looked at the disciplinary code which was produced by the Respondents at page 46 – 57 which, under part 1 provides that:

> *"This code may be cited as the disciplinary and grievance handling procedure code for EC Mining Limited, EC Grifo Zambia Limited, David Brown Limited and any other subsidiary companies that will be incorporated from time to time."*

The learned Judge opined that from the aforestated documents, by content clearly shows that the companies namely ECM Engineering Limited, EC Mining Limited, EC Grifo Zambia Limited and David Brown Limited are part of EC Group of companies and that,

therefore the disciplinary code applicable was the one which was produced by the Respondents as employees.

The learned Judge, in addition did not find anything wrong or unlawful by the Respondents choice in bringing the action herein against EC Mining Limited as the decision by the court was to affect all the concerned companies in the group.

On the offences the Respondents were charged with, the court below found that all the Respondents were charged with the offence of leaving place of work without permission, except for Brian Mwamba, Grant Chanda, Derrick Ngosa and Clement Mpundu whose complaint forms apart from the offence of *"leaving place of work without permission"* also included *"inciting employees to unconstitutional action."*. The learned Judge then went on to make the following statement:

> *"Clearly, the offence charged of leaving place of work without permission is not found hook, line and sinker in the disciplinary and grievance handling procedures of the EC Group of companies and the complainants argues that the only offence aforesaid is "leaving work early" which attracts verbal warning for the first breach, written warning for the second breach and a discharge for the third breach, the same is under category G (2)."*

The learned Judge then observed that there was also the offence of *"inciting of strike or violence or riotous behavior"* under category type of offences D (1) whose sanction on first breach is summary dismissal, but that the Respondents were not charged, neither were they dismissed from employment based on this offence.

The court below, further observed that, although the complainants were given two days within which to exculpate themselves, they were dismissed on the second day, before the exhaustion of the two days period.

At the end of the day, given his observations, finding and opinions, the learned Judge was of the view that the Respondents were not fairly treated, especially that they were not unionized.

In the circumstances, the learned Judge found that the dismissals were not justified and that the Respondents on the balance of probabilities proved their claim for damages. Evoking the principle in the case of **Swarp Spinning Mills Plc v Sebastian Chileshe**[1], the court awarded the Respondents six months' salary inclusive of allowances with interest.

On the claim for christmas bonus, the learned Judge found that, those whose letters of appointment provided for payment of the same were entitled to payment, others were not, because it was not an entitlement as it was not part of their conditions of service.

As regards the claims as to whether to declare that the Respondents were not charged with the offence of inciting unconstitutional industrial action and/or whether, they were discriminated against, the learned Judge, was of the view that, having dealt with the issue of wrongful and unfair dismissal from employment and the claim for christmas bonus, there was no need to address the claims as their failure or success will not in any way affect the outcome of the case.

Dissatisfied with the Judgment the Appellant has appealed to this Court, advancing seven grounds of appeal as follows:

(1) The court below erred in law and fact when it found that the applicable disciplinary code was the one produced by the Respondents.

(2) The court below erred in law and fact when it found that the charge applicable to the Respondents was that of leaving the place of work early and not leaving the place of work without permission.

(3) The court below erred in law and fact when it found that there was nothing wrong with the Respondents citing the Appellant only as Respondents and further holding that its decision would affect all concerned companies in the EC Group of companies.

(4) The court below erred in law and fact when it awarded damages for wrongful and unfair dismissal and or in the amounts exceeding the quantum specified at law without giving any reasons for departing from the same.

(5) The court below erred in law and fact when it disregarded the fact that the 3rd, 6th and 12th Respondents did not exhaust the administrative procedure in the disciplinary process.

(6) The court below erred in law and fact when it failed to address its mind to section 101 (2) of ***The Industrial and Labour Relations Act***[1].

(7) The court below erred in law and fact when it found that christmas bonus was a basic condition of service.

At the hearing of the appeal, Ms. Kaunda, Counsel for the Appellant relied on the Appellant's heads of argument.

As regards ground one of the appeal, Counsel submitted that, the court below did not address its mind to the fact that this was an issue dealing with authentication of documents produced in evidence as guided by the rules. That the court was in error in adopting a document produced by a former employer which he could not even explain where he got it from.

Counsel contended that, the disciplinary code which was adopted by the court is not an official document as could be seen at page 57 of the record and this was conceded by the Respondents witness. The said document reads as follows:

> *"The moment the above document is signed by the three parties representing the company it shall become company policy."*

According to Counsel, there is no evidence that this document was ever signed so as for it to become company policy.

It was Counsel's contention that, in common parlance, every document required to be signed and not signed cannot be validated by mere reference to it especially by a person who is not and has never been intended to be a signatory to the same.

Counsel further submitted that the waiver of the signatories on the document by the court below has potential of generating serious uncertainty in interpretation, authentication and validation of documents adduced in evidence in court and must be guarded against for the benefit of already established jurisprudence on the importance of appending signatures to documents where they are required.

It was Counsel's further submission that when the second Respondents' witness was asked in cross examination where he got the document from, he said it was from the previous human resource manager who had since left employment.

That, the said document does not contain the offence the Respondents were charged with and it cannot be up to the employees to decide what offence they should be charged with; it is the prerogative of the employer, with due regard being paid to the actions of the employees.

Counsel further submitted that, on the other hand, the other disciplinary code was produced by the Appellant's human resource manager and he made it clear that, that was the document he used in handling the case. Counsel was of the view that the court below should have adopted this disciplinary code which was produced by the employer who had generated and had custody of the document.

According to Counsel, the court below fell into manifest error when it found that the applicable disciplinary code was the one produced by the employees.

In respect to the second ground of appeal, Counsel reiterated the submissions in the first ground of appeal and submitted that, the learned Judge having relied on the wrong disciplinary code, it follows that the offence he preferred of leaving work early and the sanction of first warning did not apply to this case.

That, this was a clear misapprehension of facts as the Appellant as the employer who charged the Respondents never invoked and used the disciplinary code which was relied on by the court.

Counsel submitted that, the Respondents were charged with the offence of leaving the place of work without permission pursuant to the disciplinary code which was produced by the Appellant and that is the one the Respondents responded to in their exculpation, without questioning the validity of the charge at any stage of the disciplinary process.

It was Counsel's submission that the learned Judge contradicted himself when he substituted the offences, as that which was not part of the disciplinary process cannot legally and fairly take centre stage at trial or else the courts will be sitting as domestic disciplinary tribunal in domestic employment set ups.

Counsel drew our attention to section 101 (2) of **The Industrial and Labour Relations Act**[1] which forbids any employee from taking part in a strike and submitted that, in accordance with the Act, there was a concerted withdrawal of labour by the Respondents.

As regards the third ground of appeal, Counsel submitted that, one cannot treat related companies as the same when only one has been sued. That, there is no legal entity known as the EC Group of companies and even if there was, it was not a party to the proceedings.

As regards the fourth ground of appeal, Counsel submitted that, there is nothing that happened in this case nor did the learned Judge put a reason for awarding damages in excess of the notice period. Counsel was of the view that the learned Judge should have explained why he awarded damages in excess of the contractual notice period.

In respect to the fifth ground of appeal, it was submitted that the 3rd, 6th and 12th Respondents were awarded damages, when the record shows that the three made it very clear that they were not going to pursue their appeals any further.

That, as such, they refused to complete the disciplinary process.

Our attention was drawn to section 19 (3) (a) of Statutory Instrument No. 8 of 2008 which states that complaints should be made *"within ninety days of exhausting the administrative channels available to the complainant or applicant."*

It was submitted that, as the three did not exhaust the disciplinary procedure, the court below should not have entertained their complaint.

As regards the sixth ground of appeal, it was submitted that the court below, did not address its mind to the provisions of Section 101 (2) of **The Industrial and Labour Relations Act**[1] which creates an offence to withdraw labour, as the act by the Respondents was clearly illegal at law.

In respect to the seventh ground of appeal, Counsel submitted that, christmas bonus was not a condition of service. Our attention was drawn to the case of **Zesco Limited v Salimu Banda and Twelve Others**[2] Where the Supreme Court held that:

> *"the 13th cheque is a gratuitous payment and not a condition of service which an employee can claim as a matter of right."*

Counsel submitted that, similarly, in this case, the payment of christmas bonus by the Appellant, could not be claimed as a matter of right by the Respondents.

In response, the Respondents filed a cross appeal.

At the hearing of the appeal, Mr. Michelo Counsel for the Respondents relied on the Respondents' heads of argument. In response to the first ground of appeal, Counsel drew our attention to the case of **Philip Mhango v Dorothy Ngulube and Six Others**[3] where the Supreme Court held as follows:

> *"that the court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any valuable evidence or upon a misapprehension of the facts, that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make."*

Counsel submitted that, in arriving at which disciplinary code was applicable, the court below heard witnesses from both sides and looked at both disciplinary codes and gave reasons for finding that it was the disciplinary code which was produced by the Respondents which was applicable.

It was Counsel's contention that, had the Appellants referred to specific clauses of the disciplinary code being invoked, the question of the appropriate code would not have arisen.

According to Counsel, the issue of the applicable disciplinary code cannot be resolved by the appellate court as they were not privy to the demeanor of witnesses.

In response to the second ground of appeal, Counsel submitted that the court below was on firm ground in holding that the charge ought to have been that of leaving the place of work early having

found that the applicable disciplinary code was the one produced by the Respondents and should not be reversed.

According to Counsel, the offence of leaving the place of work without permission did not exist.

In respect to the third ground of appeal, Counsel submitted that the learned Judge was justified in holding that the decision affected all the companies in the group.

That, though the employees belonged to different companies under the group of companies, the charge letters and dismissal letters all bore only one company, namely EC Mining Limited.

According to Counsel, a person who is not one's employer cannot dismiss one.

On the fourth ground of appeal, Counsel submitted that the quantum of damages was justified and in line with the **Swarp Spinning Mills**[1] case. It was submitted that this Court can only reverse an award of damages if it is excessive and it comes to the court with a sense of shock.

According to Counsel, looking at the jobs the Respondents occupied and the difficulty in getting the same jobs, the award was in the circumstances reasonable.

Counsel responded to the fifth and six grounds of appeal together and submitted that, though the issue of the three Respondents not having exhausted the administrative process was raised in the pleadings, it was not canvassed during trial and it cannot therefore be a subject of the appeal.

Our attention in that respect was drawn to the case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders**

Enterprise[4], where the Supreme Court held that *"It is not competent for a party on appeal to raise issues not raised in the court below."*

On the issue of the strike action, Counsel equally submitted that it was not raised in the pleadings and in evidence, in particular Section 101 (2) of **The Industrial and Labour Relations Act**[1].

In response to the seventh ground of appeal, Counsel submitted that the christmas bonus was a condition of service as it was laid out in the employee's contracts of service.

That in the manner the provision for the bonus was couched, there was no discretion given to management as to the payment of the bonus.

Counsel submitted that the bonus was a basic condition of service which was entrenched and could not be taken away.

On the cross appeal, on the learned Judge's finding that other employees were not entitled to the christmas bonus, Counsel submitted that, the fact that these employee's contracts did not contain a provision for payment of the bonus, management policy of paying the same to the said employees, incorporated it into their conditions of service, hence it could not unilaterally be withdrawn.

Counsel for the Appellant in response to the cross appeal merely reiterated her earlier submissions.

We have considered the submissions by Counsel and the Judgment being impugned.

We shall address the first and second grounds of appeal together as they are related; since the issue being raised is basically questioning the learned Judge's finding that the disciplinary code which the court below found to be applicable was the one which

was produced in court by the Respondents as employees as opposed to the one which was produced by the Appellant as the employer.

In our view, the learned Judge took a very cursory look at the evidence before him before arriving at his finding.

The fact that Iain-Anderson Slight signed the Notice to the Respondents at page 106 of the record, most of the letters of offer of employment and was also supposed to sign the disciplinary code which was produced by the Respondents, could not have formed the basis for the learned Judge arriving at a finding that the applicable disciplinary code was the one produced by the Respondents.

The only thing the aforestated shows, is that, EC Mining Limited and ECM Engineering Limited to which the Respondents were employees, both belonged to ECM group, in which companies, Iain – Anderson Slight was a managing director and nothing more.

In our view, the learned Judge's considerations and analysis used in arriving at his decision were flowed, for the following reasons; the source of the disciplinary code was highly questionable; furthermore, the same code is not dated. Brian Mwamba, the Respondents' first witness who, according to his evidence, first saw this code in 2012, could not state whether it was still applicable at the time he was employed as a permanent and pensionable employee in 2015 under ECM Engineering Limited as per the letter at page 64 of the record; which company as earlier alluded to only came into existance after 2013. At the time, it was made clear to him under clause 10 of the conditions of service that:

"While in the service of ECM Engineering Limited, you will be subjected to ECM Engineering Limited's rules and procedures now in existence and those which will be introduced from time to time hereafter and to all common law and any statutory provisions which may be applicable."

Apart from seeing this code in 2012, Brian Mwamba, did not state as from where he got the document for him to exhibit it in court.

Furthermore, this code which was required to be signed at page 57 of the record in order for it to become company policy, was never signed and both Brian Mwamba (CW1) and Dominic Kaluba (CW2) confirmed that it was not company policy since it was not signed.

It is also evident that, the code which was adopted does not mention ECM Engineering Limited but mentions EC Grifo Zambia Limited which was no longer in existence.

On the other hand, the learned Judge did not address the disciplinary code which was generated and produced by the Appellant's human resource manager as the custodian of the document which code was dated October 2014 and headed at page 221 under ECM.

The fact that the offences the Respondents were charged with were not provided for under the code he found applicable should have alerted the learned Judge and put him on guard that it was not the applicable code instead of attempting to substitute the charges as he ended up doing.

Looking at the disciplinary code which was produced by the Appellant, although the specific clauses were not mentioned in the

charges, the offences they were charged with fell in line with clauses 3.8.1 (c) (d) and (e) and 4.4.9 (a) of the disciplinary code.

In view of the aforestated, we find that the finding by the learned judge in the court below that the applicable disciplinary code was the one produced by the employees was perverse as it was against the weight of evidence and there was also misapprehension of facts on his part. We are therefore duty bound to reverse that finding of fact and substitute it with the finding that the applicable disciplinary code was the one which was produced by the Appellant as the employer.

In the view we have taken, the Respondents were not wrongly charged. They were correctly charged under the disciplinary code produced by the Appellant and those who were charged with the offence of leaving the place of work without permission, admitted the offence and were visited by the sanction provided for under the code.

Those who were charged with the offence of inciting unconstitutional industrial action and denied the offence, also went through the disciplinary process and were accordingly dismissed as provided for under the code. It was therefore not in order for the learned Judge to engage in the substitution of offences.

We also do not find anything wrong in the employer dismissing the employees before the expiry of the two days they were given, since they all had been given the opportunity to exculpate themselves, which they all utilized before the expiry of the given two days.

In that regard, grounds one and two of the appeal succeed.

In the view we have taken, the Respondents dismissals were not unfair, wrongful or null and void.

The third ground of appeal attacks the learned Judge's finding that there was nothing wrong or unlawful in the Respondents bringing the action in the court below, against EC Mining Limited as the decision by the court was going to affect all concerned companies in the group.

We note that the affected employees were employed by ECM Engineering Limited and EC Mining Limited which companies belong to the ECM group. The dismissal letters were done on letterhead belonging to those two companies and were signed by the same person, M. L. Mutono, as the human resource manager.

We find the argument by Counsel for the Appellant, self-defeating for the following reasons; firstly, according to the Appellant's own witness, Mr. Mutono (RW1) who signed the dismissal letters, confirmed in re examination at page 390 of the record that ECM Engineering Limited was part of the proceedings, although it was only EC Mining Limited which had been sued.

In Mr. Mutono's view, all the employees mingled freely, worked on the same premises and the managing director was the same.

Secondly, we note that Ms. Kaunda, Counsel for the Respondents, was also Counsel for the Respondents in the court below. If she had felt strongly about this issue, she should have applied for joinder of parties to the proceedings, which she did not.

In our view, we cannot fault the learned Judge for arriving at the finding as he did. This ground has no merit.

The fourth ground of appeal attacks the award which was given by the learned Judge. Having found that the dismissals were neither unfair nor wrongful, this ground of appeal becomes otiose.

The fifth ground of appeal attacks the learned Judge's entertainment of the complaint as regards three of the Respondents who according to the Appellant did not exhaust the appeals as set out in the disciplinary code.

Our perusal of the disciplinary code does not show that it contains any provision which precludes any employee from going to court without first exhausting the appeal procedures, especially if they know that the appeal will be in futility.

Our attention on this ground was drawn to Section 19 (3) (a) of Statutory Instrument No. 8 of 2008. Our understanding of that provision of the law is that it does not forbid any person from litigating, unless he has exhausted the appeal procedures.

The provision deals with time limitation of an action, when one can be said to be within the limited time for the cause to be actionable.

It therefore raises the issues of whether at the time of commencement of an action one is within or outside the limited time for taking out an action, so that the time does not start counting from the date of dismissal but from the time one exhausts the appeals procedure.

That provision is not applicable to this matter and this ground of appeal therefore has no merit.

The sixth ground of appeal attacks the learned Judge's failure to take into consideration the provisions of Section 101 (2) of **The Industrial and Labour Relations Act**[1]. Our short answer to this ground

is that, it relates to employees who are members of a trade union or subject of a collective agreement and is therefore not applicable to the Respondents. This ground equally has no merit.

As regards the seventh ground of appeal we shall address it together with the cross appeal as they are both dealing with the issue of christmas bonus.

It should be noted that the learned Judge only ordered payment of the christmas bonus, to those employees whose letters of appointment provide for payment of the same. The learned Judge did not order for the others because it was not in their letters of appointment.

We have had a look at the letters of appointment which provided for payment of the bonus. These letters clearly state that the bonus was a condition of service and an entitlement which was to be paid in December. Therefore, the learned Judge cannot be faulted for the finding that those for whom it was provided in their letters were entitled while others were not.

Counsel for the Respondents cited the case of **Zesco Limited and Salimu Banda and Others**[2] in which the Supreme Court at page J10 had this to say:

> *"The 13th cheque is not one of the entitlements. Therefore, we agree with the submission on behalf of the Appellant that the 13th Cheque is a gratuitous payment. It is not a condition of service. An employee cannot claim it as a matter of right."*

That case in our view does not in any way assist Counsel in her argument, as in that case, the 13th cheque was not part of the

conditions of service, whilst in casu, it was embended in the conditions of service for those whom the Judge found that they should be paid.

In view of the aforestated, both the seventh ground of appeal and the cross appeal have no merits and are accordingly dismissed.

The sum total of this appeal is that, the first and second grounds of appeal succeed and the third, fourth, fifth, sixth and seventh grounds of appeal and the cross appeal fail.

The bonus as ordered in the court below shall attract interest at the lending bank of Zambia rate from the date of notice of complaint to the time of full payment.

Each party shall bear its own costs both in the court below and in this Court.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE