

IN THE SUPREME COURT FOR LUSAKA

APPEAL NO. 206/2015

HOLDEN AT KABWE

SCZ/8/307/2015

CIVIL JURISDICTION

BETWEEN:

FIRST QUANTUM MINING AND OPERATIONS LIMITED

APPELLANT

AND

OBBY YENDAMOH

RESPONDENT

Coram : Wood, Kabuka and Mutuna, JJS

On 7th August 2018 and 15th August 2018

For the Appellant : N/A

For the Respondent : IN PERSON

J U D G M E N T

Mutuna, JS. delivered the judgment of the Court.

Cases referred to:

- 1) Attorney-General v Richard Jackson Phiri (1988/89) Z.R. 121
- 2) Zambia Electricity Supply Corporation Limited v Lubasi Muyambango (2006) ZR 22
- 3) Caroline Tomaidah Daka v Zambia National Commercial Bank Limited Plc (High Court Judgment of 31st December, 2012)
- 4) Dennis Chansa v Barclays Bank SCZ/8/128/2011

- 5) **Kafue District Council v James Chipulu SCZ Judgment No. 51 of 1997**
- 6) **Chilanga Cement v Kasote Singogo (2009) ZR 122**
- 7) **Browne v Dunn (1893) 6 R 67 (HL)**
- 8) **United States v Salerno 481 US 739**
- 9) **Tolani Zulu and Musa Hamwala v Barclays SCZ judgment No. 17 of 2003**
- 10) **Fartinol Nkandu v Cargo Management Services Limited Appeal No. 139 of 2009**
- 11) **Chintu Kanga (Suing as administrator of the estate of Godfrey Locha) v Zambia Revenue Authority Appeal No. 194 of 2015**
- 12) **Dennis Chansa v Barclays Bank of Zambia Plc**

Statute referred to:

- 1) **Industrial and Labour Relations Act, Cap 269**

Other authorities referred to:

- 1) **Chitty on Contracts - volume 1, 29th edition by H.G. Beale, QC, general editor, London, Sweet and Maxwell**
- 2) **Black's Law Dictionary, 9th edition by Bryan A. Garner, Thomson West USA**

Introduction

- 1) The relationship of employer and employee is governed by terms and conditions of service which often times contain a disciplinary code. This disciplinary code contains the various offences

which an employee is likely to commit and the penalties for such offences.

- 2) The question that arises from the foregoing is the level at which an employer is permitted by the law to invoke the provisions of the disciplinary code. That is to say, is an employer, like an automaton, permitted to invoke the provisions of the disciplinary code to the letter whenever an employee appears to have committed an offence without having regard to mitigating factors.
- 3) This is the question which is posed by this appeal which arises from a decision of the Industrial and Labour Division of the High Court (erstwhile Industrial Relations Court) by which the Respondent's claim for unlawful and unfair dismissal was upheld.

- 4) The appeal also discusses the extent to which an employer is compelled to abide by the rules of natural justice when invoking the power to terminate an employee's employment.

Background

- 5) The facts of this case are that the Respondent was employed by the Appellant in November 2006 as a Spotter in Solwezi. In the course of his employment he rose to the rank of Person In Charge (PIC).
- 6) On 17th April 2014, the Respondent was involved in a road traffic accident along the Solwezi Chingola road which resulted in injury to a pedestrian. As a result of this, the pedestrian was taken to Chingola Hospital while the Respondent was detained at Chingola Police Station.

- 7) On the night of 17th April 2014, the Respondent made frantic attempts to contact his superiors to inform them of his predicament and seek leave of absence. Later he was informed by the person who stood in for him as PIC to send the Police Bond Report to the Appellant for purposes of facilitating an application for leave. No formal communication was made to him in respect of the application.
- 8) Subsequently, on 20th April 2014, the Respondent was released from custody and directed by the Police to make frequent checks on the pedestrian and settle his medical bills, who at this stage had been transferred to Ndola Central Hospital.
- 9) In compliance with the directive from the Police he continued to check on the pedestrian and settle his bills. In doing so, he spent nights at the

hospital at Ndola, on the insistence of the pedestrian's relatives, while the pedestrian's spouse spent days with him.

10) During this episode, he continued to inform his superiors of the position he was in. This notwithstanding, on 8th May, 2014 the Appellant terminated the Respondent's employment on grounds of desertion.

11) The Respondent appealed against the termination of employment and was requested to attend an appeal hearing on 11th June 2014. After the hearing, the Appellant wrote to the Respondent on 16th June 2014, informing him that his appeal had been declined. This did not please the Respondent, prompting him to commence an action against the Appellant in the Court below.

The Respondent's claim and Appellant's defence in the Court below

- 12) The claim by the Respondent was by way of a notice of complaint pursuant to section 85(4) of the **Industrial and Labour Relations Act** and he sought the reliefs of damages for unlawful dismissal, reinstatement and any other relief the Court deemed fit.
- 13) The basis upon which the Respondent made the claim was that the Appellant had unlawfully and unfairly dismissed him from employment.
- 14) The Appellant denied the claim and contended that the termination of the Respondent's employment was by way of summary dismissal on account of gross misconduct. According, to the Appellant, the Respondent had absconded from,

work without official leave for a period of more than five days.

- 15) The Appellant explained that although the Respondent had furnished it with a police bond confirming his arrest and detention, the Respondent did not explain the conditions of such police bond. It contended further that the Appellant followed its disciplinary procedure prior to terminating the Respondent's employment in that he was allowed to appeal following which, an appeal hearing was held which resolved to dismiss the Respondent.

The evidence presented by the parties in the Court

below

- 16) The parties presented their evidence by way of affidavits in support and opposition to the notice

of complaint and *viva voce* evidence at the hearing.

- 17) The Respondent's evidence set out the events leading up to his arrest and detention by the Chingola Police and the subsequent stay at Ndola Central Hospital attending to the pedestrian.
- 18) The crucial evidence was in the *viva voce* evidence stating the efforts the Respondent made after his arrest to contact his superiors. The evidence also revealed that as per the discussion he had with one of his superiors, he had sent a copy of his police bond to prove the arrest effected upon him. Further, it set out the change in his circumstances when he was directed by the police to be by the pedestrian's bedside and his attempt at this stage to apply for leave.

- 19) Likewise, the evidence, both affidavit and *viva voce*, led by the Appellant was in line with the undisputed facts of this case. The testimony of RW1, one Michael Ngoma, the Respondent's supervisor confirmed that he received a copy of the Police Bond from the Respondent and that he applied for leave on behalf of the Respondent based on the Police Bond but it was denied.
- 20) The evidence also revealed that in its determination of the Respondent's case, the appeal committee considered the warning which the Appellant had given the Respondent in an earlier incident of absenteeism.

Consideration and decision by the Court below

- 21) The Court below began its determination of the matter by setting out the undisputed facts which are, by and large, in line with the undisputed

facts we have set out in the earlier part of this judgment save for two other findings. These were that: the disciplinary action against the Respondent was not preceded by a disciplinary hearing by a disciplinary committee; and the Appellant's disciplinary code does not have provision for consideration of the reasons for an employee's absence or efforts made by such an employee to fill in leave forms.

- 22) The Court below then framed the issue for determination as being whether or not the Respondent was unlawfully and unfairly dismissed? In respect of the consideration of unlawful dismissal, the Court stated that in considering the issue, it must look at the form of the dismissal *vis a vis* the disciplinary procedure. It referred to our decisions in the cases

of *Attorney General v Richard Jackson Phiri*¹ and *Zambia Electricity Supply Corporation Limited v Lubasi Muyambango*² where we held that in considering the issue of unfair dismissal the Court should not act as an appellate tribunal from the decision of the disciplinary committee. That the duty of a Court is limited to determining whether there was necessary power to act by the disciplinary committee and if such power was exercised properly.

- 23) The Court concluded by setting out the questions a Court should ask itself in making the determination.
- 24) Turning its attention to what constitutes unfair dismissal, the Court relied on its finding in the case of *Caroline Tomaidah Daka v Zambia National Commercial Bank*³ where it observed

that unfair dismissal arises from statutory provisions and involves the protection of the right to employment and advancement of fair labour practices. This entails the requirement of the employer to terminate the contract of employment only on specified grounds and provision of the rare remedy of reinstatement.

- 25) To this end, the Court found that in considering whether or not there was unfair dismissal, it must determine the merits and demerits of the dismissal. That is to say, are the reasons given for the dismissal just? The Court explained further that contracts of employment should only be terminated if reasons exist for doing so based on the conduct, capacity of the worker or operational requirements of the business.

26) After explaining the legal position as we have set out in the preceding paragraphs, the Court considered the evidence and found that the termination of the Respondent's employment by way of summary dismissal was not only wrongful but unfair. It based its finding on the fact that the tenets of natural justice were contravened as follows:

26.1 The summary dismissal resulted in the neglect by the Appellant to fulfill conditions precedent to the dismissal being: the charging of the Respondent; giving him an opportunity to exculpate himself; and an opportunity to be heard by the disciplinary committee;

26.2 Although the offence the Respondent was charged with prescribes a penalty of summary dismissal in accordance with clause 1 of the Disciplinary Code, the Respondent's absence from work resulted from events which were beyond his control, which the Appellant's management was aware of. As such, the rules of natural justice required that he should have been given an opportunity to explain the circumstances that he found himself in. The Court stated further that the Appellant's management knew where the Respondent was and that

he could not complete the leave forms which were in Solwezi whilst he was at Chingola police station.

26.3 The conduct of the Appellant's management, as revealed by the evidence of RW1 was suspicious and shows that it had made up its mind to dismiss the Respondent. The Court formed this opinion from RW1's evidence which was that when he approached his immediate supervisor to apply for leave for the Respondent, the supervisor declined the application on the ground that the Respondent was in the habit of absconding from work.

27) Having found that the Respondent's dismissal was wrongful and unfair, the Court considered the remedy to award the Respondent and declined to order reinstatement in view of the hostility which the Appellant's management had displayed towards the Respondent. In its place, the Court awarded the Respondent the following: twenty four months' salary as damages for wrongful dismissal; and twelve months' salary as compensation for unfair dismissal, The basis of the award was our decisions in the cases of

*Dennis Chansa v Barclays Bank*⁴, *Kafue District Council v James Chipulu*⁵ and *Chilanga Cement v Kasote Singogo*⁶ whose awards we have discussed in the latter part of this judgment.

- 28) The Court also awarded the Respondent interest on these monetary awards at the short term commercial bank rate from the 16th October, 2014 to the date of judgment, thereafter, at the current lending rate as determined by Bank of Zambia.

Grounds of appeal to this Court and arguments by the parties

- 29) The Appellant is aggrieved by the decision of the Court below and has launched this appeal on six grounds as follows:

- 29.1 The Court below erred at law and in fact by failing to consider the provisions of Appellant's disciplinary code in relation to the penalty for being away from work without leave;
- 29.2 The Court below misdirected itself in failing to make a finding that the respondent had not been granted leave to be away from the office;
- 29.3 The Court below erred in law and in fact when it held that the Respondent's termination of employment by way of summary dismissal was both wrongful and unfair on the ground that the tenets of natural justice were contravened;
- 29.4 The Court below erred at law and in fact when it held that the rules of natural justice are applicable in all cases;
- 29.5 The Court below misdirected itself by holding that the rules of natural justice were breached by not holding a hearing when in fact the Respondent had been accorded an adequate hearing at appeal stage;
- 29.6 The Court below misdirected itself by failing to take into account that by not abiding by the procedure for obtaining leave from his employer and instead followed the directive of the police which had no legal backing the Respondent assumed the risk of being dismissed from employment.

- 30) The Appellant argued grounds 1 and 2 of the appeal together and these were that the relationship between the parties was governed by terms and conditions of employment which contained a disciplinary code of conduct. It was an express term of the contract that prior to going on leave the Respondent was required to formally apply for, and obtain leave.
- 31) According to the Appellant, the evidence on record reveals that the Respondent did not apply for leave prior to going on leave and, as such, the Appellant was entitled to invoke the provisions of the disciplinary code which prescribed dismissal for such an infraction. Further, the parties were both bound by the provisions of the disciplinary code, therefore, the Court could not invoke rules of natural justice in place of the procedure

provided for in the disciplinary code. The Appellant drew our attention to the case of ***Maclean v The Workers Union***⁷ in which Marghan J held at page 623 that where a contract between the parties sets out procedural rules governing them, the Court cannot invoke the rules of natural justice as a substitute to the terms of the contract.

- 32) The Appellant also referred to section 36(1)(c) of the ***Employment Act*** which states *inter alia* as follows:

"36(1) A Written Contract of Service shall be terminated -

a) ...

b) ...

c) In any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise."

Here, the Appellant's contention was that the Court below misdirected itself when it found that

the termination was wrongful and unfair despite the Respondent's employment being terminated in accordance with the agreement of the parties.

33) In addition, the Appellant argued that the unchallenged evidence of RW3 revealed that the Respondent did not request him to apply for leave of his behalf. There was no attempt on the part of the Respondent to discredit this evidence by way of cross examination as such, the Court was at liberty to regard the said evidence as undisputed. We were referred to the cases of *Browne v Dunn*⁷ in regard to this latter submission and *United States v Salerno*⁸ where Steven J stated the purpose of cross examination as being to undermine the opponent's evidence.

34) The Appellant, concluded arguments on the two grounds of appeal by defining a contract in the

context that it gives rise to obligations by the parties which are enforceable. Regard was had to the definition of the word in ***Chitty on Contracts - General Principles and Black's Law Dictionary.***

- 35) Turning to grounds 3 and 5 of the appeal, the argument by the Appellant was simply this, that there was no breach of the rules of natural justice by it in effecting the Respondent's dismissal because he was given an opportunity to be heard. This is clear from the evidence on record which reveals that after the Respondent was served with the dismissal letter he was invited to a hearing of the appeals committee. That in affording the Respondent the said hearing the Appellant acted in conformity with our decision in the case of ***Tolani Zulu and Musa***

*Hamwala v Barclays Bank Limited*⁹ where we set out the provisions of section 26A of the **Employment Act** and Article 7 of the International Labour Organisation which state the need for an employer to give an employee opportunity to be heard prior to terminating this employment on the grounds of conduct.

- 36) Under ground 4 of the appeal, the Appellant argued in the alternative that even assuming that it omitted to apply the rules of natural justice, it was on firm ground in terminating the Respondent's employment because he committed a dismissible offence. The Appellant relied on our decision in the case of *Fartinol Nkandu v Cargo Management Services Limited*¹⁰ in which we reaffirmed an earlier decision that where an employee has committed an offence for which he

can be dismissed, no injustice arises from failure by the employer to comply with the agreed procedure for dismissal and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.

- 37) The arguments concluded by setting out authorities which state that an employee may be summarily dismissed if he willfully disobeys any lawful and reasonable order of the employer. We have not reproduced the said arguments because of the reasons which are apparent in the portion of this judgment which deals with ground 4 of the appeal.
- 38) Coming to ground 6 of the appeal, which was the last ground of appeal, the Appellant essentially reviewed the evidence led in the Court below as it

related to the directive given to the Respondent to attend to the pedestrian and the findings of fact made by the Court as a consequence thereof. It concluded by attacking the findings of fact on the ground that they were not made on a proper review of the facts and were such that on a proper review of the evidence, no trial Court could make.

39) In response, the Respondent in his heads of argument did not make any legal arguments but merely recounted and reviewed the facts of this case. This is understandable as he is lay and opted to represent himself. We have not reproduced the contents of his heads of argument because the facts of this case are in any event, by and large, not in dispute.

40) At the hearing, in his *viva voce* arguments, the Respondent requested us to expunge the

supplementary heads of argument filed by the Appellant from the record as they introduced legal issues that were not before the High Court.

Consideration by this Court and decision

- 41) In our consideration of this appeal, we have only dealt with grounds 1, 2, 3 and 5 of the appeal. We have not dealt with the merits and demerits of grounds 4 and 6 of the appeal because the issue under the former was not argued in the Court below, whilst the issue under the latter question findings of fact, which cannot be the subject of appeal in view of the Division from which the appeal emanated.
- 42) We also hasten to add that, at the hearing of the appeal the Appellant was not represented by counsel who opted to file a notice of non attendance in accordance with our rules. We were

therefore, not able to ascertain from counsel whether or not the Appellant had filed supplementary heads of argument referred to by the Respondent in his *viva voce* arguments. Our efforts to locate these supplementary heads of argument on the record drew a blank. We have thus not referred to them in our determination of the appeal.

- 43) For purposes of clarity, the arguments advanced by the Appellant under ground 4 are that even assuming the Appellant did breach the rules of natural justice, it was justified in dismissing the Respondent because the offence he committed was in any event a dismissible one. We are of the firm view that this argument is at odds with the argument and evidence led in the Court below which was that the Appellant complied with the

rules of natural justice because it gave the Respondent an opportunity to be heard in effecting his dismissal by way of the hearing on appeal. The Appellant did not advance the alternative argument being canvassed now.

- 44) In relation to ground 6 of the appeal, we have said in a plethora of authorities, most recently in our decision in the case of ***Chintu Kanga (suing as administrator of the estate of Godfrey Locha) v Zambia Revenue Authority***¹², that an appeal to this Court from the Industrial and Labour Division of the High Court can not be entertained where it only questions findings of fact. This arises from the provisions of section 97 of the ***Industrial and Labour Relations Act*** which only allows appeals on points of law or any point of mixed law and fact.

- 45) This brings us to grounds 1, 2, 3 and 5 of the appeal. These grounds raise two issues namely: whether or not the Appellant ought to have followed the rules of natural justice prior to dismissing the Respondent; and whether or not the Court below misdirected itself when it found that the Appellant ought to have considered the reasons for the Respondent's absence from work, despite the mandatory sanction prescribed in the Disciplinary code of summary dismissal, for first breach.
- 46) We must state from the outset that we agree with the findings by the Court below that wrongful dismissal addresses the procedure adopted in effecting the dismissal whilst unfair dismissal addresses the genuineness or otherwise for the dismissal. We also agree that in dealing with

wrongful dismissal a Court should not act as an appellate tribunal, but rather examine if the procedure prior to dismissal was correct and if the constitution of the disciplinary committee was in accordance with the disciplinary code.

- 47) Turning to the first issue on compliance with the rules of natural justice, the Appellant has contended that it complied with the rules because it afforded the Respondent an opportunity to be heard at the appeal stage.
- 48) The findings by the Court below were that the evidence on record revealed that the letter of dismissal "*blocked*" the adherence by the Appellant to the rules of natural justice. We agree with this finding because the evidence reveals that the Respondent was not charged prior to his dismissal and neither was he invited to exculpate

himself or appear before a disciplinary committee. These are the basic tenets of natural justice which the Appellant failed to comply with.

- 49) It was not enough for the Appellant to merely afford the Respondent an opportunity to be heard only at the appeal stage. We, therefore, hold that the Court below was on firm ground when it found that the dismissal was wrongful especially that, and as argued by the Appellant, an employee is entitled to be heard prior to his dismissal based on conduct pursuant to section 26A of the ***Employment Act*** (as amended 1997).
- 50) Coming to the second issue which deals with the finding by the Court that the Appellant should have considered the reasons for the Respondent's absence from work. The starting point here is to recognize the fact that the disciplinary code

prescribes the mandatory penalty of summary dismissal for the offence for which the Respondent was dismissed. The Appellant has, in this regard, argued that the provisions of the code being the terms and conditions upon which the Respondent's contract of employment was anchored are binding on him and should be enforced to the letter.

- 51) We would like to begin by revisiting the reasoning by the Court below after it considered the evidence. The relevant portion is at page 27 of the record of appeal and it is the one numbered (iii) and (iv) which states in part as follows:

"While it is appreciated that the offence of 'Absent Without Official' Leave (AWOL) for 5 days or more, under Clause 1 of the [Appellant's] disciplinary Code, carries a penalty of summary Dismissal, the Respondent's absence from work for more than 5 days was beyond his control, and the Appellant's management knew this fact which

should have warranted the rules of natural justice to be invoked ...

The Appellant's top management's conduct in this matter is quite suspicious and raises eye brows and a lot of questions, in that all the effort the [Respondent] made to inform the [Appellant] about his predicament /whereabouts, and efforts he made to have his official leave granted was not considered and was totally ignored. It shows they already had a fixed state of mind about the [Respondent] and granting him no room to be heard."

- 52) The foregoing was the basis upon which the Respondent was found to have been unfairly dismissed as the Court below did not accept as genuine the reason advanced for the dismissal.
- 53) We agree entirely with the reasoning of the Court below because although as Courts we are bound to enforce the terms and conditions of a contract between parties, we can only do so when the person seeking to enforce the terms is acting reasonably and the said actions are supported by relevant evidence. In this case as the Court,

below correctly observed, the evidence reveals that the Respondent found himself in a hopeless situation which he sought to remedy by immediately informing his employer and seek official leave. Despite this, the Appellant unreasonably declined to grant the leave and in so doing created a situation that would put the Respondent squarely within the realms of clause 1 of the disciplinary code. We say the Appellant created this situation because by definition "AWOL" is absent without leave; or missing without notice or permission (see **Black's Law Dictionary**). The latter part of the definition denotes that if notice is given for ones absence, as was given by the Respondent to the Appellant, one is not AWOL.

- 54) To the extent, therefore, that the reason given for the dismissal was not genuine, the Court below did not misdirect itself when it found that the Respondent was unfairly dismissed.
- 55) Consequently, this appeal lacks merit in respect of the findings under wrongful and unfair dismissal. The matters however, do not end there because, the Court below went on to award two remedies, that is twenty four months' damages for wrongful dismissal and twelve months' salary as compensation for unfair dismissal.
- 56) The position we have taken is that the two awards were wrong in principle because they arise out of one compensatory event, which is the loss of employment. In granting the two awards the Court below justified them with the fact that reinstatement was inappropriate and that there is

scarcity of jobs on the labour market. The Court relied on a number of our decisions to justify the awards.

- 57) The first of such decision was ***Dennis Chansa v Barclays Bank of Zambia Plc***¹³ in which we upheld an award of thirty six months salary as damages on the ground that with passage of time our awards must increase because the global economies deteriorate the chances of finding employment.
- 58) There is a clear distinction between the principle applied in the award by the Court below, which we upheld, in the ***Dennis Chansa*** case and the one in this case by the Court below in that in the former, the thirty six month salary award was a single award for a single or one compensatory event. In essence, the fact that a single compensatory event had been proved by two facts i.e. wrongful dismissal and unfair dismissal does not mean two remedies should be awarded.

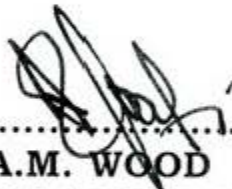
- 59) What we have said in the preceding paragraph must be distinguished from what we said in the ***Kafue District Council v Chipulu*** case which is the second decision the Court below relied upon. In that case we upheld the decision of the lower Court awarding various monetary amounts as damages. These were, inter alia, for inconvenience and mental torture arising out of the appellant's failure to recruit the Respondent. These were proper awards because they were given in respect of the various damages proved to have been suffered by the Respondent. To this extent, the case is distinguishable from this appeal. Likewise, the decision in the ***Singogo*** case is also distinguishable because we only upheld one award of twenty four month salary as damages and struck down the award of six months pay for mental torture.
- 60) In the ordinary course of things we would have been compelled to strike down the two awards by the Court below. We have not done so because, the quantum of damages i.e. thirty six months is in conformity with our decision in the case of

Dennis Chansa v Barclays Bank of Zambia Plc

where we expressed the need for awards to increase because the scarcity of employment is higher by the day on account of deterioration of the global economy.

Conclusion

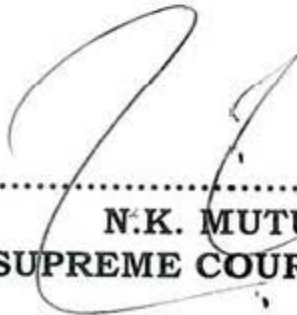
- 61) We accordingly find no merit whatsoever in the appeal and dismiss it with costs. The same are to be taxed in default of agreement.



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A.M. WOOD
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE