IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 86/2017
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

MOPANI COPPER MINES PLC **APPELLANT**

AND

MATHEWS MPHARO **RESPONDENT**

CORAM: Chashi, Siavwapa and Ngulube, JJA
On 21st February 2018 and 24th May 2018

FOR THE APPELLANT: MR. A. GONDWE, LEGAL COUNSEL

FOR THE RESPONDENT: MR. P. KAELA OF GM LEGAL PRACTITIONERS

J U D G M E N T

SIAVWAPA, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. ***Sitali v Central Board of Health (SCZ) Appeal No. 178 of 1999***
2. ***Mumba v Telecel (Zambia) Limited (SCZ) Appeal No. 156 of 2005***

This is an appeal against the Judgement of the court below which found that the Respondent had been wrongfully terminated from employment and awarded damages.

The Appellant has advanced five grounds of appeal as follows;

1. That the learned trial Judge erred in law and in fact when she found contrary to the over whelming evidence on record that the Respondent was not heard on the charge of failing to account for company property because no case hearing was conducted and if it was, it was procedurally unfair to be sustained.
2. That the learned trial Judge erred in law and in fact when she found that the summary dismissal of the Respondent on the charge of failing to account for company property was wrongful contrary to her findings of fact on record.
3. That the learned trial Judge misdirected herself and therefore, erred in law and in fact when she evaluated the evidence on record in an imbalanced manner where only the alleged flaws of the Appellant but not of the Respondent were considered as shown in ground two above.
4. That the learned trial Judge erred in law and in fact when she found contrary to the overwhelming evidence on record that the Employee Relations Department did not conduct any investigations in the Respondent's case which conduct was contrary to Clause 2.5 of the Disciplinary Code.

5. That the learned trial Judge erred in law and in fact when she awarded the Respondent 24 months' salaries plus perquisites, damages for wrongful dismissal contrary to the law and well entrenched principles on the award of damages having found as a fact that at the time of the hearing of this case, the Respondent was in employment at Barrick Lumwana.

The background facts of the case are that the Respondent was employed by the Appellant as an Electrical Foreman in 2000.

In March 2007, he requisitioned for two NEWELEC MOTOR PROTECTION MONITORS as described, after which he proceeded on sick leave. Upon resumption of duties, he found that the motors had been delivered and received by one Enoch Sameta on 28th March 2007. Sameta, who was the custodian of the key to the storage where the motors were kept, showed the Respondent the motors.

In June 2007, the Respondent made a requisition for an Electronic overload CT 500/1 and the same was delivered on 18th June 2007. When the item was subjected to a security scrutiny, it was discovered that it bore the same security secret code as was placed on one of the motors delivered in March. It also turned out that one of the motors delivered in March was missing from the storage where it had been kept. Both the Respondent and Sameta were

subjected to the Appellant's disciplinary process on 19th June 2007 and subsequently dismissed the same day.

They were informed of their right of appeal but they chose not to exercise it. They were later handed over to the police and prosecuted, after which they were acquitted. They then commenced the action whose Judgment is the subject of this appeal but Sameta withdrew from the case leaving the Respondent who was successful and awarded damages.

For the purposes of this Judgment, we shall deal with the grounds of appeal in three sets namely grounds 1 and 2, grounds 3 and 4 and ground 5.

Grounds 1 and 2 attack the learned trial Judge's finding that the Respondent was not heard contrary to Clause 2.6 of the Disciplinary Code and Grievance Procedure. The Appellant, in its heads of argument has submitted that it was erroneous for the learned trial Judge to have held that the Respondent was not heard contrary to the evidence before her.

This submission is premised on the statement at page 31 paragraph 3 of the Record of the Appeal where the learned trial Judge states as follows in her judgment;

"With the foregoing, it is my considered view that the Plaintiff was not heard on the charge of failing to account for company property because no case hearing was conducted and if it was, it was procedurally unfair to be sustained. On this basis, I am satisfied that the Plaintiff's termination of employment was wrongful as it was in breach of Clause 2.6 of the Disciplinary Code. The plaintiff is therefore entitled to an award of damages."

The Appellant's argument is that DW1 and DW2's evidence on record is to the effect that a disciplinary case hearing was conducted and a perusal of the record of proceedings in the court below in particular at pages 204 to 214 and 215 to 219 of the Record of Appeal attests to that effect. We however, also note that the Respondent, in his evidence and cross-examination in particular at pages 197 and 198 of the record of Appeal, said that no disciplinary case hearing was held. Clearly this fact is in dispute between the parties and no attempt was made by the learned trial Judge to resolve it by determining whose witness was more credible than the other.

We nonetheless find that the determination by the Judge was based on the understanding that a disciplinary case hearing consists in the accused making a physical appearance before a duly constituted disciplinary panel to give viva voce evidence or to

answer questions put to him by the panel concerning the charge laid against him.

On the evidence before the learned trial Judge it is clear that the Respondent was written to, to show cause why and he tendered an exculpatory letter. Thus, the learned trial Judge found as a fact as at page 26 paragraphs 7 and 8 of the Record of Appeal.

The learned trial Judge found it as a fact that the Respondent was formally charged with the subject offence on the same date for which he was summarily dismissed.

At page 27 of the Record of Appeal under, **"Issues for determination"** the learned trial Judge listed the following items;

1. Whether or not the Plaintiff attended a formal case hearing on the charge of failing to account for Company property.
2. Whether the Plaintiff's termination of employment was wrongful.

Because the learned trial Judge answered the first question in the negative, she answered the second question in the affirmative. It follows by necessary implication that if the first question was answered in the affirmative, then the second question would have

been answered in the negative to underscore the point that the second question is dependent on the first.

So the main issue that is subject of this appeal is whether the learned trial Judge applied the law correctly to the fact of the disciplinary case hearing.

In her Judgment, the learned trial Judge came to the conclusion that there was no case hearing conducted at which the Respondent was present and we do not assail that finding of fact by the learned trial Judge. What the Appellant contends against that finding is its legal correctness. In other words, did the learned trial Judge apply the correct principle of the law to the facts? Does a disciplinary case hearing only apply to a physical appearance of an accused before a properly constituted disciplinary panel?

The Appellant has argued that, that is not the correct position at law and the case of *Sitali v Central Board of Health*[1] was relied upon.

In that case, the Supreme Court of Zambia held as follows;

> ***"Hearing, for the purposes of disciplinary proceedings is not confined to physical presence of an accused (employee) and giving oral evidence. In our view a submission of an exculpatory letter in disciplinary proceedings is a form of hearing. What is important is that a party must be afforded an opportunity to present***

his or her case or a defence either orally or in writing....."

This holding by the Supreme Court was buttressed by its later holding in the case of *Mumba v Telecel (Zambia) Limited*[2]. In that case it put the matter thus;

"We have pronounced ourselves before on this matter and we shall say it again that the employee is given an opportunity to be heard on the charges levelled against him when he is charged and asked to exculpate himself. There is no format on what an exculpatory statement should take but it is anticipated that the employee concerned will explain fully what transpired in relation to the allegations levelled against him with a view to vitiating those allegations."

On the basis of this holding by the Supreme Court, it is clear that the learned trial Judge misdirected herself in law when she held that the Respondent was not heard. The exculpatory statement he submitted constituted a hearing and as such, it was not necessary for the Appellant to engage in a physical oral hearing with the Respondent. There was therefore no breach of Clause 2.6 on the part of the Appellant to give rise to the claim of wrongful termination of employment.

Clearly, from the facts before the learned trial Judge, procedure was followed and the offence the Respondent was charged with is punishable by summary dismissal in accordance with Clause 4.7.1 (a) of the Disciplinary Procedure Code.

The Appellant therefore succeeds on grounds 1 and 2.

With regard to grounds 3 and 4, the Appellant argues that there was no breach of procedure relating to investigations pursuant to Clause 2.5 and that the learned trial Judge was biased in favour of the Respondent in her evaluation of the evidence.

In view of what we have said on the first two grounds, we do not consider it necessary to delve into these two grounds because the issues raised therein do not inform the lower Court's ratio decidendi as we have demonstrated at the start of this Judgment.

The learned trial Judge awarded damages to the Respondent solely on the basis that the Respondent was not heard and or that he was treated unfairly.

Our findings in relation to the first two grounds of appeal suffice to uphold the appeal in totality and in view of our position on the first four grounds, ground five becomes otiose

We accordingly allow the appeal and set aside the lower Court's Judgment with costs to the Appellant in this Court and each party to bear its own costs in the court below.

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J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE