

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**HOLDEN AT KITWE**  
**(Civil Jurisdiction)**

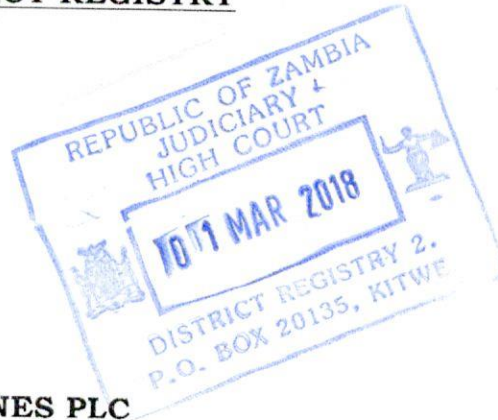
2015/HK/474

**BETWEEN:**

**NATHAN SOMBE**

**AND**

**KONKOLA COPPER MINES PLC**



**PLAINTIFF**

**DEFENDANT**

**Before: Mrs. Justice C. B. Maka - Phiri**

**For the Plaintiff: In Person**

**For the Defendant: Ms. G. Kumwenda of Messrs ECB Legal Practitioners**

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## **J U D G M E N T**

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**Cases referred to:**

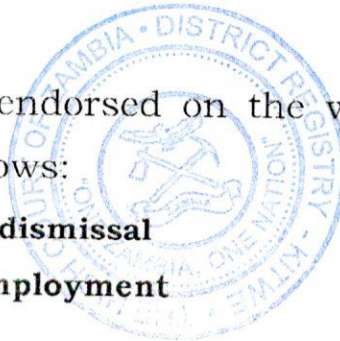
1. **Moses Choongo v. ZESCO Recreation Club, Itezhi Tezhi Appeal No. 168/2013.**
2. **Zambia National Provident Fund v. Chirwa 1986 ZR 70**

**Legislation referred to:**

1. **The Workers Compensation Act No. 10 of 1999**

The Plaintiffs' claims as endorsed on the writ of summons dated 20<sup>th</sup> July, 2015 are as follows:

1. **Damages for unlawful dismissal**
2. **Damages for loss of employment**



- 3. Damages for compensation for failure to send the Plaintiff for medical examination**
- 4. Order for reinstatement**
- 5. Interest and costs**
- 6. Any other relief the court may deem fit.**

At the trial of the matter, the Plaintiff (*hereinafter referred to as PW1*), testified that he started work at Napundwe Mine on 18<sup>th</sup> February, 1990 and was transferred to Nchanga Mine in 2006 where he worked until 2014 when he was dismissed.

Subsequent to his dismissal, PW1 found employment at Dangote and was sent for silicosis test so that he could be given a Certificate of fitness. The Bureau however declined to examine him on account that the finding on his medical report of 2005 was that he was not fit to work. The Bureau gave PW1 a copy of his medical report which is shown in the Plaintiff's bundle of documents. The original copy was sent to the Defendant in 2005. The Plaintiff pleaded with the Bureau to examine him but they refused on account that the doctor had indorsed "rejected permanently" on the report. This revelation at the Bureau prompted PW1 to sue the Defendant for hiding the medical report from him.

With regard to his claims for unlawful dismissal, PW1 testified that he was charged for leaving the place of work and for the loss of ammunition; he attended the hearing and was subsequently dismissed.

PW1 narrated that he was deployed at the Tailings Leach Plant (TLP) on the material date but due to shortage of manpower in the afternoon shift he was taken to the tank houses. The shift officer on night duty however told PW1 that he was supposed to be found at the TLP and not the tank houses and consequently the shift officer charged him with the offence of leaving place of work. PW1 explained that that being a patrol man he was not supposed to be at one place and as such he was not supposed to be dismissed for leaving place of work. PW1 confirmed that the charge of losing ammunition is a dismissible offence under the disciplinary code. PW1's contention was that procedure was not followed as he was laid off before being heard. Further that he sued the defendant because he was not told of the report from the bureau.

When cross examined, PW1 confirmed that he was employed as a mine police and that he did not have any Certificate of fitness in 2006 when he joined Nchanga Division. PW1 blamed the defendant for not having the Certificate of fitness on account that it was the Defendant's responsibility to send him for medical examination. The Plaintiff insisted that the defendant neglected to take him for medical examination which ought to be done annually. He further explained that the medical report is given to the company and not the employee and as such the Bureau did not inform him of his medical condition in 2005.

In re-examination, PW1 explained that the results of the examination are sent to the Human Resource Department who should inform the employee about the results. He further stated that when he joined Nchanga division, he asked the silicosis officers why he was not being taken for silicosis examination and was told to continue working as they investigated the matter.

PW1 further stated that he was laid off on 12<sup>th</sup> May, 2014 after the shift officer discovered that ammunition was missing from the firearm. He conceded that he did not get permission from his superior the time he left the plant. PW1 further conceded that though his shift ended at 22:00 hours on 12<sup>th</sup> May, 2014, he only handed over the firearm the following day around 08:00 hours. PW1 insisted that he did not receive the charges for leaving place of work, failure to secure firearm and negligent loss of one round of ammunition though he was formally informed of the charges before he went home on the 12<sup>th</sup> May, 2014.

PW1 admitted that he received the letter of summary dismissal dated 6<sup>th</sup> June, 2014 but denied receiving the disciplinary case reminder letter dated 28<sup>th</sup> May 2014 shown in the Defendant's bundle of documents. PW1 further confirmed that he appealed against his dismissal and his appeal was heard and rejected.

This marked the close of the plaintiff's case as the Plaintiff did not call any witness.

The Defendant called one witness. DW1, Rodney Mutale is the Assistant Superintendent, Human Capital Management (HCM) in the defendant mine. DW1 confirmed that the Plaintiff was working for the Defendant in the Security Department prior to his dismissal. Further that the Plaintiff had a disciplinary case of missing from place of work and failing to account for company property.

DW1 explained that the Plaintiff as an employee had a right to report to management if he was not going for silicosis but no such report was received. DW1 narrated further that not all employees are designated to go for silicosis examination. That employees in non-scheduled areas are not supposed to go for silicosis, whilst for those in scheduled areas, it is mandatory for them to undergo silicosis examination.

When referred to the Plaintiff's report on medical examination from the Bureau, DW1 confirmed that the report dated 22<sup>nd</sup> September, 2005, clearly stated that the Plaintiff should not continue working as a miner. According to DW1, when the Plaintiff was transferred from Nampundwe to Nchanga division in 2005, the report was not availed to Human Resource at the Defendant's Mine and as such the Defendant was not aware of the Plaintiff's condition. That the Plaintiff worked in a non-scheduled area from 2005 up to 2009 when he was transferred to TLP, a scheduled area. DW1 confirmed

that it was unusual for an employee working in a scheduled area not to undergo silicosis examination.

When cross examined, DW1 conceded that it was mandatory for any employee working in the mining area to have a Certificate for silicosis from the Bureau. Further that it is the silicosis controller who arranges for employees to go for silicosis examination. DW1 insisted that his department never received the Plaintiff's report from the Bureau. He however confirmed that the original copy of the Certificate of silicosis is given to the silicosis controller who is an employee of the Defendant mine.

In re-examination, DW1 confirmed that the silicosis Certificate is not availed to an employee but it is given to the silicosis controller on behalf of the company. Further that the findings of the Bureau are made known to the employee through the silicosis controller who in turn notifies Human Resource Management of the silicosis examination findings.

This marked the close of the defence case.

I have considered the evidence adduced in this matter. It is not in dispute that the Plaintiff started work at Nampundwe Mine as underground lasher in 1990 under the then Zambia Consolidated Copper Mines. In 2005, the defendant transferred the Plaintiff from

Nampundwe to Nchanga Division in Chingola where he worked as Mine Police.

It is further not in dispute that the Plaintiff last went for silicosis examination at the Health and Safety Bureau on 22<sup>nd</sup> September, 2005. The Report on Medical Examination exhibited in the Plaintiff's bundle of documents shows that the Plaintiff was found not fit for work as a miner in any circumstances. The report further stated that the Plaintiff was not eligible to be examined again by the Health and Safety Bureau for a certificate of fitness. It is therefore incontrovertible that the Plaintiff had no Certificate of fitness from 2005 up to 2014 when he was dismissed from employment.

DW1 conceded that the medical report is sent to the employer by the Health and Safety Bureau and it is the employer who should notify the employee of the outcome of the medical examination. I therefore find as a fact that the defendant was in receipt of the original copy of the Plaintiff's medical report. The defendant did not notify the Plaintiff the findings of the report on medical examination and allowed him to continue working in the scheduled area of the mine without a Certificate of Fitness. DW1's evidence that the defendant was not aware of the plaintiff's condition is therefore not true.

It is a fact that the Plaintiff was summarily dismissed from employment on 6<sup>th</sup> June, 2014 for leaving place of work without

permission, failure to secure a firearm and negligent loss of one round of ammunition on 12<sup>th</sup> May, 2014. The letter of summary dismissal dated 6<sup>th</sup> June, 2014 was shown in the Defendant's bundle of documents.

There is evidence from the Plaintiff himself that prior to his dismissal, the Shift Officer formally informed him of the charges of leaving place of work, failure to secure firearm and negligent loss of ammunition on the 12<sup>th</sup> May, 2014 before he went home. The plaintiff admitted that he committed the offences of failure to secure a firearm and negligent loss of ammunition and was very much aware that the two offences are dismissible offences under the disciplinary code. The charge letter in the Defendant's bundle of documents clearly supports the Plaintiff's own testimony and the Defendant's arguments in defence that the Plaintiff was charged with the offence of leaving place of work, negligent loss of one live ammunition and failing to report a missing firearm on 12<sup>th</sup> May, 2014.

There is evidence that the defendant wrote to the Plaintiff requesting him to attend the disciplinary hearing but the Plaintiff never showed up. The disciplinary hearings were therefore in absentia of the Plaintiff. The Plaintiff was therefore accorded a chance to be heard but he chose to stay away.



It is further not in dispute that the Plaintiff appealed against his dismissal in a letter dated 9<sup>th</sup> June, 2014 shown in the Defendant's bundle of appeal. This first appeal was heard on 19<sup>th</sup> June, 2014 and was rejected on account that the offences that the Plaintiff committed were very serious. The Plaintiff lodged in a final appeal on 20<sup>th</sup> June, 2014 which was heard on 1<sup>st</sup> July, 2014 and was again rejected for the same reasons that the Plaintiff had committed serious offences and that his conduct as a custodian of company property on the material date was unacceptable. The rejection of the Plaintiff's final appeal entailed that the Plaintiff remained summarily dismissed from the service of the defendant.

The question for determination is whether the Plaintiff was unlawfully dismissed to be entitled to damages and or reinstatement. The second issue is whether the Plaintiff should be compensated for the defendant's failure to send him for medical examination.

Unlawful dismissal is a dismissal that is effected for a reason that is expressly made unlawful. The courts will therefore look at the reasons of the dismissal to determine whether the dismissal was justified or not. In the case of **Moses Choonga vs. Zesco Recreation Club, Itezhi Tezhi**<sup>(1)</sup>, the Supreme Court found that the appellant's dismissal was unlawful and unfair because the reason given for the termination of the contract was not related to

the capability or qualifications of the employee in performing his duties as cleaner.

In the case in casu, the Plaintiff was dismissed because he had committed dismissible offences of failure to secure a firearm and negligent loss of ammunition. The plaintiff admitted that he committed the two offences and was very much aware that the two offences are dismissible offences under the disciplinary code. The plaintiff's only contention was with the offence of leaving place of work which he alleges he should not have been charged with as he was a patrol man by virtue of which he was not supposed to be found in one place. The evidence however clearly establishes that the plaintiff left the place of work without permission and the defendant was justified to find him guilty based on the facts that were before it. It is therefore my considered view that the Plaintiff's dismissal was not unlawful and unfair. The defendant was justified to dismiss the Plaintiff as he had committed dismissible offences.

The Plaintiff also contended that procedure was not followed as the defendant laid him off before he was formally charged. The issue before court is one of dismissal and not being laid off. Suffice to note that the position of the law as was held in the case of **Zambia National Provident Fund V. Chirwa**<sup>(2)</sup> is that;

**“Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal, and he is so dismissed, no injustice arises from failure to comply with laid down procedure in the**

**contract and the employee has no claim on the ground for wrongful dismissal, or a declaration that the dismissal is a nullity.**

It is my considered view that the Plaintiff did not suffer any injustice when the shift officer laid off on the 12<sup>th</sup> May, 2014 after he discovered that the Plaintiff had left place of work. Further the Plaintiff case was exhaustively considered on appeal and the fact that the Plaintiff had committed dismissible offences was reaffirmed. It is clear that Plaintiff's dismissal was therefore not wrongful in any way.

With the foregoing, I come to the conclusion that the Plaintiff's claim for damages for unlawful dismissal and loss of employment has no merit and it is hereby dismissed. The Plaintiff's claim for an order for reinstatement cannot equally be sustained on account that the plaintiff's dismissal was not unlawful, unfair or wrongful. It should be noted that a reinstatement is a discretionary remedy that the court may grant sparingly order once it finds that the dismissal was wrongful.

The last question for determination is whether the Plaintiff is entitled to damages for compensation for failure to send the Plaintiff for medical examination. The facts of this case disclose that the plaintiff and defendant were in a legal relationship. The defendant as employer owed the Plaintiff a statutory duty to take him for medical examination annually. This requirement is prescribed

under section 34 and 35 of the **Workers' Compensation Act No. 10 of 1999**. The defendant did not take the Plaintiff for periodical medical examination from 2006 up to 2014 when he was dismissed. The Plaintiff worked without a Certificate of fitness when the Act makes it mandatory for any employee working in scheduled areas of the mine to have a certificate of fitness. The defendant went further and concealed the results of the medical examination from the plaintiff and yet it was the obligation of the defendant as employer to notify the Plaintiff of the results from the examiner at the Health and Safety Bureau.

The facts of this case clearly disclose that there was a breach of statutory duty by the defendant. The defendant's conduct not to notify the Plaintiff of his medical condition as found by the Health and Safety Bureau precluded the Plaintiff from pursuing the prescribed procedures and statutory remedies that were available to him under the Workers' Compensation Act upon being found unfit to work in any circumstances. Such remedies include a life pension from the Workers' Compensation Fund Control Board.

I am therefore satisfied that notwithstanding the manner in which the claim is couched on the writ of summons, the Plaintiff has demonstrated that the defendant had breached its statutory duty that it owed to the plaintiff and his claim is founded on the same. It is therefore my considered view that the plaintiff is entitled to damages for this breach.

I therefore award the plaintiff a lump sum equivalent of the Plaintiff's 24 (twenty four) months' salary based on his last drawn salary together with interest at the prevailing average lending rate from date of writ to date of Judgment and thereafter at short term deposit rate until full payment.

The plaintiff has partly succeeded on his claims. I therefore order that each party will bear its own costs.

Leave to appeal is hereby granted.

Delivered in Open Court at Kitwe; this 1<sup>st</sup> day of March, 2018

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**C. B. MAKA - PHIRI (MRS.)  
HIGH COURT JUDGE**