IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL No. 78/2016
APPEAL No. 81/2016

(Civil Jurisdiction)

BETWEEN:

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED	**APPELLANT**
AND	
MIRRIAM SHABWANGA	**1ST RESPONDENT**
MAANGA SISHEKANO	**2ND RESPONDENT**
SAMUEL MWANDALESA	**3RD RESPONDENT**
PAMELA MWANANSHIKU	**4TH RESPONDENT**
MWABA KAPOKA	**5TH RESPONDENT**
CAROLINE MWANSA	**6TH RESPONDENT**

CORAM: Mambilima, CJ, Kajimanga and Kabuka, JJS,

On 5th March, 2019 and 11th March, 2019.

FOR THE APPELLANT: Mr. M. Chiteba, Mulenga Mundashi, Kasonde & Co.

FOR THE RESPONDENTS: Mr. K. Kaunda, Messrs. Ellis & Co.

JUDGMENT

KABUKA, JS, delivered the judgment of the Court.

Cases referred to:

1. Caroline Tomaidah Daka v Zambia National Commercial Bank (2012) ZR 8 HC.
2. Pamodzi Hotel v Godwin Mbewe (1987) ZR 56.
3. Barclays Bank Zambia PLC v Zambia Union of Financial Institutions and Allied Workers, SCZ Judgement No.12 of 2007.
4. Zambia National Provident Fund v Chirwa (1986) ZR 70.
5. Chimanga Changa v Ngombe (2010) ZR 208.
6. Ward v Bradford Corporation (1971) 70 LG. 27.
7. Boniface Siame v Mopani Copper Mines PLC, SCZ Appeal No. 75 of 2013.
8. Amiran Limited v Robert Bones, SCZ Appeal No. 42 of 2010.
9. The Attorney General v E.B. Machinists Limited, SCZ Appeal No. 26 of 2000.
10. Autry Chanda v Barclays Bank Zambia Plc, 2013 (2) ZR 238.
11. Attorney General v Richard Jackson Phiri 1988-1989 ZR 121.
12. Mulungushi Investments Limited v Gradwell Mafumba, SCZ Appeal No.141 of 1997.
13. National Breweries Limited v Phillip Mwenya 2002 ZR 78.
14. Undi Phiri v Bank of Zambia 2007 ZR 186.
15. Tap Zambia Limited v Limbusha and Others, Appeal No. 31 of 2015.
16. BP Zambia Plc v Expendito Chipasha & 235 Others, SCZ Appeal No. 189 of 2016.
17. Zambia National Commercial Bank Plc v Joseph Kangwa, SCZ Appeal No.54 of 2008.
18. Carr v Allen Bradley Electronics Limited [1980] ICR 603.
19. Wilson Knowsley Metropolitan Borough Council (1989) The Times, November 2011.
20. Callister Kasongo v Mansa Milling Limited (APG Milling) & 4 Others, SCZ Appeal No. 184 of 2014.
21. Yeta v African Banking Corporation, SCZ Appeal No.117 of 2013.

Legislation and Other Works referred to:

1. The Industrial and Labour Relations Court Rules, r.44 (1)
2. The Sheriffs Act Cap. 37 s. 14 (2)

Introduction

1. The appellant filed two separate appeals. The first was against the substantive judgment, while the second, was against a ruling on execution of the same judgment.

2. The appeal filed against the substantive judgment is against the finding of the Industrial Relations Court (IRC) that the respondents were wrongfully and unfairly dismissed from employment.

3. On the ruling, the appeal is directed at the refusal by the trial court, to award the appellant costs for wrongful execution, when it had set aside the writ of execution for irregularity.

4. As the two appeals arose from the same action, between the same parties and are on matters decided by the same court, we, for convenience, ordered that they be heard together so that they are disposed of in one judgment, which we now do.

Background

5. The history of the matter is that, the respondents were, on diverse dates, employed by the appellant as Consumer Sales Consultants to sell cell-phones, accessories, sim-cards, airtime and other related products.

6. The respondents were placed on two year fixed term contracts, renewable at the discretion of the appellant, for a further three years. At the material time, in the first quarter of 2013, the respondents had all completed their two year contracts, which had been renewed for a further three years.

7. As part of their duties, the respondents were between 2010 and 2012, whilst serving their two year contracts, assigned work for which the appellant had set targets intended to achieve an active mobile subscriber base of 600,000 by the end of 2011. The appellant also set to achieve, within the same period, a net revenue amounting to K590, 092, 309, 388 (unrebased).

8. To enable them achieve the intended goals, the respondents were accorded wide latitude by the appellant, to individually

identify, recruit and supervise agents known as Direct Sales Agents ("DSAs"), also referred to as Consumer Sales Assistants ("CSAs"). It was on the recommendation of the respondents that the appellant then, entered into fixed term contracts with each of the DSAs. The respondents however, ultimately remained the point of contact and overall supervisors of the DSAs.

9. It was also the sole responsibility of the respondents to obtain stock from the appellant's stores for which they signed and there was no limit placed on stock drawn. A requisition form was approved by the head of department and a relevant finance officer.

10. The respondents in turn made the DSAs sign for stock passed on to them for direct sale to the public. The DSAs were, on a daily basis at 4:30 p.m. obligated to remit the monies made by them back to the respondents, who in turn, would then remit and account to the appellant.

11. This system appeared to work well, until an audit was conducted for the period October, 2011 to January, 2012. The audit revealed that huge amounts of company stock worth

K123, 544.75; K23, 400.00; K35, 169.62; K175,918.00; K93,120.00 and K51,362.85 in the total sum of K502, 515. 22 (unrebased) was unaccounted for by the 1st to the 6th respondents, respectively.

12. The respondents were verbally asked to explain the losses but their explanations were found to be unsatisfactory. On the 13th and 14th February, 2013 the appellant proceeded to formally charge them for failure to account for company stock pursuant to clause 15.0.58, of the appellant's disciplinary code.

13. In their written exculpation to the charge, the respondents denied any wrong doing and raised a uniform defence, that it was the DSAs who were responsible for the loss, as they had disappeared with the appellant's stock. Police reports were produced showing the alleged thefts had been duly reported by the respondents.

14. The respondents further denied the charge on the basis that, as the appellant had subsequently entered into individual contracts with the DSAs, it was its responsibility to pursue the matter directly with them.

15. Following a formal disciplinary hearing of the matter, the disciplinary committee found that the respondents did not deny drawing stock during the period in question, and failing to cash in the amounts, corresponding to the stock requisitioned.

16. In the absence of sufficient evidence or none at all, from the respondents to show that the DSAs had obtained the stock in question from themselves, the disciplinary committee found that the offence charged was established. As dismissal was the penalty for the offence, by letters dated 28th March, 2013 the respondents were dismissed from employment and their appeal to the appellant's CEO was unsuccessful.

Notice of complaint and answer filed before the Industrial Relations Court

17. Dissatisfied with that outcome, the respondents filed a notice of complaint before the IRC seeking damages for the unfair and unlawful dismissal arising from alleged failure to account for company stock, compensation and costs of the matter.

18. The substance of their claim was that, from the time that the stock had begun disappearing, they had informed the

appellant's management and reported the various incidences of missing stock to the police.

19. In its answer to the notice of complaint, the appellant denied the respondents' claims and averred that, the respondents had obtained company stock on diverse dates, to hand over to the DSAs whom they had personally, recommended to the appellant to engage.

20. That after an audit was conducted covering a specified period, it was discovered that the respondents had not accounted financially, for all the stock individually drawn by themselves from the company. They were accordingly charged for failure to account for company stock, materials and cash; and, were only dismissed after due hearing by the disciplinary committee. The appellant maintained that, the respondents were not entitled to the relief they were seeking.

Evidence of the parties before the Industrial Relations Court

21. At the hearing of the matter before the trial court, the respondents confirmed in their evidence that, they were employed as Consumer Sales Consultants and part of their

duties was to identify and recommend DSAs for recruitment by the appellant.

22. The respondents also admitted that, when they collected company stock, they handed it over to the DSAs under their supervision to sell. That this was done in the presence of one of the appellant's representatives. The respondents however, insisted, that the DSAs were the culprits who ran away with the stock and a report was made for all such incidences to their superiors as well as to the police.

23. The respondents further testified that they were never availed with minutes of the disciplinary proceedings and saw them for the first time with their lawyers. And, that at the end of their two year contracts, only the 3rd and 5th respondents were paid their gratuity.

24. The substance of the appellant's evidence in defence was that, an audit was carried out in 2012 and discrepancies were found in amounts remitted by the respondents against stock they had obtained. They were accordingly, charged with failure to account for stock.

25. That in answer to the charge, the respondents submitted a number of police reports claiming that DSAs stole the stock and run away. The problem the appellant found with these reports was that, the contents were based solely on what the respondents had said to the police.

Findings and decision of the trial court

26. After considering the evidence led before it, the trial court found that at the expiry of each respondent's first contract, all the respondents received a renewal for a further 3 years and that out of the six respondents, only the 3rd and 5th were paid their end of contract gratuity.

27. The court also found that, the respondents were not availed minutes of the proceedings following their dismissal, and that they did not agree with the contents of the said minutes.

28. The trial court was nonetheless satisfied, that the respondents had all been properly charged and received charge letters to appear before the disciplinary committee to exculpate themselves. That, as consumer sales consultants who signed for the company stock in issue the respondents were

accountable for the said stock; particularly that, the DSAs were only employed by the appellant, following identification and recommendation by themselves.

29. The court went on to observe that, what was to be determined legally, was whether the respondents had been wrongfully and unfairly dismissed from employment, as claimed.

30. On the question of wrongfulness, the court considered that wrongful dismissal looks at the form of dismissal relating to established or documented disciplinary procedure. That this involves an employee being charged with an offence contained in a disciplinary code; given the chance to exculpate himself at a properly constituted hearing; and the outcome or verdict made known to him in writing with a chance to appeal the decision. The outcome on appeal, should again be communicated to him in writing.

31. On unfairness of a dismissal, the court noted that it considers the merits and looks at the reasons for the dismissal in determining whether the decision reached was just. The High court case of **Caroline Tomaidah Daka v Zambia National**

Commercial Bank[1], was relied upon as re-states the position that, unfairness being statutory, is linked to the protection of the right of employment and promotion of fair labour practices. Employers are thus, required to only terminate on specified and reasonable grounds.

32. The case of **Pamodzi Hotel v Godwin Mbewe**[2] was also cited for the holding that, a decision to dismiss cannot be questioned, unless there is evidence of malice or if no reasonable person could form such an opinion.

33. Informed by the cited cases, the trial court on the one hand, found that the disciplinary process had been followed by the appellant when it charged the respondents.

34. On the other hand, the court found that the dismissal of the respondents was wrongful due to a procedural flaw, on account of failure by the appellant to comply with clause 13.9 of the disciplinary code and grievance procedure, which required all members of the disciplinary committee to sign the record of proceedings. That, from the six members that sat to

hear the respondents' case, only two had signed the minutes of the hearing.

35. The reasoning of the trial court was that, since the disciplinary code and grievance procedure formed part of the signed contract of employment between the respondents and the appellant, a violation of clause 13.9 was a breach of contract by the appellant, which rendered the dismissal wrongful.

36. Since the minutes of the disciplinary hearings were found to be a nullity, the respondent's dismissals which were premised on the same, were also said to be unfair. The court expressed its conviction that, had the respondents been given the minutes of their disciplinary case hearings, '*the invalidity and the disputable details would have definitely added to and strengthened their grounds of appeal, and that had there not been malice, the appeals committee would not have upheld the dismissal of the respondents.*'

37. After considering that an order for reinstatement would be unreasonable in the circumstances where the parties had an acrimonious working relationship, the appellant was ordered

to pay each of the respondents one month's salary for wrongful dismissal and six months' salary for unfair dismissal, in damages.

38. The court also ordered that, the 1st, 2nd, 4th and 6th respondents be paid their gratuity as provided for in their contracts. Interest at short term commercial bank rate was ordered on all amounts due. The trial court, however, did not ascertain the amounts due in its judgment.

39. That position notwithstanding, the respondents unilaterally computed amounts which they considered they were entitled to, and on which they proceeded to issue a writ of fi.fa. Execution was levied by the Sheriff on the appellant's property for a sum of K13, 601, 693.17 (unrebased), which the appellant disputed as being much higher than the amounts to which the respondents were entitled.

40. The appellant was compelled to seek redress and made three applications before the trial court: to set aside the writ of fi.fa for irregularity; for the prevention of sale of its seized assets; and an application for stay of execution pending appeal to this Court.

41. The appellant relied on **section 14 (2) of the Sheriff's Act, Cap. 37 of the Laws of Zambia** which provides for liability for wrongful issuance of a writ of execution, and the case of **Barclays Bank Zambia PLC v Zambia Union of Financial Institutions and Allied Workers[3],** where we held that, execution can only be levied on amounts found due by the court in a judgment or agreed to by the parties and incorporated into a consent judgment.

42. In its ruling, the trial court found that the amount endorsed on the writ of fi.fa was clearly wrong, and exaggerated, on the basis of which the writ of fi.fa was set aside for irregularity. On the issue of costs associated with the wrongful execution however, the court ruled that, it was in its sole discretion whether or not to allow the respondents to bear the cost of execution.

43. **Section 85 (5)** of the **Industrial and Labour Relations Act, Cap. 269** was relied upon in holding that, when balancing the interests of the parties and the mandate to dispense substantial justice, allowing the respondents to bear the cost

of the execution, would 'wipe out' the damages awarded to them in the judgment.

Grounds of appeal to this Court

44. It is against those findings that the appellant filed two grounds of appeal against the judgment, subsequently amended by leave of court, to three. Another three grounds of appeal were filed against the ruling. Stated in chronological order, the six grounds are as follows:

1. **The Industrial Relations Court erred in law and fact by focusing on the incompleteness of the minutes of the disciplinary hearing notwithstanding evidence showing that the respondents had committed dismissible offences and were in fact so dismissed.**
2. **The Industrial relations Court erred in law and fact by holding that failure to show the respondents the minutes of their disciplinary hearing was unfair, which finding was contrary to the applicable conditions of service.**
3. **The court below erred in law and fact when it awarded costs of the proceedings to the respondents in the absence of improper conduct in the proceedings on the part of the appellant.**
4. **The court below erred in law and fact when it held that it was not necessary for the judgment sum awarded to the respondents to be referred to assessment before a writ of execution could be issued to enforce the judgment.**

5. **The court below erred in law and fact when it held that it had the discretion to determine whether to hold a party liable for the damages and costs arising out of a wrongful execution of a writ of execution issued at its instance.**

6. **The court erred in law and fact when it declined to hold the respondents liable for the costs of the wrongful execution undertaken at their instance, on the basis of the provisions of section 85 (5) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**

Written heads of argument were filed by counsel for the parties on both sides which were briefly augmented orally, at the hearing of the appeal.

Arguments by the appellant on the two appeals

45. In the heads of argument filed on record, counsel for the appellant argued grounds one and two together. The case of **Zambia National Provident Fund v Chirwa**[4] was relied upon where this Court held that, when it is not disputed that an employee has committed an offence for which the appropriate punishment is dismissal, and he is so dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and such employee has no claim for wrongful dismissal or a declaration that the dismissal is a nullity.

46. Counsel further cited our holding in the case of **Chimanga Changa v Ngombe,**[5] that an employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt, that the employee committed an act in question, but only to act reasonably in coming to a decision.

47. Premised on those holdings, learned counsel argued that, the main consideration in deciding whether to uphold the dismissal of the respondents was whether, there was a reasonable basis for the dismissal and the respondents were accorded an opportunity to be heard irrespective of any lapses in the procedure.

48. That the trial court below did not consider the substance of the allegations against the respondents, but overturned their dismissals on a mere procedural consideration, that disciplinary hearing minutes were not properly signed.

49. He submitted that, in taking that approach, the trial court misdirected itself as it did not address the question, whether the dismissals were infact justified or reasonable on the evidence before it. Counsel relied, for this submission, on the case of **Ward v Bradford Corporation**[6] where it was held that,

disciplinary bodies must not be caught up in nets of legal procedure, as long as they act fairly and justly, their decisions should be supported.

50. The further argument by counsel was that, as the respondents were responsible for the recruitment of DSAs and monitoring proceeds of their daily sales, they were required to keep all relevant documentation on file.

51. The common theme of the respondents' exculpatory statements was, however, that the stock not accounted for was stolen by the DSAs under their supervision. Challenged to show proof that the DSAs accused of stealing stock had acknowledged receipt by signing for the stock, the respondents failed to produce such evidence, even after the disciplinary hearings were adjourned for them to do so.

52. The submission in that regard was that, the failure by the respondents to substantiate their allegation that stock was stolen by the DSAs is confirmation that they failed to account for company stock and therefore, committed the offence with which they were charged.

53. It was also counsel's argument that, the trial court ought to have delved into the question of whether the respondents had adduced evidence to show that they had accounted for the stock in issue in order to invalidate the decision to dismiss them. The submission on the point was that, failure by the trial court to do so, was a misdirection and the dismissals ought to have been upheld.

54. Counsel for the appellant discounted the respondents' attempt at using the police reports submitted as a way of accounting for stock obtained and argued that, the police reports were unreliable as the information they contained was based on what was submitted to them by the respondents.

55. The further submission was that, in addition to failure to account for stock obtained being an explicitly dismissible offence, the trust between the respondents and the appellant had been eroded. The **Chimanga Changa**[5] case was again, called in aid of the submission that, taking into account all the circumstances, the appellant acted reasonably in dismissing the respondents.

56. Regarding the court's finding that failure to show the respondents minutes of the disciplinary hearing was unfair and undermined the internal appeal process, the appellant cited the case of **Boniface Siame v Mopani Copper Mines Plc[7],** where this Court held that, the overriding factor in a case of dismissal is whether the employee has been given an opportunity to exculpate himself before a decision to dismiss him is taken. The submission in that regard was that, failure to avail minutes to the respondents cannot be a basis for reversing of the dismissals.

57. On ground three, the appellant argued that, the court erred in awarding the respondents costs in the absence of evidence of improper conduct in the proceedings, on its part. The appellant relied on **rule 44 (1)** of the **Industrial Relations Court Rules** which provides that, an order for costs or expenses should be made where it appears to the court that a person is guilty of 'unreasonable delay, taking improper, vexatious or unnecessary steps in any proceedings or other unreasonable conduct.'

58. A case in point was said to be **Amiran Limited v Robert Bones[8],** in which despite the appellant having succeeded on appeal, this Court still decided that, each party bear its own costs on the premise that, there was no improper conduct on the part of the respondent in defending the appeal, to warrant costs being ordered against him.

59. The appellant's arguments on grounds four and five were substantially the same as presented in their submissions before the trial court, that execution can only be levied on amounts found due by the court in a judgment or agreed to by the parties. The case of **The Attorney General v E.B. Machinists Limited[9],** was cited to support the submission that, a Sheriff acts on behalf of the executing party, and such party is liable for any damage arising out of any irregular execution which proceeded at their instance.

60. On ground six, the appellant's submission was that, the court fell into error when it refused to hold the respondents liable for costs of wrongful execution on the basis of **section 85 (5)** and cited the decision in the case of **Autry Chanda v Barclays Bank Zambia Plc[10]** that, substantial justice calls upon the

Industrial Relations Court to dispense justice for the benefit of both parties.

Respondent's arguments in response

61. In the respondents' heads of argument counsel for the respondent in answer to grounds one and two, submitted that, the minutes of the disciplinary hearing were part of the disciplinary procedure. And, this Court has held in a plethora of cases that failure to comply with such procedure can only be disregarded where an employee has admitted committing an offence or the same has been proved against the employee.

62. The submission was that, none of the respondents admitted the offence of failing to account and that the evidence shows that the respondents denied the charges proffered against them and fully accounted for the stock as demonstrated by their exculpatory letters.

63. It was further submitted that, the appellant's disciplinary code does not provide for the manner in which an employee should account for stock, but that the respondents still complied through police reports showing that, the DSAs had stolen the stock.

64. Learned counsel for the respondent argued that, the case of **Braford Corporation**[6] cited by the appellant, only confirms that the appellant acted unfairly and unjustly by breaching clause 13.9 of the disciplinary code which mandates all members of the disciplinary committee to sign and thus approve the minutes. That the failure to verify the police reports submitted, also confirms that the appellant did not carry out its investigation as was stated in the **Chimanga Changa**[5] case.

65. Counsel referred to Black's Law Dictionary for a definition of 'account' meaning; *"to furnish a good reason or convincing explanation for; to explain the cause..."* and argued that, having given full account or explanation as to what happened to the stock, the respondents did not fail to account as alleged. The submission was that, the appellant flouted its own procedures and since the offences were not admitted or proved, this procedural impropriety cannot be ignored.

66. On ground three, challenging the award of costs of the matter to the respondents as successful parties to the proceedings

before the trial court, the submission was that, the ground is misconceived as costs follow the event.

67. On grounds four and five, counsel for the respondents argued that, the appellant's reliance on **section 14 (2) of the Sheriffs Act,** is also highly misconceived as the provision provides for 'damage arising' which must be proved by way of trial and does not include costs of execution.

68. Counsel concluded his submissions in ground six, with the submission that, the court was on firm ground when it refused to award costs based on **section 85 (5) of the Act** which provides for the IRC to do substantial justice. That there would be no justice for the respondents if the compensation they were awarded were wiped out by the costs for wrongful execution.

Consideration of the matter by this Court and decision

69. We have considered the evidence on record, heads of argument, submissions by counsel and the case law to which we were referred.

70. We propose to deal with grounds one and two together, which is the manner in which they were argued. Thereafter, we will consider ground four and then proceed to conclude with the issues of costs raised in grounds three, five and six of the appeal.

71. Grounds one and two attack the importance attached to the minutes of the disciplinary hearing, by the trial court; and the finding that, failure to avail them to the respondents amounted to unfairness. The issue raised in grounds one and two rests on the question of whether, failure to comply with a procedural requirement is sufficient to reverse a dismissal where an employee committed the dismissible offence charged and was infact dismissed.

72. From the evidence on record, it is not in dispute that the respondents were given absolute discretion to identify and recruit persons personally known to them, to be employed as DSAs by the appellant, in order to meet the sale targets set by the appellant. It is also not in dispute that the respondents were the immediate supervisors of the DSAs; and the ones solely responsible for requisitioning stock from the appellant.

Individual DSAs acknowledged receipt of the same from the respondents, by signing for actual stock obtained.

73. The respondents being in charge of large amounts of stock that was passed on to the DSAs, were also in charge of receiving monies for stock sold by the DSAs which they, in turn, accounted for to the appellant. Following the audit report that revealed stock that was unaccounted for and missing, the respondents as the middlemen between the appellant and the DSAs were charged with failure to account for the stock in issue.

74. The trial court, as rightly observed by the appellant, made an initial finding of fact at page 23 of the judgment in volume 1 of the record of appeal, 'that it was indisputable that the respondents as Consumer Sales Consultants who had signed for company stock in issue were the ones to be held accountable for it.'

75. However, after correctly making that finding from the evidence, and determining that the appellant had indeed followed its disciplinary process when charging the respondents and giving them a fair hearing, the trial court misdirected itself, when it

went on, to further find that the disciplinary process was faulty, due to a procedural flaw in the signing of minutes of the proceedings.

76. This Court has consistently in many previous decisions, including the case of **Attorney General v Richard Jackson Phiri**[11], held that:

> **"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 it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same."**

77. It is not in dispute in the case *in casu,* that the respondents, as the receivers of the company stock, were called upon to account for stock disbursed, a finding which the trial court made and a fact that the respondents themselves did not dispute. Their only defence was that, the police reports which merely stated what the respondents themselves had told the police about the missing stock, should be accepted as giving account.

78. The appellant rejected that proposition and rightly so, in our view, as the records of appeal disclose that, the respondents

did not avail any other documentary evidence to show that the quantities stated in the police reports corresponded with those given out to the DSAs. When the respondents were accorded an opportunity to produce before the disciplinary committee, acknowledgment of receipts of the missing stock by the DSAs, they failed to do so.

79. That was so, notwithstanding evidence that the respondents personally recruited the DSAs, whom they recommended for employment to the appellant. The 5th respondent, Mwaba Kapoka in his evidence confirmed that he had recommended two cousins, two nieces and two friends to his nieces for employment as DSAs working under his supervision.

80. Granted those circumstances, the respondents cannot be heard to claim that they are not to blame for the loss of company stock when the said stock was handed over to persons they obviously knew and whose whereabouts they should have been able to trace.

81. That substratum of facts, in our view, supported the decision reached by the appellant to dismiss the respondents, for an

offence whose penalty was a dismissal, thereby rendering any procedural flaws in the minutes irrelevant.

82. As we stated in the **Chirwa**[4] case, when it is established that an employee has committed an offence for which the appropriate punishment is dismissal and he is infact dismissed, there is no injustice that will arise from a failure by the employer to comply with the disciplinary procedure laid down in the contract, and such employee has no claim on that ground for wrongful dismissal.

83. We have further, restated this position in a plethora of cases such as **Mulungushi Investments Limited v Gradwell Mafumba**[12]**; National Breweries Limited v Phillip Mwenya**[13] and **Undi Phiri v Bank of Zambia**[14]**,** amongst others.

It is for those reasons that we find merit in grounds one and two of the appeal and we uphold them.

84. In proceeding with ground four, suffice to state that, we agree with the appellant that it is indeed irregular for a judgment creditor to unilaterally make their own computation of a judgment sum and endorse the amount in a writ of fi.fa This was the holding made by this Court in the **Allied Workers**[3]

case, and, more recently, in **Tap Zambia Limited v Limbusha and Others**[15] and **BP Zambia Plc v Expendito Chipasha & 235 Others**[16]**.** We, in those cases, emphasised the requirement to have such amounts ascertained either in the judgment itself or by other order of the court which may be obtained by consent or through an assessment, before a party can issue a writ of execution. And, that to proceed otherwise, is an irregularity.

Ground four of the appeal is accordingly upheld.

85. Finally, on grounds three, five and six, where the appellant argued that, the Industrial Relations Court (now Labour Division of the High Court) erred in holding that it had discretion: in ground three, whether to hold an unsuccessful party liable for costs of the proceedings; in ground five and six, to decide whether or not to award damages and costs arising out of wrongful execution of a writ of fi.fa; on the basis of upholding its mandate under Section 85 (5) to do substantial justice.

86. Starting with the first argument subject of ground three of the appeal, faulting the trial court for awarding costs to the

respondents who were the successful parties in that court. The appellant argued to the effect that, **rule 44 (1) of the Industrial Court Rules** does not give that court discretion to award costs except for various acts of misconduct as specified in the rule having arisen, which are stated as: 'unreasonable delay, taking improper, vexatious or unnecessary steps in any proceedings or other unreasonable conduct.'

87. We are mindful of the general principle on costs that, costs normally follow the event. However, **rule 44 (1)** in issue specifically directs when costs can be awarded in Industrial Relations Court matters and reads as follows:

> **"Where** it appears to the Court that **any person has been guilty of unreasonable delay,** or of **taking improper, vexations** or **unnecessary steps** in any proceedings, or of **other unreasonable conduct, the Court may make an order for costs or expenses against him."** (boldfacing for emphasis supplied)

88. As was spiritedly argued by learned Counsel for the appellant, the issue is by no means a novel one. This Court has had occasion to consider **rule 44 (1)** in at least two previous decisions; **Amiran Limited**[8] and **Zambia National Commercial Bank Plc v Joseph Kangwa**[17].

89. In the **Amiran**[8] case relied on by counsel for the appellant, our holding was that:

> **"With regard to costs, Rule 44 of the Industrial Relations Court Rules contained in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides that in matters before the Industrial Relations Court, costs can only be awarded against a party if such party is guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. With appeals that come from the Industrial Relations Court, we adopt the principle in that rule. In this case, the appeal was filed by the appellant and it has succeeded. The respondent had no choice but to come and defend the appeal. In the course of this appeal, the respondent has not been guilty of any conduct that would warrant costs being ordered against him. Therefore we shall order that each party bear their own costs."**

90. In the **Joseph Kangwa**[17] case which was decided later, we again, had this to say:

> **"With regard to costs, Rule 44 of the Industrial Relations Court Rules contained in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides that a party should only be condemned in costs if they have been guilty of misconduct in the prosecution or defence of the proceedings. We wish to adopt the principle in that rule since this is a matter coming from the Industrial Relations Court. We do not find any misconduct in the respondent's defence of this appeal. Therefore, either party will bear their own costs, both here and in the court below."**

91. We are accordingly satisfied that **rule 44 (1)** is unambiguous in that it restricts the Industrial Relations Court's discretion in

the award of costs to the instances as specified therein to include matters which are either *frivolous* or *manifestly misconceived* as was held in the English cases of **Carr v Allen Bradley Electronics Limited**[18] and **Wilson Knowsley Metropolitan Borough Council (1989) The Times, November 2011**[19].

92. Considering the history of the IRC, that it was established as an Employment Tribunal, we have no doubt that the rules were intended to guard against abuse of the court process through unreasonable delays, unnecessary or vexatious applications whilst ensuring that genuine litigants were not discouraged from pursuing and asserting their rights on account of cumbersome rules of evidence and litigation costs to which they could be condemned. Ground three, faulting the trial court for having ignored **rule 44 (1)** of the Industrial Relations Rules equally succeeds.

93. In concluding with grounds five and six, attacking the trial court for having declined to award the appellant costs arising out of a wrongful execution of a writ issued at its instance, on

the basis of **section 85(5) of the Act,** and in light of **section 14 (2) of the Sheriffs Act,** as argued by the appellant.

94. **Section 14 of the Sheriffs Act,** in issue, provides for indemnifying of the Sheriff against any claims for damages in the lawful execution of his duties, by the party at whose instance the execution is levied, in the following terms:

> **14. (1) The Sheriff shall not be liable to be sued for any act or omission of any Sheriff's officer, police officer or other person in the service of any writ or the execution of any process which shall have been done, or omitted to have been done, or which may have occurred either through disobedience to or neglect of the orders or instructions given by the Sheriff.**
>
> **(2) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance.**

95. While the above section makes it clear that a party who issues a writ of fifa irregularly, is liable for any damage arising from such action and we agree with learned counsel for the respondents that where the aggrieved party seeks to pursue damages for wrongful execution, the proper approach is to commence proceedings as that claim constitutes a cause of action.

96. That may very well be the way to proceed in a claim for damages for wrongful execution. In the **Allied Workers**[3] case relied on by counsel for the appellant, we unequivocally held that, the party that issues a writ of fi.fa irregularly must bear the 'costs' of the wrongful issuance and execution. We reiterated this position in **Expendito Chipasha**[16], also cited by learned counsel for the appellant.

97. Ground five of the appeal which faults the trial court for having held that it has discretion in deciding whether or not to condemn a party at whose instance an irregular writ was executed, contrary to the specific provision of section 14 of the Sheriffs Act, succeeds.

98. Coming to the final aspect in ground six, on substantial justice as the reason for denying the appellant costs for wrongful execution, we are at pains to see the relevance of **section 85 (5) of the Act** and its applicability to the issue of costs as held by the trial court. We have in numerous decisions of this court, including that of **Callister Kasongo v Mansa Milling Limited (APG Milling) & 4 Others, SCZ Appeal no. 184 of 2014**[20] said that, the substantial justice

referred to in the provision relates to circumstances where adhering to the strict rules of evidence and technicalities by the court, will cause an injustice. We have further said that, substantial justice is for all parties involved in a matter: **Yeta v African Banking Corporation**[21]. We accordingly uphold ground six of the appeal.

99. The fact that all the grounds of appeal have succeeded notwithstanding, we have held in ground three, that there must be evidence of any one of the specified grounds in **rule 44 (1)** for condemning a party to costs of the proceedings and reversed the order condemning the appellant in costs.

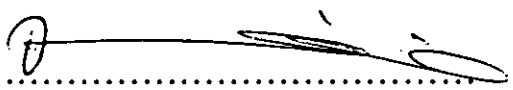
100. In the absence of any misconduct in the respondent's defence of this appeal and in line with our holdings in the **Amiran Limited**[8] and **Joseph Kangwa**[17] cases, we find that an appropriate order on costs, is for each party to bear their own costs, both here and in the court below.

Conclusion

101. Before we conclude, we would like to observe in passing that, going forward, as the Industrial Relations Court, is now a

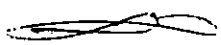
Division of the High Court presided over by a High Court Judge; and, under the High Court Act the issue of costs is one left in the sole discretion of the Judge, there is need to revisit both the Industrial and Labour Relations Act as well as the Rules in order to make them conform with the new role of the court, as a Division of the High court.

Appeal allowed.



I. C. MAMBILIMA
CHIEF JUSTICE

C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE