IN THE SUPREME COURT OF ZAMBIA **APPEAL NO 29 OF 2005**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN

KONKOLA COPPER MINES PLC	**Appellant**
AND	
JACOBUS JOHANNES KEUNE	**Respondent**

Coram: **Chirwa, Mumba and Silomba JJS on 13th July 2006 and 13th February 2007**

For the Appellant: Mr N Sampa and Ms D Chikonde of MNB
For the Respondent: Mr A Dudhia, Musa Dudhia & Co.

JUDGMENT

Chirwa, JS delivered the judgment of the Court:-

1. **Barclays Bank Zambia Limited V Mando Chola and ANOTHER [1995-97] Z.R 212**
2. **DPP V Nandu & Others SCZ J**
3. **Zambia Consolidated Copper Mines V Matale [1995-97] Z.R. 144**
4. **Masauso Zulu V Avondale Housing Project [1982] Z.R 72**

This appeal arises from the award of damages for wrongful dismissal of the respondent from the appellant's employment.

Some common facts are that the respondent, **JACOBUS JOHANNES KEUNE**, was employed by the appellant, **KONKOLA COPPER MINES PLC** on

contract. On 24th August 2002, the respondent went to Lundazi Flats premises to collect some chairs. This, it was said, was after prior arrangements with the supervisor. On collecting the chairs, he was asked for authority to remove the chairs. He replied that he did not have any written authority but had verbal authority. The security guards manning the boom leading to the premises did not open the boom in time and there was an exchange of words between the guards and the respondent. The guards alleged that he called on one of them to "**FUCK YOU KAFFER**" open the gate. The alleged use of these words are the genesis of the whole case. The guard to whom these words are alleged to have been uttered lodged a complaint to her supervisors and the respondent was charged with a disciplinary offence of using abusive and insulting language and he was asked to exculpate himself. He denied uttering the words. He appeared before an administrative Committee to hear and determine his case. At the hearing he maintained his denial but the Committee found him guilty of the offence and it felt the offence was severe enough to warrant instant dismissal. The respondent was instantly dismissed. His two appeals were also dismissed.

The respondent brought a complaint in the Industrial Relations Court for wrongful and unlawful dismissal in that the termination was done without giving 60 days notice as required under his contract and that the offence for which he was charged did not go to the root of the contract to justify summary dismissal. Further that the termination was in breach of Section 25 of the Employment Act in that the Labour Office was not informed of the dismissal. It was further claimed in the complaint that the proceedings

before the disciplinary committee were in breach of Rules of natural justice and that the punishment was unreasonable and far in excess of the punishment for the offences allowed in the Code.

On the evidence before it, the Industrial Relations Court held that the evidence of DW 2 to whom the abusive and insulting language was used was not corroborated by either DW 1 or DW 3 as their evidence was contradictory. Further, the Court found that Disciplinary and Grievance Procedure was not followed and that the matter was not adequately and properly investigated and that the complainant in the disciplinary case should have lodged her complaint to State Police and not her supervisors. The Court then came to the conclusion that the respondent had made his case on the balance of probabilities and awarded him:-

a) Salary and allowances from the date of purported dismissal to date of expiry of the contract
b) To be paid all terminal benefits due at the end of contract and repatriation expenses.
c) The above monies were to earn Bank of Zambia short-term deposit rate interest from the date of complaint to date of judgment and thereafter at Bank of Zambia lending rate from date of judgment to date of payment.

It is against these findings and awards that the appellant has appealed. There were four (4) grounds of appeal and these were that:

1) The Court below erred in both fact and law in finding that DW 1 was nearer to incident than DW 3 and putting emphasis on the same finding when it was not supported by the evidence

2) The Court below erred both in law and fact in making a finding as to where DW 2 should have reported the incident as the same was not in issue and no evidence was given.

3) The Court below erred in law that the respondent had not proved the allegation against the complaint as the burden of proof was on the complainant and not the respondent.

4) The Court below erred in awarding the complainant his dues up to end of his contract plus all terminal benefits as damages.

These grounds of appeal were supported by detailed written heads of argument and authorities which were relied upon at the hearing of the appeal. The respondent also filed detailed heads of argument on which he also relied on.

The gist of the first ground of appeal is that the Court below misdirected itself in assessing the evidence of DWs 1 and 3 in that there was no evidence before the Court to show the distance where DW 1 was in his garden in relation to the gate where the incident happened and that there was no basis for the finding that the evidence of DW 1 and 3 contradicted each other. In response to this argument, Counsel for the respondent submitted that this was finding of fact and in terms of Section 97 of the Industrial and Labour Relations Act, there can be no appeal to the Supreme Court on a finding of fact by the Industrial Relations Court and the case of **BARCLAYS BANK ZAMBIA LIMITED V MANDO CHOLA AND ANOTHER (1)** was relied upon as authority. In the alternative, it was

argued that should this Court consider this ground, it cannot be said that the finding was unreasonable in view of the facts.

In considering this ground of appeal, we agree that there can be no appeal from the Industrial Relations Court to this Court on a finding of fact in terms of Section 97 of the Industrial and Labour Relations Act. But a finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view which cannot reasonably be entertained. For this, we would refer to the cases of **DPP V NGANDU & OTHERS (2)** and **ZAMBIA CONSOLIDATED COPPER (3) at Page 146**. In the present case, the Industrial Relations Court made a finding based on wrong premises of the law. It is not law that every witness and in every case must be corroborated. The court, therefore misdirected itself at page 22 of the record when it stated that "In considering the evidence of DW 1 and DW 3 who should have corroborated the evidence of DW2. We are of the view that the two contradicted each other. In fact Mr Clark, DW 1 who was nearer ought to have heard what was being said since this was the determining factor of the summary dismissal, more so that the other witnesses who were there were not called by the Respondent". In addition to misdirecting itself on the question of corroboration, the Industrial Relations Court made a finding of contradiction of evidence between DW 1 and DW 3 on a view of facts which cannot reasonably be entertained. We see no contradiction in the evidence of DW 1 and DW 3. DW 1"s attention was drawn to the honking and noise at the gate and he observed that there seemed to be a heated argument between the respondent and DW 2 and DW 3. He was far, he did not hear what actually was exchanged.

Whereas DW 2 was at the gate and was involved in the heated argument. We agree with Counsel for the appellant that there was no evidence to indicate the distance between the gate where the argument was and where DW 1 was working in his garden. In any case, it was not the hearing ability of DW 1 that was in issue for he clearly stated that he did not hear what was discussed. On the authority of **MASAUSO ZULU V AVONDALE HOUSING PROJECT (4)** and many other authorities, this is a proper case that this appellate Court can set aside a finding of fact as being based on a misapprehension of the facts, or that it was a finding which on a proper view of the evidence no trial court acting correctly could reasonably make. The finding of contradiction between the evidence of DW 1 and 2 cannot be supported by evidence on record.

Having found that there was no contradiction between the evidence of DW 1 and 2 we will consider their respective evidence in respect of further findings of the Court that the alleged use of abusive and racist language had not been proved. DW 1's attention was drawn to the events at the gate by the continuous honking of the car horn by the respondent and he later observed the respondent's son trying to open the boom and was stopped by the guard. The respondent then went to open the boom himself and drove off. The scene presents itself with evidence that the argument was not friendly and renders some credence to the evidence of DW 2 and 3 that some abusive and insulting language was used by the respondent. The doubting of the evidence of DW 2 and 3 was based on misdirection of need for corroboration and perceived contradiction. Having found that these findings were made on

misapprehension of the law and fact, it follows that there were was no basis to doubt the evidence of these witnesses. From the wrong assessment of the evidence and finding of contradiction, the lower Court found that the appellant had not substantiated the allegation against the respondent as the two witnesses contradicted themselves. This finding cannot stand in view of what we have already discussed and it follows that the allegation of use of abusive language was proved for the purposes of disciplinary proceedings against the respondent. We would therefore allow the first ground of appeal.

This appeal is centred on the first ground of appeal. We do not therefore intend to go into other grounds of appeal in detail except to say that the lower Court again misdirected itself in holding that DW 2 erred in reporting the matter to her supervisor instead of State Police. We accept that there is a criminal element in the complaint, but that did not mean that DW 2 could only lodge her complaint with Zambia Police. There was no evidence on which the Court could entertain the possibility of Securicor Police being biased when dealing with the report.

Further the Court held the view that the appellant did not follow the proper procedure as stipulated in the Disciplinary and Grievance Procedure by not investigating the case properly and adequately especially that the parties were employees of two different companies and the incident happened at the week-end The Court does not indicate what was not followed under the Disciplinary and Grievance Procedure and what was not properly investigated. It is irrelevant that the

incident happened at the week-end as it involved property of a Company where both the complainant in the abusive language complaint and the abuser had an interest.

Having allowed the first ground of appeal which goes to the root of the appeal, we allow this appeal and set aside all the awards and orders issued in favour of the respondent. Costs will be for the appellant to be agreed, in default to be taxed.

D K Chirwa
JUDGE OF THE SUPREME COURT

FNM Mumba
JUDGE OF THE SUPREME COURT

S S Silomba
JUDGE OF THE SUPREME COURT