

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 185 OF 2005

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

ZAMBIAN BREWERIES LIMITED

APPELLANT

AND

JOHN ZULU

RESPONDENT

CORAM: Lewanika, DCJ, Chitengi and Silomba, J.J.S.
On the 2nd August, 2006 and 29th February, 2008.

For the Appellant: Mr. P. Yangailo, P. H. Yangailo & Company

For the Respondent: Mr. E. M. Sikazwe, Deputy Director of Legal Aid

J U D G M E N T

SILOMBA, J. S., delivered the judgment of the Court.

Case referred to:

- 1. Continental Restaurant and Casino Limited Vs Arida Mercy Chulu,
SCZ Judgment No. 28/2000**
- 2. Nkhata and Others Vs The Attorney General (1966) ZR 124**

We regret the delay in delivering the judgment, which was due to the busy work schedule.

At the time we heard the appeal, the Honourable Deputy Chief Justice, Mr. Justice David M. Lewanika, was a member of the panel but he passed on before the judgment was ready. This judgment is, therefore, by the majority.

The appeal is against the judgment of the High Court dated the 18th May, 2005. In an action before the High Court, the respondent, then plaintiff, sued the appellant and claimed damages for wrongful dismissal and reinstatement in his former job. The facts that gave rise to the dispute were that the respondent was dismissed from employment for being under the influence of alcohol.

The evidence of the respondent was that on the 20th March, 1998, while on duty, he drunk some cold water from a bottle. As he drunk the water he did not realize that the bottle contained caustic soda. He was later taken to the University Teaching Hospital (UTH) when his lips began to burn and his stomach developed cramps. At the hospital, he was attended to by a doctor. The contents of the bottle were examined at the local laboratory and according to the respondent, it was confirmed that the water in the bottle contained caustic soda.

When he went back to work, the respondent was charged by the appellant for being drunk whilst on duty, a charge he denied. He confirmed that he refused to be breathalysed on the 20th March, 1998 because his lips were burnt and his

stomach was paining. Besides, he claimed that he did not know that the appellant had a machine for breathalysing.

The evidence of the appellant before the trial Court confirmed that the bottle and its contents were analyzed at their laboratory and found to contain 0.8% of caustic soda. Since it was suspected that the respondent had taken alcohol, the appellant ordered him to be breathalysed but he refused. Fearing that the respondent might die as a result of taking the contents of the bottle containing caustic soda, the appellant decided to take him to the hospital. While at the hospital, the respondent was given a bed. He later left his bed in what looked like an attempt to escape from the hospital but he was brought back by DW2, a security officer with the appellant who accompanied the respondent to the hospital. When the respondent was discharged he never presented a medical discharge report to the appellant.

At the end of the trial, the learned trial Judge went through the evidence and the submissions of counsel. The learned trial Judge took into account the events on the night the respondent was rushed to the hospital and observed that although the actions of the respondent could be construed or mistaken to be those of a drunken person the laboratory tests showed otherwise. The bottle that was taken from him and from which he drunk its contents was tested and found to contain

0.8% of caustic soda; that the evidence of the medical doctor at the UTH that the appellant was diagnosed with acute gastritis was not challenged.

Accordingly, the learned trial Judge came to the conclusion that the allegation that the respondent was under the influence of alcohol while on duty had not been proved. On the basis of his reasoning, the learned trial Judge found that the respondents' dismissal from employment was wrongful. He awarded the respondent thirty days pay in lieu of notice as damages and payment of salary from the date of dismissal to the date of judgment, as well as, payment of terminal benefits.

There are two grounds of appeal. These are:

- 1. The trial Judge erred in law and fact when he failed to adequately address himself to the evidence of DW2, DW3 and DW4 which was adduced before him. Further, the trial Judge only made brief and incomplete comments on DW1's evidence. Above all, the Judge did not in his judgment offer any reasons or explanations for discounting or indeed ignoring the evidence of DW2, DW3 and DW4, apparently to the detriment of the Appellant's case.**
- 2. The trial Judge erred in law and fact when he did not adequately address himself to the very important issue of the respondent having**

denied to take a breathalyzer test, which test would have established whether or not his behavior, which suggested that he was under the influence of alcohol, was correct or not. If the trial judge had addressed himself properly and adequately to this issue and taken into account the evidence adduced by the appellant's witness he would have unavoidably reached a reasonable inference that the denial by the respondent to take a breathalyzer test was indicative, on a balance of probability, that the respondent had taken alcohol while on duty and he did not want to be confirmed, as such.

Counsel for the appellant relied on the filed heads of argument, which he reinforced with oral submissions. In relation to ground one, counsel's submission, based on the heads of argument, was that if the learned trial Judge had properly and sufficiently addressed the evidence of DW2, DW3 and DW4 he would have found that the respondent was guilty of the charge of being drunk whilst on duty.

Counsel submitted that while the learned trial Judge correctly found that the respondent was properly charged under the disciplinary code of the appellant he did not offer any justifiable reason for not considering the evidence of the appellants' witnesses, which clearly established that the respondent was guilty, especially when he refused to be breathalyzerised in order to confirm whether or not he was drunk.

In his oral submission, counsel repeated what was submitted in the heads of argument.

When it was the turn for the respondent to submit, his counsel relied on the filed heads of argument in their entirety. In relation to ground one, it was submitted in the heads of argument that the evidence of DW2, DW3 and DW4 was fully taken into account by the learned trial Judge, but it failed to prove that the respondent was drunk while on duty. According to counsel, the respondent had a good and reasonable explanation on why he refused to be tested using the breathalyzer to determine whether or not he had taken alcohol; this was because the respondent had burnt his lips after drinking water from a bottle contaminated with caustic soda. Counsel submitted that because the appellant appreciated the condition in which the respondent was, he was rushed to the UTH for proper and effective treatment.

As far as counsel was concerned, the learned trial Judge did not err as he took into account all the evidence of DW1 and commented that DW1's action to rush the respondent to the UTH was because he was afraid that he might die. Counsel submitted that while at the UTH the respondent was diagnosed with acute gastritis as per the evidence of the doctor, which was never challenged.