IN THE SUPREME COURT FOR ZAMBIA AT LUSAKA **APPEAL NO. 120/2000**

(CIVIL JURISDICTION)

B E T W E E N:

MORRIS MBALAKAO APPELLANT

AND

ZAMBIA NATIONAL PROVIDENT FUND BOARD RESPONDENT

Coram: Sakala A/DCJ, Chirwa and Chibesakunda JJS
on 8th August 2000 and 14th December 2000

For the Appellant: Mr. H Silweya of Silweya and Company

For the Respondent: Ms M V Mulonda, Legal Counsel, ZNPF

JUDGMENT

Chibesakunda JS delivered the judgment of the Court

Cases referred to:

1. Contract Haulage Vs Kamayoyo (1982) ZLR P.13
2. Zambia Privatization Agency Vs Matale (1995/1997) ZLR P.157

In this appeal, Mr. Mbalakao, the appellant is challenging the decision of the lower court both in fact and law that Zambia National Provident Fund Board (ZNPF), the respondent, lawfully terminated his contract of employment with them.

The salient facts before the lower court are that the appellant was in employment of the respondent as cashier clocking 13 years of service by 1992, which year he was dismissed. His duties as cashier involved handling money.

He would prepare a cheque, which would be signed by official signatories, then cash the cheque at the bank with a covering note from the official signatories. Then he kept the money in the cash box. Mr. Tembo and Mrs. Simukoko were the official signatories. On the 15th of March 1991 on the instructions of Mr. Banda, the Regional Accountant, the appellant raised a cheque, which was accepted and signed by the two signatories. He cashed that cheque which was in the amount of K45,750.00 and came back to the office and did the usual of putting the money in the cash box. He was surprised to see later bank officials from the Zambia National Commercial Bank raiding his office. He was subsequently arrested for the offence of fraud. He was suspended on the same day, 15th March 1991. He was subsequently taken to court and was acquitted. In the mean time, on 17th March 1991 he was asked to write an exculpatory letter, which he did. On 23rd March 1991 he again was asked by the respondent to write another exculpatory letter, as according to them they had discovered through the investigations that a larger amount of money was involved which is alleged to have been misappropriated. The appellant did not put in another exculpatory letter. On 5th October 1992, his services were terminated. The respondent in the letter of dismissal calculated his terminal benefits and his dues to them arriving at the conclusion that he owed them a sum of K954,070.49. The appellant disputed this amount because he argued that they dismissed him on one ground on which he was not legally liable to pay the amount he is alleged to have misappropriated amounting to K1,148,431.10. He also disputed the calculation of his personal levy and the National Provident Fund contributions because he argued that he was no longer an employee for them to deduct those amounts.

At Clause 28 of the conditions of service on page 86 of the record he argued that as an employee who was not convicted he ought to have been reinstated by the respondent. Also at Clause 19 (a) of the same conditions of service his further arguments are that the respondent should have given him a month's salary in lieu of notice. That was the evidence of the appellant.

The respondent's evidence was that he was lawfully dismissed. The learned trial Judge held against him and entered judgment in favour of the respondent in the sum of K954,070.46. She ordered the money to be paid with interest at twenty per cent (20%) per annum from the date of dismissal (5th October 1992) to the date of judgment and thereafter-current lending rate determined by the Bank of Zambia up to the date of payment.

Mr. Silweya on behalf of the appellant has filed very elaborate arguments submitting that the learned trial Judge misdirected herself in holding that the dismissal was lawful. According to him, since the appellant's duties were to handle the respondent's money, the appellant should have been charged and dismissed under Clause 20:1-18, (at page 86 of the record), because he argued, that this would have tied well and linked up well with the Conditions of Service Regulations Nos. 23, 27, 28 and 30 and Section 8 of the Disciplinary Code (page 86 and 116 of the record respectively). He submitted also that the appellant's dismissal under Regulation 20:1-18 (page 85) read together with Section 8 of the Disciplinary Code was irregular and a misdirection because it was a mix up involving two different disciplinary measures resulting in the wrong sanction imposed on appellant. He pointed out that the consequences of the appellant's dismissal under Section 10 of the Disciplinary Code are different from the dismissal under Clause 20:1-18 read together with Section 8 of the

Disciplinary Code. Under Section 8 the employee involved in any misappropriation of the Board's fund can be dismissed in addition to any action which may be taken under Articles 23, 28, and 30 of the Conditions of Service and that in addition the Board would have authority to recover the money from the employee's terminal benefits. Whereas the dismissal under clause 10 would not attract any recovery of any losses occasioned by the misconduct of an employee. Section 10 is silent on that. He submitted that it was a wrong set of clauses invoked by the learned trial Judge, and therefore a misdirection. He went on to state that under Clause 20:1-15 and Section 10 of the Disciplinary Code there is a possibility that an employee who although his conduct would be seen to be irregular, would still use the proceeds of the irregular conduct to purchase items for the use of the Board e.g purchasing stationery for use by the board. So there would be no need to recover the money. In the alternative he argued that it was a misdirection on the part of the lower court to have found that the appellant was involved in some misconduct, which would warrant dismissal because there was no oral or documentary evidence to support the conclusion by the court on that point. He argued that this was so because there was no production in court of various vouchers, bank statements, cashed cheques or accounts reports. Consequently, he argued that the evidence of DW3 was made in abstract bordering on hearsay. His last argument on which he laboured for some time is that the lower court took no account that the law as pronounced in the **Contract Haulage Vs Kamayoyo** (1) on the master/servant relationship has slightly changed vide **Zambia Privatization Agency Vs Matale** (2) case. The respondent in response argued that the learned trial Judge was on firm ground in holding that the appellant was lawfully dismissed.

We have considered the evidence before the court below and also the arguments before us.

We are satisfied that the appellant's services were terminated in accordance with the terms stated in the letter of dismissal from the Zambia National provident Fund. The letter says:-

"Date 5th October 1992

Our Reference ZNPF 1/18/5911

Mr Morris Mbalakao
Senior Accountancy Assistant
Zambia National provident Fund
Lotti House
LUSAKA

Dear Mr Mbalakao

DISMISSAL FROM THE BOARD'S SERVICE

I refer to our letter reference ZNPF 1/18/5911 dated 29th may 1991 in which you were suspended from carrying out your official duties for alleged offence of misappropriation of Board's funds.

Management has now completed its investigations taking into account your exculpatory letter dated 17th March 1992 and other relevant factors. Regrettably you have been found guilty of misappropriating Board's funds amounting to K1,007,400.00 thereby contravening Regulation No. 20.1.15 of our Conditions of Service Regulations as read with section No. 8 of our Disciplinary Code. Due to seriousness of the offence I have been directed to dismiss you with effect from 1st September 1992.

Your terminal benefits and debts to the Board have been worked out as follows:

1. **BENEFITS**

Value of 167 accrued leave days	K149 017.44
Staff Savings at 20%	45 343.20
Total	K194 360.64

2. **DEBTS**

Television loan	K 11 961.38
Cooker loan	8 617.77
Furniture loan	12 268.09
Radiogramme loan	26 477.81
Fridge loan	27 801.70
Misappropriation Funds	1 007 400.00

Personal Levy		**1 000.00**
ZNPF		**750.00**
PAYE		**52 154.35**
	Total	**K1 148 431.10**

Your debts in the sum of K1 148 431.10 less your terminal benefits amounting to K194 360.64 leaves you owing the Board K954 070.46, and you are required to pay this amount without delay.

To protect the Board's interest, the Personnel Officer Administration is, by copy of this letter, requested to repossess all the items you bought with loans from the Board. The items will be kept until you settle your debt. However, if you fail to pay-off your debt, the items will be sold to defray the debt in full or in part.

Yours sincerely

S Katebe
AG. ASSISTANT PERSONNEL MANAGER (P & I.R)"

It has been argued before us that there was misdirection by the lower court in invoking the provisions of Clause 20:1-15 read together with Section 8 of the Disciplinary Code. In our view for us to deal with the argument we have to quote Clause 20:1:-

> **"An employee guilty of misconduct shall be dealt with in accordance with the relevant provisions of the Disciplinary Code provided in Schedule VI if"**

Clause 20:1-15 goes on to say:

> **"The employee makes use of the Board's monies for unauthorized purposes or steals Board's property."**

Section 10 of the Disciplinary Code also says:

> **"That an employee who takes Board's money or property for the purpose of gain without knowledge and consent of Board's authorities shall be guilty of this offence and liable to dismissal."**

Obviously one can see that Clause 20:1-15 and Section 10 of the Disciplinary Code are silent on the right of the employer recovering money

misappropriated or used for unauthorized purposes as part of the disciplinary measures taken against an erring employee. Whereas Clause 20:1-18 says:

> **"Being a person to whom the provisions of Article 23 of this Agreement apply, the employee fails to carry out the obligations imposed on him by or under the aforesaid Article."**

Clause 23 also says:

> **"Where an employee misappropriates money issued to or received by him on behalf of the Board the Director may authorize the recovery of any sums due to the Board in accordance with Article 27 of this Agreement in addition to any other action which may be taken in accordance with Article 28 of this Agreement."**

and Section 8 of the Disciplinary Code also says:-

> **"An employee who misappropriates Board's money shall be liable to dismissal in addition to any action which may be taken under Article 23, 28 and 30 of the Board's Conditions of Service Regulations."**

It also says:-

> **"The Board shall have authority to recover the money from employee's terminal benefits."**

It is obvious from the provisions in Clauses 23, 27 and 28 read with Clause 20:1-18 that the disciplinary measures stipulated are not confined to dismissal only. According to Clause 27 there has to be an inquiry into any allegations of misconduct. That is in addition to any prosecution which may be undertaken against that particular employee. After the Board is satisfied that an employee falls under clause 23 the director must direct recovery of the sums due to the Board resulting from misconduct. But if the Board is satisfied that particular employee falls under Clause 20:1-15 as read with Section 10 of the disciplinary Code it cannot as part of the disciplinary measures recovery of money or property used without any authority or stolen. One can see therefore that Clauses 20:1-15 and 20:1-18 outline two parallel disciplinary measures, which can be taken against an erring

employee. In this case, therefore, there was definitely a mix up in applying clause 20:1-15 read together with Section 8 of the Disciplinary Code because 20:1-15 can only be invoked together with Section 10 of the Disciplinary Code. The result would have been that either the appellant should have been dismissed and money would not been necessarily recovered from him or that he should have been dismissed and money recovered. In our view, from facts, the latter was invoked rightly. As a matter of fact we are satisfied that even if there were this mix up there was no miscarriage of justice as there was no evidence before the court that the appellant used the funds to purchase items for use of the Board to fall under Section 10 of the Disciplinary Code. We therefore find no merit in the arguments advanced by Mr Silweya on behalf of the appellant.

This leads to the second part of the same argument that there was no evidence to support the conclusion by the learned trial Judge that the dismissal was justifiable. We do not accept that argument as according to the record there was sufficient evidence to prove on a balance of probabilities that the appellant misappropriated money issued or received by him on behalf of the Board to fall within the ambit of Clause 23 as read with Clause 20:1-18 and Section 8 of the Disciplinary Code.

The third part of the same argument was that vouchers, bank statements, cashed cheques or accountant reports should have been produced before the court. We hold the view that the appellant was represented at the trial and should have applied for these documents to be produced before the court. The learned trial Judge in spite of the absence of these documents properly found that there was sufficient evidence on the balance of probabilities to satisfy her that the appellant misappropriated the

respondent's funds. This takes us to ground 4 of the appeal. It was argued before us that the learned trial Judge misdirected herself in applying with too much zeal the principles in **Contract Haulage Vs Kamayoyo** case. In considering that ground we have looked at our decision in the **Zambia Privatization Vs Matale** case. The common law applicable in Zambia in a master/servant relationship is that the relationship even if brought about by an oral or written agreement can be terminated for good, bad cause or none at all.

In most cases the terms governing all these relationships indicate that there is a right to observe rules of natural justice and a right not to be thrown out of the job except on some rational ground. The conditions also must state the period of notice for termination, which has the same period in assessing payment in lieu of notice. In the case before us the learned trial Judge was in our view on firm ground to hold that there was sufficient evidence of misconduct to warrant dismissal. Her conclusion was based on her view of the facts, which to us could reasonably be entertained. As stated already the terms of terminating the contract were stated in the letter and as already stated although both the court and the respondent invoked Clause 20:1-15 read together with Section 10 of the Disciplinary Code when they both meant Clause 20:1-18 as read with Section 8 of the Disciplinary Code, there was no miscarriage of justice as on facts the appellant warranted the dismissal. We hold the view that the rules of natural justice were observed and the regulations stated in the Collective Agreement were observed as the letter of termination stated so. There was no breach of any laid down rules. Against the background of all these findings, we find no merit in the appeal. We dismiss the appeal with costs.

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E L Sakala
ACTING DEPUTY JUSTICE

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D K Chirwa
SUPREME COURT JUDGE

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L P Chibesakunda
SUPREME COURT JUDGE