

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 14/2002

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

ZESCO LIMITED

APPELLANT

AND

MUKUPA MWILWA

RESPONDENT

Coram: Lewanika DCJ, Mambilima and Chitengi JJS

On 2nd May, 2002 and 28th August, 2002.

For the Appellant : Mr. Kandolo
Legal Counsel - ZESCO

For the Respondent : Mr. Katuta
Loi-loi Chambers

J U D G M E N T

Chitengi JS, delivered the Judgment of the court.

Cases referred to:-

- (1) Bank of Zambia Vs Joseph Kasonde 1995/1997 ZR 238***
- (2) Kaona Vs ANZ Grindlays Bank Limited 1995/1997 ER 85***
- (3) Francis Vs Municipal Council of Kuala Lumpur 1962 3 ALL ER 663.***
- (4) Attorney-General Vs Marcus K. Achiume 1983 ZR 1***

In this appeal we shall refer to the Appellant as the Respondent and the Respondent as the Appellant which were their designations in the below.

The facts of this case can be briefly stated. On the 2nd October, 1997, the Applicant who had been working for the Respondent from June, 1990 as Linesman applied for a loan of K500,000.00 by filling in the necessary form. The loan was subsequently approved and the Respondent effected monthly loan recovery of K41,666.00. After repaying this loan the Applicant applied for another loan of K500,000.00 in November, 1997. The papers on which the applications for the loans were made were genuine. They were according to the Applicant prepared by the staff in the Accounts Department and later approved by the Personnel Department staff. Mr. Mbangweta, Manager Administration authorized the payment. Subsequent to obtaining these loans the Applicant was on 28th November, 1997 charged with dishonest conduct and on 14th December, 1997 he was put on indefinite suspension. On 19th February, 1998 the Applicant was dismissed for dishonest conduct, the particulars being that he forged two scrutiny sheets and acquired two advances of K500,000.00. Investigations by an investigations team revealed that although the scrutiny sheets were authorized by the Management Accountant Mrs. Katuta and the Manager Administration Mr. Mbangweta, the scrutiny sheets were not signed by members of payroll staff. The Applicant also denied signing the scrutiny sheets on which he got the two loans. Mrs. Katuta said in cross examination that when she approved the scrutiny sheets she did not know that they were forged. And Mrs. Lungu said they could not establish who the forger was.

On this evidence the Court below found for the Applicant and ordered his reinstatement. The Respondent now appeals against the Judgment of the Court below. The Respondent filed heads of arguments with four grounds of appeal but argued only ground one, abandoning the other grounds of appeal.

The gist of the first ground of appeal is that the Court below misdirected itself when it ordered reinstatement of the Applicant when on authority the remedy of reinstatement is rare and is granted sparingly and where there are exceptional circumstances: **Bank of Zambia Vs Joseph Kasonde(1); and Kaona Vs ANZ Grindlays Bank Limited (2); Francis Vs Municipal Council of Kuala Lumpur(3)**. In the light of these authorities Mr. Kondolo for the Respondent submitted that the remedy of reinstatement should not have been granted because there were no exceptional circumstances.

In reply Mr. Katuta for the Applicant submitted that he supported the findings of the Court. This is a rare case which has special circumstances viz: -

- (1) The Respondent failed to justify the dismissal.
- (2) There was a breach of the rules of natural justice. Mrs. Banda and Mr. Mbangweta who were interested parties participated in the disciplinary procedure.
- (3) Under **Section 85A of the Industrial and Labour Relations Act Cap. 269** the Industrial Relations Court had power to order reinstatement.

It was Mr. Katuta's submission that the Court's finding was a finding of fact. A finding of fact is impeachable only if it is based on a misapprehension of the evidence.

We have perused the judgment of the Court below and considered the evidence and submissions of Counsel.

The issue that fell for determination by the Court below was whether the Applicant was properly dismissed. The charge against the Applicant was one of dishonest conduct arising out of alleged forgeries of

the scrutiny sheets on which the Applicant obtained two loans in succession.

The Court below found that the Applicant was wrongfully dismissed. The Court below rested its judgment on the evidence of the fourth defence witness who testified that since he wrote "**Please pay**" and signed the scrutiny sheets he did not regard the documents as forgeries. Because of what this witness said the Court below made a finding of fact that the Respondent could not ground the charge of dishonest conduct on non-existent forgery as there was no document which the Applicant forged.

We have repeatedly said in many cases, one of which is **Attorney-General Vs Marcus K. Achiume(4)**, that an appellate court will not interfere with findings of fact by a trial Court unless:-

- (1) The findings were either perverse or
- (2) The findings were made in the absence of the relevant evidence or
- (3) The findings were made upon a misapprehension of the facts or
- (4) The findings were, which on a proper view of the evidence, no trial Court acting correctly could reasonably make.

After considering the evidence we have no hesitation to hold that the finding of fact by the Court below was based on a misapprehension of the evidence. Regardless of what the fourth witness for the defence said when he was explaining why he authorized the payment, the fact stood out clearly that the investigation team constituted to investigate the Applicant's loan applications found that the scrutiny sheets were forgeries. The finding of the Court below based on the evidence of the fourth defence witness' evidence was, therefore, based on an

unsupportable view of the evidence. And it is not for the Court to challenge the findings of the disciplinary bodies because, as we have repeatedly said, it is not the function of the Court to sit as an appellate tribunal against the decision of employers' internal tribunals.

In the circumstances we do not accept Mr. Katuta's submissions that the findings of the Court below were well grounded and can not be impeached and that the Respondent failed to justify the dismissal.

In the result, we reverse the Judgment of the Court below that the Applicants dismissal was unfair and we enter Judgment for the Respondent.

Since the other matters raised by Mr. Katuta relate to reinstatement, it is not now necessary to consider them in view of our holding that the Applicant was properly dismissed.

The Appeal is allowed. The Respondent will have his costs in this Court and in the Court below to be taxed in default of agreement.

.....
D. M. LEWANIKA
DEPUTY CHIEF JUSTICE

.....
I. C. MAMBILIMA
SUPREME COURT JUDGE

.....

PETER CHITENGI
SUPREME COURT JUDGE