

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 110 OF 2011

(Civil Jurisdiction)

B E T W E E N:

RUTH SAVIYE SAMATEMBA
AND
ZAMBEZI WATERFRONT LIMITED
RESPONDENT

APPELLANT

CORAM: **CHIBESAKUNDA, WANKI AND MUSONDA, JJS**
On the 20th March, 2012 and 15th June, 2012

For the Appellant: Mr. J.J. Mulongo, of Messrs. Muya and Company

For the Respondent: C. Chuula, of Messrs. Chibesakunda and Company

J U D G M E N T

Wanki, JS, delivered the Judgment of the Court.

CASES REFERRED TO:-

- 1. Zambia Consolidated Copper Mines Limited -Vs- James Matala (1989).**
- 2. Nkhata and Four Others -Vs- The Attorney General (1966) ZR 124.**
- 3. Attorney General -Vs- Peter Mvaka Ndhlovu (1986) ZR 12.**
- 4. Chilanga Cement PLC -Vs- Kasote Singogo SCZ Appeal No. 27 of 2008.**
- 5. Barclays Bank Zambia PLC -Vs- Zambia Union of Financial and Allied Workers SCZ Appeal No. 17 of 2007.**
- 6. Zambia National Provident Fund -Vs- Yekwenya Mbiniwa Chirwa (1986) ZR 70.**
- 7. Sinclair -Vs- Neighbour (1966) 2 QB 279 CA.**

LEGISLATION REFERRED TO:-

- 8. Employment Act Chapter 268 of the Laws of Zambia.**
- 9. Minimum Wages and Conditions of Employment (General) Order Statutory Instrument No. 57 of 2006.**

When we heard this appeal, Mr. Justice Musonda sat with us. However, because of the current events, this judgment is a majority judgment.

The appellant, not being satisfied with the decision of the Industrial Relations Court, Lusaka, that her claim was unmeritorious and that the reliefs sought therefore fell away, has appealed against the said decision.

The facts leading to the appeal are that, the appellant filed a Notice of Complaint under **Section 85** against the respondent on the grounds that: She was dismissed without first being charged and heard contrary to the rules of natural justice; and that she was suspended without pay from 8th September, 2008 to 3rd December, 2009. The appellant was seeking the following relief:-

- (i) Declaration that her dismissal was unlawful and thus null and void;
- (ii) Damages for unlawful dismissal;
- (iii) Declaration that she be deemed to be retired declared redundant from the date of judgment;
- (iv) Order for payment of all arrears of salary and allowances from 8th September, 2008 to the date of judgment;
- (v) Payment of retirement redundancy package;
- (vi) Interest on (ii), (iv) and (v) above at current bank lending rate from 8th September, 2008 to date of full and final settlement; and
- (vii) Costs.

The Notice of Complaint was supported by an Affidavit in Support in which the appellant stated that: On the 8th of December, 2008 she was put on suspension pending investigations but without pay; that without any charge and hearing on 3rd December, 2009 she was

summarily dismissed front employment; and that she has also not been paid her dues while on suspension.

The respondents filed an answer stating that: The appellant was rightly dismissed; that dismissal cannot be unlawful, null and void on account of a breach of an employment's conditions of service; and that the best the appellant should have pleaded is wrongful dismissal which could attract possible damages.

The answer was verified by an Affidavit that was sworn by the General Manager, Sharmine BARRY.

The appellant's evidence was that she was Assistant Accountant for the respondent. She was in charge of collecting and banking money. The money she took for banking was prepared by her immediate boss Miss VENICE SCOTT, Assistant Financial Manager who was in charge of collecting the money from the restaurant, the bar and the front office. Thereafter, her boss would make out a deposit slip. She would then go and deposit the money. She was not queried after doing her part. On 8th September, 2008 as she reported for work, she was told to return home by the Financial Director, Mr. Stephen JONASI and subsequently she was given a suspension letter. She was suspended along with the Accountant Mr. KASONSO.

Following her suspension she never heard from her employers apart from finding them at the Police in September, 2009. Later, she received her summary dismissal letter. She was not charged with any offence and being heard before receiving the dismissal letter. She denied getting money for personal use.

Her further evidence was that, because the dollar rates at the respondents were better than at the bank, it was normal requesting for cash from her work place. Her husband wrote out a cheque and she gave it to Miss VENICE SCOTT and she was given cash. She needed dollars because she was preparing for her unborn child.

The evidence of RW1 Sharmine BARRRY was that, Mrs. Venice SCOTT informed her about some anomalies with the banking and that the day the anomalies were appearing were the dates that the appellant went to the bank to deposit money. He then asked the appellant about the banking. The appellant produced two deposit slips which were not banked; and explained that she had a personal problem and she used the money.

He further stated that, when an employee is getting a loan or an advance there is a form that the employee completes that needs to be approved by the Managing Director and himself as General Manager. The appellant did not follow that procedure. Upon talking to the appellant, she mentioned to him that, she had given US\$1,000=00 to Mr. Fred KASONSO who also worked in the Accounts.

There was another hearing attended by the Managing Director, Mr. Graham NEL and, Mr. Stephen JONASI where he asked Mr. KASONSO whether he had received the money and he confirmed but he stated that he was not aware that it was company money. The appellant confirmed once more that she had taken the money and she had used the US\$2,481=00 for personal problem. Within the first week of September, 2008 he requested the appellant's husband to come to Waterfront. In the presence of her husband, the appellant stated that she gave US\$1,000=00 to Mr. KASONSO and the remainder she had a personal problem. It was at this point when her husband said to him that, he would pay back the US\$2,481=00 and gave them a postdated cheque.

Thereafter, the Head of Accounts Department, Mr. Stephen JONASI wrote suspension letters. Later, the appellant was invited to appear for hearing. She however, did not appear. The matter was still under investigations by the Police.

The evidence of RW2 Venice SCOTT was that, in September, 2008 after finding a deposit slip of 20 Euro amongst the deposit slips for Bush

Front Lodge, she conducted a reconciliation. Thereafter, she found a large variation of under banking. She then reported her finding to her Superiors.

The evidence of RW3 Brian PHIRI was that, they did some forensic out for Zambezi Waterfront. The scope of the work was limited to the terms of reference which was the verification of revenues collected on a daily basis for a period of 9 months from January, 2008 to September, 2008. The verification took 1 month; when they finished they issued a report.

The Court below after analyzing the evidence before it, found and held that, the respondent acted reasonably in exercise of its powers; consequent to this position the Court below held and found that, the claim of unlawful dismissal is unmeritorious and the reliefs sought therefore fell away and dismissed the complaint.

The appellant has advanced two grounds of appeal, namely:

- 1. The Court below erred in law and fact in coming up with its own new reason for the dismissal of the appellant, contrary to evidence on record.**

- 2. The Court below erred in law when it decided that the appellant's contract of employment was not covered by Section 20A of the Employment Act but terminable at common law.**

The parties filed respective heads of argument on which they entirely relied at the hearing of the appeal.

In support of ground one, it was submitted that it will be noted as per judgment of the Court below in lines 11 to 13 at page 20 of the Record of Appeal, the appellant was dismissed for "taking and using of US\$2,481=00 cash without the knowledge and approval of the respondent who was the owner of the cash asset." It was pointed out that, the Court below went on to acknowledge in lines 15 to 17 that both letters of suspension and dismissal did not specify this.

It was contended that, the reason given by the Court below for the appellant's dismissal was therefore clearly a new one, and different from the one mentioned by the respondent in the dismissal letter.

It was pointed out that, according to the letter of dismissal (at page 31 of the Record of Appeal) the appellant was dismissed "for the loss to the company" in excess of K400,000,000=00.

It has been submitted that, this amount was discovered by a forensic audit for the period 1st January to 30th September, 2008, the audit report itself is at pages 80 to 110 of the Record of Appeal. In relation to the respondent's United States dollar account, the audit report shows, at page 82 under item 20 "cash collected and not deposited of US\$91,935=00." It was pointed out that, at item 5 on page 84 of the record the report clearly states that:-

"Please note that we were not provided with an explanation or support documentation that the cash collected was utilized for business purposes, to justify the non-existence of a bank deposit slip, therefore we are unable to conclude if this cash was misappropriated."

It was further pointed out that when asked, under cross-examination (lines 10 to 18, at page 202 of the record) RW3 reiterated (at lines 2 and 3 on page 2003) that he could not say money was misappropriated by the appellant.

It was pointed out that, in her evidence RW1 testified that:-

"After our investigation that is where the Managing Director came up with the amount of K400,000,000=00. I cannot give you an exact amount CW1 was dismissed for."

It was contended that, from the foregoing, it is clear that there was no evidence even remotely suggesting that the appellant was dismissed for taking and using US\$2,481.00 without the respondent's knowledge or approval.

It was further contended that, the decision of the Court below was therefore not supported by any evidence. It was pointed out that, the legal position on a decision not supported by evidence is well settled.

In support, the case of **ZAMBIA CONSOLIDATED COPPER MINES LIMITED -VS- JAMES MATALE** ⁽¹⁾ was cited in which we held that:-

“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 of facts which cannot reasonably be entertained.”

It was submitted that, in the case now before the Court the finding of fact that, the appellant was dismissed for taking and issuing US\$2,481=00 is not supported by evidence. It is therefore, now a question of law.

The case of **NKHATA AND FOUR OTHERS -VS- THE ATTORNEY GENERAL OF ZAMBIA** ⁽²⁾ was referred to, in which the Court of Appeal set the conditions for the reversal of findings of fact by a trial Judge sitting without a jury, as being if:-

- (1)The Judge erred in accepting evidence; or
- (2)The Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered; or
- (3)The Judge did not take proper advantage of having seen and heard the witnesses; or
- (4)External evidence demonstrates that the Judge erred in assessing manner and demeanour and demeanour of witnesses.

It was contended that, the Court below not only made a finding which was not supported by the evidence, but also went on to take into account some matter which should have been ignored, namely; the issue of US\$2,481=00.

It was argued that, the Court below also failed to take proper advantage of having seen and heard the witnesses. It was pointed out that, it would be noted by the Court that while RW2 evidenced that:-

“The audit report should not for in part of any evidence because it makes no sense to me whatsoever’ (refer to lines 4 and 5 at page 197.”

The Court below in its judgment (at page 16 lines 9 and 10) stated that:-

“It was RW2’s evidence that she was not qualified to comment on the audit report, since she did not even understand it.”

It was pointed out that, the Record of Appeal will also show in lines 15 to 26 at page 186, that there was evidence from RW1 that in relation to US\$2,481=00, “there were two deposits in the same amount,” namely as per page 913 dated 30th August, 2008 and 915 also dated 30th August, 2008. But the Court below held that, the appellant took and used US \$2,481=00.

It was submitted that from the foregoing, the Court below did not take proper advantage of having seen and heard the witnesses and as the Court held in **ATTORNEY GENERAL -VS- PETER MVAKA NDHLOVU:-**⁽³⁾

“This is ground for disturbing the findings of fact.”

In support of ground two of appeal, it was pointed out that, RW1 in her evidence did state (in lines 17 and 18 at page 181 of the Record of Appeal) that she relied on her Affidavit in Support of the answer as part of her evidence. The said Affidavit exhibit **“SB1”** (at page 7) a “copy of Employment Contract entered into between the appellant and Safari Par Excellence.”

It was further pointed out that, in her viva voce evidence at trial, RW1 told the Court that, “there are no other conditions apart from **SB1**”, (line 23 at page 189.)

It was argued that exhibit “**SB1**” (page 72) is very clear in paragraph 3 that, the **Employment Act** ⁽⁸⁾ was automatically incorporated as part of the terms and conditions of the **Appellant’s Employment Contract**.

It was submitted that, it will be noted that apart from providing for a probationary period, “**SB1**” subjects all other aspects of the appellant’s employment to the provisions of the **Employment Act** ⁽⁸⁾ and “other related pieces of legislation.”

It was contended that, although the respondent had a collective agreement, this was only for junior members of staff and not the appellant. Even the Disciplinary Code did not cover the appellant, (see last paragraph of page 189 of the Record of Appeal.)

It was further contended that, there was therefore at trial no document which could be referred to as the appellant’s Contract of Employment whose details meet the requirements of **Section 30 of Employment Act**.⁽⁸⁾ On the contrary, all there was are probation 24 hours notice period for termination, salary accounting, transport and lunch allowances/provisions.

It was submitted that, these items and allowances are essentially a replica of the provisions of the **Minimum Wages and Conditions of Employment General Orders; Statutory Instrument No. 57** ⁽⁹⁾ of (2006) which provides for a “qualified clerk.”

It was further submitted that, in view of the fact that there is no written Contract of Employment in keeping with **Section 30 of Employment Act**,⁽⁸⁾ the appellant served under an oral Contract of Employment as provided for in terms of the **Employment Act**. ⁽⁸⁾

It was contended that, the provisions of **Section 26A** applied to the appellant’s employment.

It was further contended that, the failure by the respondent to charge the appellant with any offence prior to dismissing her was a breach of the mandatory provisions of that Section, for which they

urged upon the Court the necessity of reversing the findings of the Court below.

The Court was finally prayed to allow the appeal with costs in this Court and the Court below.

In response to ground one of appeal, it was submitted that, the Court below was on firm ground when it held that the dismissal of the appellant was lawful as the evidence on record did show that the appellant was dismissed for financial misconduct.

It was pointed out that, the Court below did not come up with its own new reason for the dismissal of the appellant and in arriving at its judgment did not base its findings on factors outside the evidence on record.

It was submitted that, the appellant was sent on suspension and finally dismissed from employment with the respondent company on the basis of financial irregularities and misappropriation of various amounts of money of which the aforementioned amount of US\$2,481=00 forms part of the various amounts misappropriated.

It was pointed out that, the letter of dismissal as seen at pages 31 and 64 of the Record of Appeal, is self-explanatory, it will be noted that it makes reference to financial irregularities of an amount exceeding K400,000,000.00.

It was submitted that, as the Supreme Court stated in the case of **ATTORNEY GENERAL -VS- RICHARD JACKSON PHIRI**, the duty of the Court was:-

“Not to interpose itself as an appellant tribunal and review what management had done, but rather, if there was necessary power, and if such power was exercised in due form.”

It was pointed out that, from the judgment in the Court below, at page 22 lines 20 to 25 of the Record of Appeal, the Court below did guide itself with the foregoing principle in arriving at its judgment.

It was argued that, the appellant having been dismissed based on an allegation of financial irregularity, the Court below was not to conduct itself as a tribunal and review what management ought to have done, but simply to assess from the evidence presented and ascertain whether or not on the balance of probabilities the appellant had misappropriated any funds. It was contended that, in so doing, the Court below looked at the evidence presented. It was pointed out that, it is clear from page 176 of the Record of Appeal, lines 5 to 12 that the appellant confirmed having gotten certain monies from the respondent for personal use to travel to Namibia in preparation for her unborn child by verbally requesting for the same; page 179 line 4 of the Record of Appeal and later requested her husband to pay the same back by cheque as is confirmed by her at line 6. It was further pointed out that, RW1 at page 83 of the record at lines 9 to 12 also confirms the fact that the appellant did confirm to her having gotten the said US\$2,481=00 without approval because she had personal problem and requested her husband to pay it back as stated at lines 10 to 13 at page 183.

It was argued that, the procedure for requesting to get any loan or advance from the respondent company was set out by RW1 at page 182 lines 15 to 19 of the Record of Appeal, which involves completing a form and obtaining approval from the Managing Director and the General Manager of the respondent company which procedure the appellant confirms she never followed.

It was submitted that, the respondent deemed the appellant as having obtained this money without due approval.

It was pointed out that, it was clear, and as was correctly noted by the Court below that, the actions of the appellant in getting the aforesaid monies and having used them was inconsistent with her duties to her employer, the respondent. It was contended that, an employee owes his or her employer a duty to act in such away that the

employer can have confidence in the employee. The case of **SINCLAIR - VS- NEIGHBOUR** ⁽⁷⁾ was cited in which the Court of Appeal held that:-

“Even though no dishonesty was involved, because the employee had taken his employer’s money for a purpose of which he knew the employer would disapprove, the conduct was sufficiently reprehensible to warrant dismissal.”

It was contended that, the Court below did not err in law and in fact, but was on firm ground when it held that the appellant was guilty of misconduct by taking the employer’s cash without the knowledge and authority of the employer and that in line with the case of **SINCLAIR**, ⁽⁷⁾ this was a dismissible offence.

It was submitted that, as this evidence was presented before the Court below, the Court below did not base its judgment on a reason for dismissal that was contrary to the evidence on record as is seen from the above references made to the record of proceedings.

As regards the appellant’s argument that an amount of US\$2,481=00 was deposited, it was pointed out that, as is seen from page 188 of the Record of Appeal at lines 17 and 18, the deposit slips that were not deposited and which cover the amount in issue were at page 914 and 915. It was further pointed out that, the deposit referred to at page 913 as being the amount of US\$2,481=00 that was paid was with reference to the cheque that the appellant’s husband repaid for the money that the appellant had gotten without due approval. This is confirmed at page 188 lines 19 to 20.

In relation to the argument that the audit report should not form part of the evidence, it was contended that, only RW1 requested the same not to form part of her evidence and not the other witnesses. The argument is therefore misconceived.

It was further contended that, in the light of the foregoing, the appellant’s reference to the cases of **NKHATA AND FOUR OTHERS - VS- THE ATTORNEY GENERAL** ⁽²⁾ and **ZAMBIA CONSOLIDATED**

COPPER MINES LIMITED -VS- JAMES MATALE ⁽¹⁾ has been wrong as there was no error on the Court below in assessing the evidence that was before it.

In response to ground two of appeal, it was submitted that, this is in line with the principle established by the Supreme Court in the case of **CHILANGA CEMENT PLC -VS- KASOTE SINGOGO** ⁽⁴⁾ reciting its earlier decision in the case of **BARCLAYS BANK ZAMBIA PLC -VS- ZAMBIA UNION OF FINANCIAL AND ALLIED WORKERS** ⁽⁵⁾ in which the Court indicated that, the provisions of Part IV of the **Employment Act** ⁽⁸⁾ do not apply where there is a written Contract of Employment as the case was in this instance.

It was pointed out that, as stated in the appellant's own heads of argument, the appellant as rightly stated by the Court below was employed under a Contract of Employment which indeed made reference to the provisions of the **Employment Act** ⁽⁸⁾ and other legislation. It was submitted that, in this respect as is the case with any other written Contract of Employment, only the provisions with respect to written Contracts of Employment are applicable to this.

It was contended that, therefore the Court below did not err in law nor in fact when it held that the appellant's Contract of Employment was not covered by **Section 26A** of the **Employment Act** ⁽⁸⁾. Reliance was placed on the case of **ZAMBIA NATIONAL PROVIDENT FUND -VS- YEKWENYA MBINIWA CHIRWA** ⁽⁶⁾, where it was held that:-

“Where it is not in dispute 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 the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.”

It was submitted that in light of the above, the Court dismisses the appeal in its entirety with costs as it lacks merit.

We have considered the appeal; the grounds of appeal; the respective heads of argument; and the judgment of the Court below appealed against.

In ground one of appeal, the appellant has attacked the Court below in coming up with its own new reason for the dismissal of the appellant contrary to evidence on record.

From the record of appeal at page 20 the Court below after paying anxious consideration to the reason that the respondent relied on for the dismissal; vis-à-vis the conduct of CW1, with particular reference to the taking and using of US\$2,481=00 cash without the knowledge or approval of the respondent who was the owner of the money in question, and after considering that the evidence that CW1's husband later paid the money back to the respondent via postdated cheque No. 000008 was not rebutted found that:-

“This to our understanding is the reason why respondent dismissed CW1 even though both the suspension and the dismissal letters are not specific on this.”

We have considered the foregoing finding of the Court below. We do not think the Court below can be said to have come up with its own new reason for the dismissal of the appellant; contrary to evidence on record. The Court below is confirming that the reason for the appellant's dismissal was the taking and using of the US\$2,481=00 cash without the knowledge or approval of the respondent who was the owner of the cash in question. On the evidence before it, as contained in the record of appeal, the Court below cannot be faulted when it found as it did.

In the circumstances, we find no merit in ground one of appeal.

In ground two of appeal, the appellant has attacked the Court below when it decided the appellant's Contract of Employment was not

covered by **Section 26A** of the **EMPLOYMENT ACT**, but terminable at common law.

We have examined the record of appeal.

The Court below at page 19 of the record stated that, “the question for determination is, was the respondent entitled to dismissing the Complainant in the circumstances?” After considering the provisions of **Section 26A** of the **EMPLOYMENT ACT**, ⁽⁸⁾ the Court below went on to say that, here, we wish to guide that this Section is found in **PART IV** of the **Act** which deals only with oral Contracts of Employment; whereas Complainant was engaged on the basis of a written contract and subjected to probationary period and eventually being promoted to the position of Assistant Accountant. Therefore, **Section 26A** of the **EMPLOYMENT ACT** ⁽⁸⁾ never applied to her employment.”

We have perused the said **Part (IV)** of **EMPLOYMENT ACT** ⁽⁸⁾ and we have found that **Section 16** provides that:-

“The provisions of this part shall apply to oral contracts.”

There can be no doubt therefore that, the provisions of **PART IV** of the **EMPLOYMENT ACT** ⁽⁸⁾ applies to oral contract.

The issue for consideration therefore, is whether the appellant was serving under oral or written contract.

The evidence as it stands, it is clear that the appellant was serving under Written Contract. Therefore the Court below cannot be faulted for holding that, the provisions of **PART IV** of the **EMPLOYMENT ACT** ⁽⁸⁾ do not apply to the appellant’s Contract of Employment. We find no merit in ground two of appeal.

In the light of the foregoing, we find no merit in the appeal which is, accordingly dismissed.

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L. P. Chibesakunda
SUPREME COURT JUDGE

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M. E. Wanki
SUPREME COURT JUDGE

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P. Musonda
SUPREME COURT JUDGE