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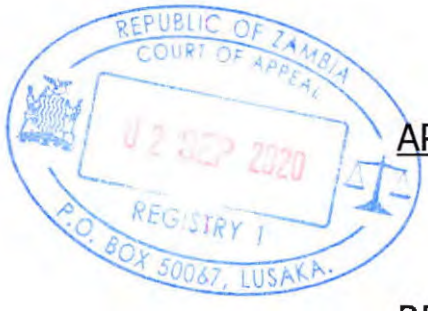
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL Nº 152/2019



BETWEEN:

ZAMBIA SUGAR PLC APPELLANT

AND

LUMUNO MUKWALI RESPONDENT

CORAM: **Chashi, Makungu** and **Lengalenga, JJA**
On 26th August, 2020 and 2nd September, 2020.

For the Appellant: Mr. A Tembo – Messrs Tembo Ngulube & Associates

For the Respondent: N/A

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court

Cases referred to:

1. **BANK OF ZAMBIA v JOSEPH KASONDE (1995 – 97) ZR 238 (SC)**
2. **ATTORNEY GENERAL v JACKSON PHIRI (1988 – 89) ZR 121 (SC)**
3. **THE POST OFFICE v UNION OF POST OFFICE WORKERS & ANOR (1974) 1 ALL ER 229**

Legislation referred to:

1. **THE INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA**

1.0 INTRODUCTION

1.1 This appeal arises from Hon Judge Egispo Mwansa's judgment dated 24th April, 2018 delivered in the Industrial Relations Division of the High Court.

2.0 BACKGROUND TO THE APPEAL

2.1 The undisputed facts are that the Respondent was employed by the Appellant on 26th October, 2006 as a unionised employee in the position of Zone Supervisor. He was subsequently elected President of the Zambia Union of Sugar Industry and Allied Workers (ZUSIAW hereinafter referred to as **"the Union"**). The said Union was duly recognized by the Appellant. On Sunday, 7th February, 2016, on the Respondent's day off, whilst he was in the company of the Union Secretary General, the Respondent featured on a paid for phone-in radio programme hosted by Mazabuka radio station. The radio programme was repeated on 21st February, 2016 and during the said programme the Respondent made following utterances:

> **"(a) I know how pathetic working conditions are at the company.**
>
> **(b) The company cannot give you anything, they come here to make money.**

(c) Management are saying things are bad yet they increase the price of sugar everyday, but when it comes to wages they tell you that there is no money even after selling the product which they have produced.

(d) How do you submit that you want to negotiate for 26% when the inflation rate is at 21.8%? Zambia Sugar has always emphasized on the increment of inflation related wage plus 5 – 6%.

(e) Management is to blame for not availing the list of members each union has, maybe they want to see confusion."

2.2 The Appellant's management was aggrieved with the Respondent's utterances and charged him with gross misconduct. A disciplinary hearing was duly held where the Respondent made his representations and he was subsequently dismissed from employment. His appeal to the Appellant's Managing Director proved futile.

2.3 Consequently, the Respondent lodged a complaint in the Industrial Relations Division of the High Court where he sought the following reliefs:

(1) An order that the summary dismissal is a nullity and void of effect.

(2) An order for reinstatement to employment in the

same capacity.

(3) An order for payment of salaries which were not paid as a result of the wrongful and unfair dismissal.

(4) An order for any other relief the Court may deem fit; and

(5) Costs.

2.4 At trial, the Respondent testified that the radio programme was paid for by the Union but that the Appellant dismissed him on the basis that he was not supposed to be on the said programme as the Appellant's employee. He contended that even though he was the Appellant's employee, he featured on the programme in his capacity as a unionist. He argued that his dismissal infringed his rights to participate in union activities as a unionised employee. He further argued that the Appellant's code of conduct did not extend to union activities. The Respondent informed the Court below that the Union was composed of members from different sectors of the industry beside the Appellant.

2.5 In cross-examination, the Respondent reiterated that during the radio programme, whilst he was the Appellant's employee, he was not

representing the Appellant but the Union. He informed the Court below that the code of ethics and BIZ practices only applied to him as an employee and that the said code of conduct did not apply to him when he was in the Union jacket.

2.6 The Appellant's witness, RW1, Dixter Kaluba testified that during the radio programme, the Respondent used disparaging words against his employer, that had the potential to cause industrial disharmony as there were on-going negotiations for salaries and conditions of service, even though the Union was not part of the negotiations. He informed the Court below that the issues concerning the negotiations were confidential and that the Respondent was bound to the code since he was discussing the employer and not general issues.

2.7 However, in cross-examination, RW1 stated that on the material day, the Respondent was not expected to ask for permission from the Appellant to be on the radio programme since the activity was outside the Appellant company. He conceded that the Respondent went to the radio programme for the benefit of the Union but he denied that the Employment Act № 15 of 2015 was violated as alleged by the Respondent.

3.0 DECISION BY THE COURT BELOW

3.1 After considering the evidence and submissions, the Hon. Judge in the Court below was of the view that the important question that arose is in what capacity the Respondent went to the radio station. He reasoned that if the Respondent went there as an aggrieved employee of the Appellant, then he was culpable. However, if he spoke as a Union official, the question that arises is whether a Union official, in his capacity as Union president, can be subjected to disciplinary action or procedures for words spoken at such an occasion.

3.2 He noted that the Appellant seemed to have taken the view that the Respondent did take off the dress and tag of an employee of the Appellant company when he featured on the radio programme. The Hon. Judge however held a contrary view that all indications from the facts were that the Respondent featured on the said programme as Union president, on a Sunday and that the programme was paid for by the Union and he spoke on Union issues. He relied on section 5 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia which provides for every employee's right to be a member of

a union and to participate in union activities. The said provision also forbids, frowns upon management manouvres at victimizing, penalizing, or intimidating an employee who performs union functions as the Respondent did.

3.3 Whilst the Hon. Judge found no flaw in the procedure at the disciplinary hearing, he, however, found the disciplining of the Respondent in the performance of his duties as Union president to be inappropriate.

3.4 The Hon. Judge, therefore, found that it was a proper case in which to declare the Respondent's dismissal unlawful and as such null and void and of no effect as it seriously and directly offended the provisions of section 5 of the Act.

3.5 He declined to grant the Respondent's prayer for reinstatement on the reasoning that it is a remedy that is rarely granted and when granted, it is granted sparingly, with great care and jealousy and with extreme caution as was stated by the Supreme Court in the case of **BANK OF ZAMBIA v JOSEPH KASONDE[1].**

3.6 In place of reinstatement, the Hon. Judge awarded 24 months salary as damages and a further three months salary as damages for mental

torture and anguish and the awards were to attract interest at fifteen percent (15%) per annum from date of Notice of Complaint to judgment and thereafter at 6%.

3.7 Dissatisfied with the judgment by the Court below, the Appellant has appealed to this Court on the following grounds:

1. **The Court below erred in law and fact when it held that the Respondent had taken off the dress and tag of an employee of Zambia Sugar Plc when he featured on the radio programme.**

2. **The Court below erred in law and fact when it found that there was no substance at all on which disciplinary proceedings could be grounded.**

3. **The Court below erred in law and fact when it held that this is a proper case to declare that the dismissal was unlawful and as such, null and void of effect as it seriously and directly offended the provisions of section 5 of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**

4.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

4.1 In arguing ground one, Appellant's Counsel submitted that at the time the Respondent made the statements in issue, he was still employed by the Appellant as Zone Supervisor. He, therefore, disagreed with the Court below on the question for determination and he instead identified it as being:

"Whether an employee who misconducts himself in the course of performing trade union functions can be subjected to disciplinary measures by his employer."

4.2 In answering the question, Appellant's Counsel referred this Court to section 2 of the Employment (Amendment) Act, Nº 15 of 2015 of the Laws of Zambia which was the applicable law at the time and which defines employment relationship in part as:

> **"a situation where work is carried out in accordance with instructions and under the control of an employer and may include –**
> **(b) Work**
> **(iii) Which is of a particular duration and has a certain permanency."**

4.3 Appellant's Counsel argued that by virtue of the fact that the employment relationship between the Appellant and the Respondent was subsisting at the material time that the Respondent was bound by his obligations to the Appellant as enshrined in the various documents and pieces of legislation governing their employment relationship.

4.4 It is contended that to uphold the view that the employment relationship between an employer and employee participating in union activities ceases to exist for that duration, would be encouraging

industrial disharmony in that employees will be free to misconduct themselves or misbehave under the guise of participating in union activities. Appellant's Counsel prayed that ground one be allowed and the holding by the Court below in this regard be reversed.

4.5 Grounds one and two were argued together. Appellant's Counsel with reference to section 5 of the Industrial and Labour Relations Act, submitted that the Respondent was allowed by the Appellant to join a union of his choice and to participate in union activities. He, however, argued that, as much as the said provision confers statutory rights on an employee, the said rights are reciprocated by obligations on the part of the employee participating in union activities as evidenced by section 6 of the Act which provides that:

> **"Every employee shall promote, maintain and co-operate with the management of the undertaking in which the employee is employed in the interest of industrial peace, greater efficiency and productivity."**

4.6 He submitted that whereas section 5 is not a stand-alone provision and is subject to other provisions, section 6 is a stand-alone provision, which thereby makes section 5 subject to it. He therefore argued that as the employee's rights are subject to obligations imposed on the

employee under section 6, an employee cannot violate the said provision and seek to be shielded from disciplinary action by invoking provisions of section 5. He further submitted that the Respondent violated his over-riding obligation to the Appellant under section 6 by making disparaging remarks that were not aimed at promoting, maintaining and co-operating with the Appellant's management but that were calculated to cause industrial disharmony in the Appellant company during the process of collective bargaining.

4.7 Appellant's Counsel submitted that there are facts established to support the disciplinary action taken against the Respondent by the Appellant. He identified the facts as the failure to observe his obligations under section 6 of the Act and violation of clause 13 of the Appellant's Code of Conduct and Business Practice, which proscribes against the disclosure of confidential information to outsiders and the need to exercise discretion when approached by the media. To fortify his argument, Appellant's Counsel relied on the case of **ATTORNEY GENERAL v JACKSON PHIRI**[2] where the Supreme Court observed that:

"Once the correct procedures have been followed, the

only question which can arise for the consideration of the Court, based on the facts of the case would be whether there were in fact facts established to support disciplinary measures, since any exercise of powers will be regarded as bad if there is no substratum of facts to support the same."

4.8 Based on the cited case, Appellant's Counsel argued that there was wrongdoing on the part of the Respondent to justify the institution of disciplinary proceedings by the Appellant, which resulted in the Respondent's summary dismissal. He submitted that, therefore, the Respondent's dismissal was not unlawful as it did not violate the provisions of section 5 of the Act contrary to the finding of the Court below.

4.9 In concluding his arguments, he urged this Court to reverse the finding by the Court below and to set aside the awards of twenty-four months' salary as damages and three months' salary as damages for mental torture and anguish.

5.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL

5.1 Although the Respondent who is unrepresented was not before Court at the hearing of the appeal, we took into consideration his heads of argument which were filed into court on 19th September, 2019.

In response to ground one, the Respondent submitted that the Court below was on firm ground when it held that he had taken off the dress and tag of the Appellant's employee when he featured on the radio programme on a Sunday when he was off duty. He argued that he featured on the said community radio programme as president of the Zambia Union of Sugar Industry and Allied Workers (ZUSIAW) and not in his capacity as Zone Supervisor of the Appellant company. He submitted that he spoke on issues related to unionism and that, therefore, there is no employment relationship with the Appellant when he was acting in that office of union president. It is the Respondent's contention that the Appellant seemed to seek to silence the employees' voice under the guise of owning the union president and thereby being an obstacle to the workers' freedom of expression and association as enshrined in the Constitution of Zambia.

5.2 The Respondent, therefore, urged this Court to uphold the judgment of the Court below and to order his reinstatement as Zone Supervisor.

5.3 In response to grounds two and three the Respondent submitted that the Court below was on firm ground when it held that this is a proper

case in which to declare that the dismissal was unlawful and as such null and void and of no effect as it seriously offended the provisions of section 5 of the Industrial and Labour Relations Act. He submitted that as the trial judge rightly pointed out, there is no substance on which disciplinary procedures leading to dismissal could be founded. He further submitted that he as Zone Supervisor did not violate any code of conduct and any laws of Zambia as alleged by the Appellant that he violated clause 13 of the said code of conduct, since there were no facts or evidence by the Appellant to support that allegation. He referred the Court to the said confidentiality clause which in part provides that:

> **"13.1 Confidential information, which is not generally available to the public may under no circumstances be disclosed to outsiders.**
>
> **3.2 Employees must not discuss company matters with outsiders – the principle of "need to know" must be constantly and under all circumstances strictly applied.**
>
> **.....**
>
> **3.5 Discretion should be exercised when approached by the media and any press statements must first be cleared by the Managing Director before they are released."**

5.4 The Respondent prayed that this Court upholds the judgment of the Court below and orders his re-instatement.

6.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND ITS DECISION

6.1 We have considered the grounds of appeal, respective arguments by the parties, authorities cited, evidence on record and judgment appealed against.

6.2 With regard to ground one where the Court below is faulted for holding a contrary view to the Appellant's contention that the Respondent did not take off the dress and tag of being the Appellant's employee when he featured on the live radio programme, we find that the Court below was on firm ground when it found as it did. We are of the view that the reasoning by the Court below is sound as the Respondent appeared on the Union sponsored radio programme in his capacity as Union president and he spoke on matters that related to unionism and workers conditions of service. Therefore, he was not bound by the Appellant's code of conduct at that time. We are further of the view that he properly considered the provisions of section 5 of the Industrial and Labour Relations Act and its objectives to ensure that workers' rights are protected through unionism.

6.3 We had occasion to peruse the said section 5 of the Act which provides that every employee shall have the following rights: and with reference to 5(1)(c):

> **"the right, at any appropriate time, to take part in the activities of a trade union including any activities as, or with a view to becoming an officer of the trade union."**

6.4 Therefore, from the said provision, the Respondent as union president was at liberty to participate in any union activities in terms of section 5 of the Act. We note that the participation in union activities is limited to what is referred to as **"any appropriate time."** Consequently, in this case, the Respondent in his capacity as Union president used his day off on Sunday to participate in the radio programme that was dedicated to addressing union matters which can be considered as **"an appropriate time"** to attend to such activities. Thus in the case of **THE POST OFFICE v UNION OF POST OFFICE WORKERS & ANOR**[3], it was held that:

> **"(Section 5(1)(c) of the English Industrial Relations Act) entitled a worker who was a member of a trade union to take part in the activities of his union whilst he was on his employer's premises but not actually working since the definition "appropriate time" ..... made it clear that the expression included all time outside the worker's 'working hours' i.e. the period**

> **when the worker was actually at work, and therefore included periods when the worker was and was entitled to be on his employer's premises but not actually working."**

6.5 *In casu,* the Respondent participated in a radio programme at an appropriate time in his capacity as Union president and made utterances which unfortunately the Appellant found offensive. In view of the foregoing, we cannot fault the Court below for finding as it did. Consequently, we find that ground one is devoid of merit.

6.6 Grounds two and three were argued together and we will also deal with them together as the issues are interrelated.

6.7 In ground two, the Appellant contend that there was in fact substance upon which disciplinary proceedings could be grounded. The said contention is premised on the obligations placed on an employee by section 6 of the Industrial and Labour Relations Act which states that:

> **"Every employee shall promote, maintain and co-operate with the management of the undertaking in which the employee is employed in the interest of industrial peace, greater efficiency and productivity."**

6.8 It was contended by the Appellant that the Respondent's utterances on Mazabuka radio were contrary to the promotion, maintenance and

co-operation with management of industrial peace, efficiency and productivity.

6.9 However, upon perusal of the said provision, we note that it refers to an employee and, therefore, imposes a duty on an employee and not a unionist even though such person also holds another hat as an employee. We, therefore, opine that the omission to make reference to a unionist is intended to allow them to perform their union activities without intimidation and to remain unfettered in their operations so as to enable them to adequately represent their members. However, this should not be perceived as supporting or encouraging union leaders to be reckless in executing their duties and having no regard to the maintenance of a conducive working environment.

6.10 Whilst we accept that the Respondent's utterances were rather harsh and were not well received by the Appellant, we are also of the view that the said utterances made in the course of the Respondent's union activities cannot reasonably be considered to be contrary to section 6 of the Act. We opine that the Respondent's utterances made in the course of union activities carried out at an appropriate time, could not form substance upon which disciplinary proceedings could be

founded. Furthermore, apart from the said utterances not forming substance on which disciplinary charges can be formed, instituting such disciplinary action is contrary to the spirit and objective of section 5 of the Act.

6.11 For the reasons stated, we find that the Court below was on firm ground in holding as it did. We, therefore, find that ground two also lacks merit.

6.12 In ground three the Court below is faulted for finding that the dismissal was unlawful and offensive to the provisions of section 5 of the Act, because of our position in ground two we find this ground to be devoid of merit.

6.13 In conclusion, all three grounds being unsuccessful, the net effect is that the appeal fails and we, accordingly, dismiss it.

6.14 Each party shall bear its own costs both in this Court and in the Court below.

.....
J. Chashi
COURT OF APPEAL JUDGE

.....
C. K. Makungu
COURT OF APPEAL JUDGE

.....
F. M. Lengalenga
COURT OF APPEAL JUDGE