

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA**

(Civil Jurisdiction)

BETWEEN:

RAPHAEL KATANEKWA



APPELLANT

AND

FINANCE BANK ZAMBIA LIMITED

RESPONDENT

Coram : Chibesakunda A/g CJ, Phiri and Muyovwe, JJS
On 2nd December, 2014 and 18th March, 2020

**For the Appellant: Mr. M. Z. Mwandenga – MZ Mwandenga
and Company**

For the Respondent: Mr. S. P. Chilembo – (In House Counsel)

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Agholor vs Cheesebrough Ponds (Z) Limited (1976) ZR 1**
2. **National Breweries Limited vs Philip Mwenya (2002) ZR 118
Zambia**
3. **Attorney – General vs Lee Habasonda (on his own behalf and on
behalf of SACCORD) (2007) ZR. 207**
4. **National Provident Fund vs Yekweniya Mbiniwa Chirwa (1986) ZR
70.**
5. **Zambia Electricity Supply Corporation Limited-vs- David Lubasi
Muyambango, SCZ Judgment No. 7 of 2006**

Legislation and other works referred to:

- 1. Employment Law, 2nd Edition, London Sweet and Maxwell, (1995) By Gwyneth Pitt**
- 2. Chitty's Mercantile Contracts, edited by Barry Chedlow, Chitty published by Sweet and Maxwell Limited (1955)**

We deeply regret the delay in delivering this Judgment. When we heard this appeal, the Hon. Madam Justice L. P. Chibesakunda, acting Chief Justice was part of the court. This is therefore the majority decision.

This is an appeal against the judgment of the erstwhile Industrial Relations Court which did not find any merit in the appellant's claim for wrongful dismissal. The background to this appeal is that the appellant was employed by the Respondent Bank as a Clerk in 1995. He rose to the rank of Officer in which he served until his dismissal in March, 2010 following a disciplinary hearing.

The facts which precipitated the disciplinary hearing were that the appellant on the 17th December, 2009 allowed a woman named Kasongo Mugala to re-open an account with the bank through which the woman practiced a cheque fraud amounting to K50 million kwacha which resulted into a loss to the bank. The appellant's

employer alleged that the fraudster's account was re-opened without following established Bank procedures. He was charged with two disciplinary offences, namely; gross negligence of duty resulting in loss of funds, and failure to follow procedures.

The disciplinary process was followed and exhausted with a final decision to dismiss him from employment. Thereafter the appellant launched an action seeking damages for wrongful/unfair dismissal; damages for mental distress and anguish; interest and costs. His position was that the loss to the bank could not be wholly attributed to him because it was not his fault that the whole cheque clearing period passed without the defect in the fraudster's cheque being detected by others involved in the process.

The Respondent's defence was that the appellant was responsible for the loss to the bank. In its assessment of the evidence before it, the trial court rejected the respondent's defence after finding that the loss of funds could not be wholly attributed to the appellant after the whole cheque clearing period passed. However, the trial court agreed that the appellant failed to follow procedures for the following reasons:-

- He opened the subject account without the mandate of the branch Manager as was required.
- He re-opened an old account without any authorization by his Supervisor.
- The appellant wrongly endorsed on the letter authored by the offending customer to re-open the account.
- He wrongfully verified the signature of the offending customer on her letter of request.
- He allowed the fraudster's cheque deposit without any cash deposit of at least one hundred thousand kwacha to enable the bank recover a penalty charge, known as re-activation fee.

The trial court reasoned that the appellant committed the wrongful acts which merited his dismissal and dismissed him.

Before us, the appellant filed four grounds of appeal as follows:

- 1. The trial court failed to properly guide itself on the law regarding termination of a contract of employment via dismissal of an employee.**
- 2. The trial court misdirected itself in law and fact when it found that there were various wrongful acts committed by the appellant which all merited dismissal.**
- 3. The trial court misdirected itself in law and fact when it based its decision to uphold the respondent's decision to**

dismiss the appellant on grounds that did not merit dismissal under the appellant's contract of employment.

- 4. Further and/or alternatively the trial court misdirected itself by failing to give reasons as to why it decided to uphold the respondent's decision to dismiss the appellant on grounds that did not merit dismissal under the appellant's contract of employment.**

In support of the first ground of appeal, it was argued that although the trial court made reference to the case of **Agholor vs Cheesebrough Ponds (Z) Limited⁽¹⁾**, which decided that the word "dismissal" was associated with wrong doing by the dismissed employee, the lower court suggested that it was any wrong doing that would merit dismissal without considering the degree or seriousness of the alleged misconduct. It was argued that the trial court should have considered the guidance given in the bank's grievance and disciplinary procedure code.

In support of this argument, the learned counsel cited text from the authors of **Employment Law⁽¹⁾** and **Chitty's Mercantile Contracts⁽²⁾** and insisted that the trial court failed to properly guide itself on the law, resulting in a wrong verdict.

The foregoing argument was largely repeated in support of the second and third grounds of appeal. In arguing the second ground of appeal,

learned Counsel specifically referred to a text in the judgment that read as follows: -

“There must be a wrongful act done by the employee to merit dismissal. We have found that there were as outlined above, various wrongful acts committed by the complainant in this case all of which merit dismissal.”

The appellant's contention was that the trial court did not in any way explain how and why it found that those “various wrongful acts” merited dismissal, and that the lower court did not take into consideration the fact that the appellant was serving under a contract of employment which had a grievance and disciplinary procedure code as part of his conditions of service. It was Counsel's contention that the trial court ought to have given reasons why the code was not taken into consideration.

To buttress the argument, the case of **National Breweries Limited vs Philip Mwenya** ⁽²⁾, was cited. In that case, the court held that:

“where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure in the contract and as such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity”

In support of ground three of the appeal it was argued that the lower court erroneously upheld the appellant's dismissal on the ground that he failed to follow procedure which was against the appellant's contract of employment which did not indicate dismissal as the punishment for that type of offence under the code. It was contended that failure to follow the code was in breach of the appellant's conditions of employment and rendered the dismissal unlawful at law.

In support of the last ground of appeal, it was submitted that the trial court never gave reasons why it ignored the provisions of the disciplinary code by simply concluding that:

"we are satisfied that the respondent was on firm ground when they dismissed the complaint."

According to learned Counsel, the foregoing conclusion was a misdirection because the wrong doings cited by the trial court did not merit dismissal under the appellant's contract of employment. It was further submitted that the lower court's judgment failed to meet the standards set by us in the case of the **Minister of Home Affairs, the Attorney – General vs Lee Habasonda (on his own behalf and on behalf of SACCORD)**⁽³⁾, where it was held, inter alia, that:

“Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.”

For the foregoing reasons, the applicant contended that failure by the trial court to give reasons made the judgment complained of fatally flawed. Thus, we were urged to allow the appeal and reverse the lower court’s judgment.

The respondent’s submission in reply to ground one was that the lower court properly guided itself when it applied the principle in the **Agholor case**⁽¹⁾ and concluded that the wrong acts done by the appellant merited dismissal; and that there was no suggestion to the effect that any wrong doing would necessitate dismissal.

On the second ground of the appeal, the respondent’s contention was that the trial court did not hold that there was no negligence on the part of the appellant, but merely alluded to the fact that the loss of funds was “not wholly the fault of the appellant”. Thus, the wrongful acts referred to in the lower court’s judgment do not only relate to failure to follow procedure, but also to negligence which caused the financial loss suffered by the respondent.

Regarding ground three of the appeal, it was the respondent’s contention that the lower court’s decision to uphold the appellant’s

dismissal was not based on the ground that he failed to follow procedure, but was based on the grounds that there were several wrongful acts which when considered together merited dismissal.

The learned Counsel referred us to the case of **Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa**⁽⁴⁾ in which this court held that procedural rules are part of the conditions of service of the parastatal organization and are not statutory. It was submitted that the trial court was not bound by procedural rules under the appellant's conditions of service, and therefore, it was on firm ground when it decided to uphold the dismissal on grounds that it felt that the appellant had committed several wrongful acts that together warranted dismissal.

On the fourth and last ground of appeal, the Respondents contention was that the lower court's judgment gave clear and brief reasons for the decision by addressing the two charges laid against the appellant in detail; reviewing the evidence, the arguments and making its findings on the basis of the precedent in the **Agholor case**⁽¹⁾. In support of this argument, we were referred to the case of **Zambia Electricity Supply Corporation Limited-vs- David Lubasi Muyambango**⁽⁵⁾ in which it was held that:

“it is not the function of the court to interpose itself as an Appellant tribunal within the domestic disciplinary Procedures to review what others have done. The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised properly.”

It was submitted that in the present case, the court below did adequately examine the disciplinary power and found that the disciplinary power was exercised properly and in accordance with what was before it. These were the arguments placed before us.

What is in common cause in this appeal is that the Respondent's disciplinary committee found the Appellant guilty of gross negligence of duty and failure to follow procedure resulting in loss to the Bank. The disciplinary committee factually established five specific wrongs committed by the Appellant. The Appellant's defence, which he repeated in his arguments before us, was that the faults could not wholly be attributed to him; and that the disciplinary charges were not dismissible under his contract of employment. Clearly, the tone of the Appellant's defences is that he substantially admitted to have committed the administrative wrongs.

The issue which is at the centre of this appeal therefore, is whether the listed wrongs committed by the Appellant could validly attract a dismissal from employment.

On the nature of the wrongs, we stated earlier in this judgment that these five listed wrongs were factually established by the disciplinary committee. We note that amongst the wrongs, was the charge of negligence which expressly attracted dismissal under the Appellant's conditions of service. The learned trial court discounted this charge on the grounds that the Appellant was not wholly to blame because the fraudulent bank cheque should have been detected by others in the clearing process. In our view, this holding by the court below was a misdirection. It is obvious to us that the lower court misdirected itself by making a finding that the Appellant was not liable for negligence in the loss of the money through fraud because that finding was unsupported by the factual evidence in the record of proceedings. This charge of negligence was factually established by the disciplinary committee and we uphold that finding and discount the lower court's holding. In any case, partial negligence in employment law cannot and should not absolve an employee from responsibility. Therefore, the Appellant remained liable for dismissal for negligence.

Coming to the specific grounds of the appeal; regarding grounds one, two and three, we have not seen any suggestion in the lower

court's judgment to the effect that every wrong by an employee merited dismissal. We are of the considered view that by relying on the principles pronounced in the decision in the **Agholor** ⁽¹⁾ case, the lower court properly guided itself on the law of termination of a contract of employment.

The lower court did acknowledge that accumulation of wrong doing may merit dismissal in appropriate cases even when dismissal is not specifically provided for in each disciplinary charge. In our considered view, this position is further supported by our decision in the case of **Zambia National Provident Fund - v- Yekweniya Mbiniwa Chirwa** ⁽⁴⁾ which was cited in the submissions.

Regarding ground 4 of the appeal which alleges that the lower court's judgment fell short of the threshold of what a judgment ought to be, we must say that we have not found any merit in this ground because the lower court did give clear reasons for each and every finding; including the finding on contributory negligence which we have not upheld. In our view, the case of **Lee Habasonda** ⁽³⁾ does not offer any comfort to the Appellant's arguments.

We equally find no merit in ground four (4) of the appeal whose argument in support was similar to ground three (3) which we have

dismissed. The net result is that we dismiss the appeal. We make no order for costs.



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G.S. Phiri
SUPREME COURT JUDGE



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E. C. Muyovwe
SUPREME COURT JUDGE