

**Appeal No. 155/2013**

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT NDOLA**  
(Civil Jurisdiction)

BETWEEN:



**CITIBANK ZAMBIA LIMITED**

**APPELLANT**

**AND**

**GARDNER MALENJI**

**RESPONDENT**

**Coram : Phiri, Muyovwe and Wood, JJS**

On 1<sup>st</sup> December, 2015 and 13<sup>th</sup> May, 2020

**For the Appellant: Mr. A. Dudhia of Messrs. Musa Dudhia & Company**

**For the Respondent: No appearance.**

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## **JUDGMENT**

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**PHIRI, JS, delivered the Judgment of the Court.**

**CASES REFERRED TO:**

1. *Gunton v London Borough of Richmond upon Thames* (1980) 3 ALL ER 577
2. *Attorney General v Tembo*, SCZ Judgment No. 1 of 2012,
3. *Wilson Masauso Zulu vs Avondale Housing Project* (1982) ZR 172
4. *Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa* (1986) ZR. 70.

5. **Tolani Zulu and Musa Hamwala vs Barclays Bank SCZ judgment No. 17 of 2003**
6. **Rosemary Mwanza vs Standard Chartered Bank Zambia Limited Appeal No. 55/2009**
7. **Simon Mukanzo vs ZCCM, SCZ Appeal No. 133 of 1999**

**LEGISLATION REFERRED TO:**

1. **Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**

The delay in rendering this judgment is deeply regretted and so is any inconvenience caused to the parties.

This appeal arose from the decision of the erstwhile Industrial Relations Court, in favour of the Respondent's claim against the Appellant Bank in a complaint filed pursuant to **Section 85 (4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.**

By his complaint in the court below, the Respondent sought the following reliefs:

- (i) **Damages for wrongful dismissal.**
- (ii) **Damages for mental distress occasioned by the wrongful dismissal.**

- (iii) An order that the respondent Bank facilitates the transfer of ownership to the complainant of the Dodge Nitro Registration Number ABL 9135.**
- (iv) Interest**
- (v) Costs and (vi) Any other relief the court may deem fit.**

The background of this matter, as is relevant to this appeal, is that the Respondent was an employee of the Appellant engaged on contract from 3<sup>rd</sup> March, 1998 as a cash Management Assistant. He was confirmed on permanent and pensionable terms on 1<sup>st</sup> April, 1999 and subsequently rose through the ranks to the position of Head of Trade of Treasury Services/Assistant Vice President. The Respondent was entitled to, inter alia, a brand new motor vehicle of his choice as long as it did not exceed USD 45000 in value and the Bank provided a capped amount of fuel for the motor vehicle. The Respondent held the position of Vice-President until his termination of employment.

The events leading to the Respondent's termination began when the Appellant's Bank raised concerns over the Respondent's Management of his personal finances. It was noted that his staff and fuel accounts were overdrawn on several occasions. In accordance with the company Disciplinary Procedure, Management issued him with a verbal warning which was later reduced to writing on 12<sup>th</sup> August, 2010.



Subsequently, on 15<sup>th</sup> September, 2010, the Appellant's Management wrote to the Respondent to inform him that his failure to adhere to the verbal warning amounted to improper conduct on his part and, as a result, a disciplinary tribunal had been convened to hear his case and that he had the opportunity to be heard.

Consequently, the disciplinary tribunal heard the case but before its ruling was delivered the Bank management terminated the Respondent employment in accordance with his contract of employment, by paying him one month's salary in lieu of notice. This event is what triggered the legal action.

The Respondent's position in the lower court was that he was terminated without following the disciplinary steps as outlined in the Disciplinary Policy and Procedure up to the final written warning letter followed by a period of 18 months before the final warning letter could take effect in order to give him a chance to perform satisfactorily. On the other hand, the Appellant's position was that the disciplinary hearing had no bearing on the termination of the Respondent's employment because the Appellant decided to exercise its option to terminate by notice pursuant to clause 12 of the contract of service.

The trial court identified three issues for determination. These were:-

1. Whether or not the Appellant Bank complied with its Disciplinary code in handling the Respondent's case.
2. Whether or not there were other reasons for terminating the Respondent's employment other than invocation of the termination clause in the Respondent's contract of employment; and
3. Whether or not the Respondent was entitled to a transfer of the car bought by the Appellant Bank for use by the Respondent under the Bank's car policy which capped the value to USD 45,000.

The trial court resolved the first issue in the Respondent's favour on the basis of the English case of **Gunton v London Brough of Richmond upon Thames**<sup>(1)</sup>; and our own case of **Attorney General v Tembo**, <sup>(2)</sup> which affirmed that failure to follow the correct disciplinary procedural steps in dealing with an employee's case amounted to wrongful dismissal. The trial court concluded that the invocation of the termination clause by the Bank which had already commenced the disciplinary proceedings was improper and amounted to wrongful dismissal.



Regarding the second issue the trial court found no cause to address and determine it in view of its conclusion in the first issue.

Regarding the third issue, the trial court found in favour of the Bank on the ground that there was no evidence on record to confirm that the topping up on the purchase price of the personal-to-holder motor vehicle, whose price had been capped at USD 45000, was a common practice at the Bank or that the Bank had waived the prohibition for members of staff topping up on the purchase price of motor vehicles as provided in the Bank's car policy. The trial court found that the top-up amount claimed by the Respondent was not paid to the Appellant, but to the suppliers of the vehicle; that, therefore, the claimed top-up amount should be ignored for the purpose of determining the net book value of the motor vehicle under the car policy which limited the value to USD 45,000. Thus, the transfer of ownership to the Respondent was rejected and, instead, the Respondent was ordered to surrender the vehicle in accordance with the car policy.

In the trial court's judgment, the Respondent succeeded only in his claim for wrongful termination of employment. This is what triggered this appeal.

The Appellant appealed to this court canvassing two (2) grounds of appeal, namely:-

- 1. The trial court misdirected itself in fact and law in finding that the Appellant initiated the disciplinary proceedings against the Respondent without fully following the disciplinary steps outlined in the Appellant's Disciplinary and procedure Code before terminating the Respondent's contract of employment in complete disregard of the unchallenged evidence.**
- 2. The trial court erred both in fact and law when it held that the invocation by the appellant of the termination clause in the Respondent's contract of employment after disciplinary proceedings had already been instituted was improper and resulted in wrongful termination.**

In support of ground one, it was submitted that the trial court failed to consider the proviso in the disciplinary procedure clause of the Disciplinary policy and Procedure Code, whose effect was that the appellant could use only one warning letter which would serve as both the first and final warning letter where there was serious misconduct on the part of the employee, including misuse of staff accounts. It was argued that there was overwhelming evidence on record establishing that the Respondent misused his staff account by overdrawing it,



bouncing cheques and failing to settle his excess fuel bill and MTN bills on time.

It was further argued that the trial court took an erroneous view when it found that the Appellant was only entitled to terminate the Respondent's employment once a final written warning letter was issued to him and he repeated the offences therein.

It was argued that this view was a clear misapprehension of facts which this court has the power to reverse in line with the holding in the case of **Wilson Masauso Zulu vs Avondale Housing Project**.<sup>(3)</sup> It was further submitted that the offences the Respondent committed were dismissible offences in any event, such that if there was any failure to comply with the laid down disciplinary procedure, the respondent had no valid claim for wrongful dismissal, as no injustice was occasioned to him; as was held in the case of **Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa**.<sup>(4)</sup>

With regard to the second ground of the appeal, it was submitted that the trial court wrongly interpreted the English case of **Gunton vs London Borough of Richmond upon Thames**<sup>(1)</sup> whose ratio decidendi allows an employer to invoke the termination clause in an employment



contract, even where there is a prescribed disciplinary procedure. It was submitted that the **Gunton vs London Borough<sup>(1)</sup>** case was distinguishable from the present case because in that case, the **London Borough<sup>(1)</sup>** decided to shorten the disciplinary steps that were set out in the disciplinary code, while in the present case the appellant Bank followed all the necessary disciplinary steps that were set out in the disciplinary code before the decision to terminate the contract of employment by way of payment of one month's salary in lieu of notice, after consideration of the Respondent's length of service and the seniority of the position he held; and that the Respondent could not have suffered any prejudice as he was given notice of the charges and had the opportunity to respond to the allegations of improper conduct.

In support of this submission, Mr. Dudhia referred us to the case of **Tolani Zulu and Musa Hamwala vs Barclays Bank<sup>(5)</sup>** in which this court pronounced that an employer has the right to either summarily dismiss an erring employee, or to terminate an employment contract by notice or payment of one month's salary in lieu of notice. We were also referred to the case of **Rosemary Mwanza vs Standard Chartered Bank Zambia Limited<sup>(6)</sup>** where it was held that a reason ought to be given where an employer summarily dismisses an employee, or dismisses an

employee for a cause, while no reason needs to be given where an employer opts to terminate a contract of employment in accordance with its termination clause.

These were the submissions we received on behalf of the Appellant.

When we sat to hear this appeal, there was no appearance by the respondent, for himself or through counsel on his behalf; and no heads of arguments opposing the appeal were filed. Efforts to serve the Notice of Hearing were exhausted without success, the Respondent had moved from his known residential address, and he was no longer represented by the Advocates who were on record in the trial court. However, after a long period of inactivity, the Respondent reappeared through his written Heads of Argument dated 1<sup>st</sup> February, 2016 and, later, his written Heads of Argument in Reply dated 16<sup>th</sup> February, 2016. The latter documents were all filed without leave of court as a result of which we were compelled by the rules of court to discount them.

From the facts in common cause, which we have narrated in this judgment, it clearly emerges that the Appellant Bank initially decided to deal with the Respondent in accordance with the disciplinary process of

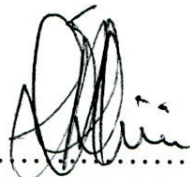


the Bank. They were perfectly entitled to deal with him in that manner. The Appellant was accused, in writing, of misuse of his staff accounts by overdrawing his bank, fuel and phone accounts. The Disciplinary Procedure and Policy Code clearly stated that where the offence is a serious one, such as misuse of staff accounts, the first warning letter could amount to the final warning. The Bank took further steps to constitute the tribunal to hear the Respondent's case and it was clear that the offences the Respondent was accused of having committed were dismissible offences. They decided to terminate his employment in accordance with his contract of employment by payment to him of one month's salary in lieu of notice after taking into consideration the Appellant's senior position in the Bank and his considerable length of service.

The court below found that the invocation of the termination clause by the Respondent where disciplinary proceedings were commenced, was improper and resulted in wrongful termination. In the lower court's understanding, simply because disciplinary proceedings had commenced, the Appellant Bank was barred from invoking the termination clause. This view was a misdirection because termination by notice was still open to the Appellant against the Respondent; whose



argument was that the Disciplinary Code should have been followed to the latter. The latter argument was wrong because the Respondent's grave misconduct was dismissible in accordance with the guidelines provided in the Disciplinary Code. This was the essence of our decision in the case of **Simon Mukanzo vs ZCCM**<sup>(7)</sup>. We do not accept that the Respondent's dismissal was wrongful procedurally. We find merit in this appeal and we allow it. We order that each party shall bear their own costs.



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G. S. Phiri  
**SUPREME COURT JUDGE**



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E. C. Muyovwe  
**SUPREME COURT JUDGE**



.....  
A. M. Wood  
**SUPREME COURT JUDGE**