s

IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 117/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BIKSON JISHIKA - **APPELLANT**

AND

BARRICK LUMWANA MINING COMPANY LIMITED **RESPONDENT**

CORAM: MAKUNGU, KONDOLO SC AND MAJULA JJA

On 27th March 2018, and J1.2tl1#2020

For the Appellant : Mr. F. Sumaili of Messrs Mumba Malila and Partners

For the Respondent: Mr. S. Chisenga of Messrs Corpus Legal Practitioners

---

JUDGMENT

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Bank of Zambia v Kasonde (1995-1997) ZR 238**
2. **First Quantum Mining and Operations Limited v Moses Banda CAZ Appeal No. 194/2018 (Nov 2019)**
3. **Nkhata and Others v Attorney General (1966) Z.R. 124.**
4. **Chibesakaunda Mwila Kayula v Family Health International SCZ Appeal No. 145 of 2012.**
5. **Care International Zambia Limited v Misheck Tembo Selected Judgment No. 58 of 2018**
6. **Eston Banda v Edward Dalitso Zulu v The Attorney General SCZ Appeal No. 42/2016 (Feb 2019)**

LEGISLATION REFERRED TO:

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

TEXT REFERRED TO:

1. **International Labour Organisation (ILO) Termination of Employment Convention, 2982 (No.158)**
2. **Mwenda W.S. On Employment Law: Cases and Materials (2004) UNZA Press, Lusaka**
3. **Sprack John. Employment and Practice. 1st edition (2007) Sweet and Maxwell, London**
4. **Blacks Law Dictionary**
5. **Slewwyn's Law of Employment**

The Appellant was dismissed from employment and commenced an action seeking damages for unfair dismissal. The brief facts were that the Appellant was employed by the Respondent Company as driver and on the 22nd May, 2016 during the night shift at around 23:00 hours, he reversed into a stationary truck. The damage occasioned to the truck included damage to a rear-view mirror and handrails on the driver's side. The Respondent perceived the cause of the accident as being due to a competency gap on the part of the Appellant and it was recommended that he undergoes retraining whilst his disciplinary hearing was still pending.

He was subsequently charged with reckless/ negligent driving of a machine which endangers property and life and was directed to exculpate himself, which he did. He was summoned to attend a disciplinary hearing where he admitted the charge and was subsequently dismissed. Not satisfied with the outcome, he appealed to the General Manager who then sealed his fate.

The Appellant launched a complaint in the Industrial Relations Division of the High Court seeking a declaration that the purported termination of employment was unfair and unjustifiable for which damages ought to be awarded.

The trial Court examined the evidence on record and came to the conclusion that the disciplinary procedure was adhered and the dismissal was thus justified. The Court held the view that the Appellant admitted the charge at his disciplinary hearing, on appeal and before the trial Court. His only contention was he didn't damage the truck but just scratched it.

The trial Court did not accept his version of events and found that the evidence showed that the area where he parked was sufficiently

lit and large. His claim that he scratched the other truck because of insufficient passing space and poor visibility was rejected and his dismissal was upheld and his complaint dismissed.

The Appellant assailed the Judgment of the lower Court on the following 5 grounds;

1) **The Court below erred both in law and in fact when it found that the disciplinary procedure was adhered to without considering the fact that the decision to summarily dismiss the Appellant was arrived at before the disciplinary hearing.**
ii) **The Court below erred both in law and in fact when it found that the Appellant's dismissal was justified in the absence of evidence to validate the charge against the Appellant.**
iii) **The Court below erred both in law and in fact when it found that the Appellant's dismissal was justified without having regard to the inconsistent manner in which the Respondent administered its disciplinary code of conduct.**

iv) **The Court below erred both in law and in fact when it found that the Appellant's dismissal was justified without considering the fact that the Appellant had already been punished by way of retraining for causing the accident.**

v) **The Court below erred in law and in fact when it placed the burden of proof solely on the Appellant.**

Counsel for the Appellant Mr. Sumaili filed Heads of Argument which he augmented with oral submissions. He indicated that the grounds of appeal would be argued in two parts, namely, grounds 1,3 and 4 relating to procedure as one ground and grounds 2 and 5 relating to breach of the **International Labour Organisation (ILO) Termination of Employment Convention, 2982 (No.158)' ratified** by Zambia in 1990 and domesticated in 1997, as another. The gist of grounds 1,3 and 4 is that the disciplinary procedure was not followed because he was subjected to two parallel processes.

---

[1] International Labour Organisation (ILO) Termination of Employment Convention, 2982 (No. 158)

In ground one, he argued that the parent company in Canada recommended that he be re-trained and if competent, was entitled to retain his job. Under the said process, the Appellant was re-trained and certified as competent to resume work but the same day he was charged with reckless driving and scheduled to appear before the Disciplinary Committee which, according to counsel, amounted to double jeopardy. It was submitted that the comment in the Disciplinary Case Record at page 68 of the Record which states that *"The accused will be terminated..."* was the reason for his dismissal.

It was further submitted that the dismissal was not supported by evidence and the Respondent ought to have justified its decision. In a similar incident where handrails were damaged, the Appellant was charged with damage to property and therefore the current charge was full of *mala fides.* The **International Labour Organisation (ILO) Termination of Employment Convention was** called on to reinforce grounds 2 and 5 and on whose basis it was argued that employment should not be terminated without valid cause and the burden of proof to show that there was a valid reason

for termination is placed on the employer. Mr. Sumaili argued that the Respondent did not discharge its burden on the charge.

It was further argued that in arriving at its judgment, the lower Court did not consider the definition of reckless driving. Counsel referred to Black's Law Dictionary Fifth Edition (1979) which defines reckless driving as operating an automobile whilst manifesting reckless disregard of possible consequences and indifference to other's right. The definition includes element's that must be present to establish the statutory offense of reckless driving according to English law. He opined that the offense was not proved because the Appellant did not admit to reckless driving and he adverted to the case of Bank of Zambia v Kasonde [(1)] in which the Supreme Court held that the allegations that go to dismissal of an employee must be proved.

On behalf of the Respondents, Mr. Chisenga submitted that the Complaint was for unfair dismissal and not wrongful or unlawful dismissal. He stated that unfair dismissal was concerned with the reasons for the dismissal and not compliance with the disciplinary procedure or breach of the contract of employment. He pointed out

that the issue of procedure did not arise in the lower Court and on that basis alone, grounds 1, 3 and 4 were misconceived and, in any event, grounds 1 and 2 were challenging findings of fact which according to **Section 97 of the Industrial and Labour Relations Act**[2] was untenable.

It was further submitted that the Appellant was not punished twice on account of the re-training and the dismissal. He was re-trained because the Respondent needed to ascertain his competency levels and the fact that he was sent for retraining demonstrated that there was no bias against him as they considered him an employee pending the decision of the Disciplinary Committee.

With regard to ground 5, Mr. Chisenga stated that the Appellant admitted the charge and his reliance on the International Labour Organisation (ILO) Termination of Employment Convention and the submissions on the burden of proof were not issues that were raised in the Court below. That the termination was justified and was

[2] Section 97 of the Industrial and Labour Relations Act, Chapter 269, Laws of Zambia

supported by the evidence on record. We were urged to dismiss the appeal.

In reply, Mr. Sumaili repeated his arguments in support of double jeopardy.

Counsel for both parties are thanked for their spirited arguments. We have perused the Record of Appeal and the Grounds of appeal and identified three issues namely;

1. Whether there was adherence to the disciplinary procedure.
2. Whether the summary dismissal was justifiable
3. Whether in the circumstances, the Court can reverse the findings of fact vis a vis Section 97 of the Industrial and Labour Relation Act.

We shall begin by addressing grounds 1, 3 and 4 as approached by the parties. The Appellant challenged the procedure adopted by the Respondent Company and argued that as confirmed by the note at page 68 of the record of appeal, the decision to summarily dismiss

him was made before the disciplinary hearing. The comment on the note referred to was dated 24th July, 2016 and stated as follows; *"The accused will be terminated as this was a very reckless operation of the DT and he admitted being responsible."*

The Respondent on the other hand argued that the decision to dismiss him was arrived at, at the end of the hearing and the *controversial words, "...he will be terminated..."* was a recommendation as to what should happen if he was found guilty. That, in any event, the trial Court did indicate that it would consider the evidence on record, which it did and found that the procedure was adhered to.

The record shows that the disciplinary procedure was followed and commenced with a charge being issued and in his Affidavit in support of the complaint as well as his testimony at page 151 of the Record of Appeal, the Appellant admitted that he received a Charge Sheet after which he was issued a Notice of Hearing for 14th July, 2016. His testimony at pages 153 and 157 of the Record of Appeal shows that he admitted damaging the handrail and asked for leniency. We therefore do not accept the preposition that he was

adjudged before the hearing because he was given a chance to exonerate himself but he admitted to causing damage and pleaded for leniency.

We note however, that what the Appellant challenged was whether the damage to property was as a result of negligent or reckless driving which endangers property or life. He testified that he was not aware, at the material time, that there was another person in the truck. He was also discontent with the charge he was given because in a similar incident, earlier on, he was only charged with causing damage to company property but in the current situation the disciplinary code applied differently.

We have gleaned from the record that the 1st charge was premised on the fact that he reversed into a rock and he was given a warning letter. In this case, he was charged under a different head, we suspect it was due to the fact that the wellbeing of RW 1, Fuckson Mufwaya, was put at risk. Accepting this argument, which we do not, would imply that employers cannot vary the charges leveled against erring employees depending on the facts supporting the charge. We reiterate that it remains the purview of employers to charge erring

employees with whatever charge they deem appropriate under the circumstances. The Appellant was duly charged, heard and a decision arrived at.

With regard to ground 3 which alleges that the Appellant was punished twice, the Respondent argued that the re-training did not fall within the four stages of punishment stated in the Disciplinary Code. It was, in any event, untenable to suggest that the re-training to operate heavy machinery was punitive when it had been shown that it was a requirement and normal practice in a mine operations area. We opine that in terms of timing and in certain circumstances, re-training might seem inconveniencing but would certainly not qualify as punishment.

We therefore agree with the Respondent's Counsel that the re-training was in no way a punishment and we are fortified by the Appellants response in cross examination, at page 161 of the Record of Appeal, where he stated that he was trained when initially employed but was re-trained in 2014 and his salary was increased. Further, Clause 6.3 of the Disciplinary Code which provides for forms

of punishment does not list re-training as one of them. Counsel for the Appellants arguments on this ground fail.

The Appellant seeks that this Court reverses the findings of fact by the lower Court that the disciplinary procedure was adhered to. As rightly pointed out by Counsel for the Respondent, an appeal from the Industrial Relations Division is subject to Section 97 of the Industrial and Labour Relation Act which provides that appeals must be against a finding of law or any point of mixed law and fact.

In First Quantum Mining and Operations Limited v Moses Banda [(2)] **we cited the case of Nkhata and Others v Attorney General** [(3)] *vis a vis* reversal of findings of fact at appeal stage and we were also guided by **Gertrude Chibesakaunda Mwila Kayula v Family Health International** [(4)] in which Section 97 of the Industrial and Labour Relation Act was interpreted to preclude appeals against findings of fact. We held in that case, that the ground of appeal attacking the lower Court's finding of fact, having evaluated the evidence before it, that the respondent was unfairly dismissed, was a fact that could not be appealed against. In casu we can act no differently and see no reason to upset the lower Courts finding of fact

that the Respondent followed procedure and that the Appellant was duly subjected to all stages of the Disciplinary Code. We therefore find no merit in Grounds 1, 3 and 4 and dismiss them accordingly.

Grounds 2 and 5 were argued as one and assailed the merits of the dismissal. Over the years some parties before court have failed to distinguish between unfair dismissal and unlawful dismissal. In the case of Care International Zambia Limited v Misheck Tembo [5] the Supreme Court cleared the various misconceptions by setting out the principles of dismissal. Musonda DCJ, cited a number of authorities including a text from the book On Employment Law: Cases and Materials by Mwenda W.S. [3] and stated that there is wrongful dismissal and unfair dismissal. The former is concerned with the form of the dismissal or a breach of the terms of the employment contract whilst the latter is a creature of statute and looks at the merits/reasons for the dismissal.

Selwyn's Law of Employment 6th Edition was cited and it was acknowledged that the disciplinary code or disciplinary rules must be brought to the attention of the employee. The Supreme Court

---

Mwenda W.S. On Employment Law: cases and Materials (2004) Unza Press, Lusaka

warned against the cavalier or careless use of the terms 'unlawful dismissal', 'unfair dismissal', 'unlawful termination of employment' and 'wrongful dismissal' because even though they all relate to the cessation of employment, they connote different things. Also cited was an excerpt from **Sprack John on Employment and Practice** where it stated that the dismissal can either be wrongful; unfair; wrongful and unfair; or lawful meaning it is neither wrongful nor unfair.

In the more recent case, **Eston Banda, Edward Dalitso Zulu v The Attorney General** [6] the Supreme Court recapped its holding in Care International Limited [5] Supra that the mode of an employees dismissal or exit from employment will determine what relief, if at all, they would be entitled to. The cited case simplified the position regarding dismissal and stated that:

> ***"..there are only two broad categories for dismissal Lw an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term for which***

the employee is engaged; whilst 'unfair', as stated at paragraph 757 of Haisbury's Laws of England, refers to a dismissal in breach of a statutory provision, where an employee has a statutory right not to be dismissed." (our emphasis)

In casu, the procedure was properly followed and the lower Court found as a fact that the Appellant had actually committed the offence for which he was dismissed and that he admitted the charge and sought leniency. His plea for leniency was refused and his employment was terminated.

During the trial, as per page 144 of the record of appeal, the Appellant conceded in cross examination that he had, during the disciplinary hearing on appeal, agreed that he had not followed the correct procedure when reversing his truck. He agreed that the right-hand side was the blind side. RW1 stated that when reversing, the Appellant positioned the stationery truck in his blind spot thereby causing the accident. The fact that the truck was damaged on the left

side shows that he adopted the wrong method when parking his truck.

Despite admitting to having reversed wrongly, throughout his testimony, the Appellant was adamant that he did not damage the truck but only scratched it. His assertion is however, not supported by any evidence because if it was only a scratch, during the disciplinary hearing, he would not have admitted to the charge of damaging a handrail.

As earlier indicated, the Appellant admitted the charge against him during the disciplinary hearing as well as at appeal stage and there was not a lot the learned trial Judge could do other than dismiss the Appellants claims. In the earlier cited case of Care International Limited (supra) the Supreme Court pointed out that an employer is under no obligation to conduct a full scale trial or prove the case beyond reasonable doubt. We find that the trial judge correctly assessed and evaluated the evidence before him and found that the Appellant, having admitted to the charge, was correctly dismissed. Grounds 2 and 5 are likewise dismissed.

In the premises we uphold the judgment of the lower Court and this appeal is dismissed. Each Party shall bear its own costs.

.....

C.K.MAKUNGU
COURT OF APPEAL JUDGE

....

M.M. KONDOLO, Sc
COURT OF APPEAL JUDGE

B.M.'MAJULA
COURT OF APPEAL JUDGE