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IN THE COURT OF APPEAL FOR ZAMBIA **CAZ APPEAL NO. 58/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)

ALICK CHINDO **APPELLANT**

AND

BUKS HAULAGE LIMITED **RESPONDENT**

Coram: **CHISANGA JP SICHINGA and NGULUBE, JJA**

This 21St day of January 2020 and 2nd June 2020

For the Appellant: *N/A*
For the Respondent: *S. M. Chilufya, Messrs DMK Legal Practitioners on behalf of AD Gray & Partners*

JUDGMENT

CHISANGA JP delivered the judgment of the Court

Cases Referred to:

1. ***Chansa vs Barclays Bank Zambia Limited PLC Appeal No 111/2011***
2. ***Lupemba vs First Quantum Mining and Operations Limited Appeal No 120/2017***
3. ***AEC Zambia PLC vs Shaft Simwinga Appeal No. 223/2015***
4. ***Swarp Spinning Mills vs Sebastian Chileshe and Other (2002) ZR 23***
5. ***Sikombe vs Access Bank (Zambia) Limited Appeal No 240/2013***
6. ***Undi Phiri vs Bank of Zambia (2007) ZR 186, 191***
7. ***National Breweries Ltd vs Mwenya (SCZ No 28 of 2002)***
8. ***Chimanga Changa Limited vs Stephen Chipango Ngombe (2020) Vol 1 ZR 208***
9. ***Attorney General vs Phiri (1988-89) ZR 121***
10. ***Biston Depo Fishing Company vs Ansel (1888) 39 Ch. D339***

11. ***Zambia National Provident Fund vs Chiruda (1986) ZR 70***
12. ***Tembo vs Hybrid Poultry Farm (Z) Limited (2003) ZR 98***
13. ***Mutale vs Zambia Consolidated Copper Mines (1993-94) ZR 94, 96***
14. **Nkhata** & **Four Others vs Attorney General (1965) Z.R.P**
15. ***Attorney General vs Jackson Phiri (1988-89) Z.R. 121***
16. ***Zambia National Provident Fund vs Chirwa SCZ Judgment No 18 of 1986***

The appellant was employed by the respondent as a truck driver, until he was summarily dismissed in October 2011. According to the appellant, he was on 3rd October 2011, driving a Company truck to Kansanshi Mine. When he reached a restaurant in Chingola, he stopped over to buy himself food. Whilst parked at the restaurant, the defendant's Director of Operations, a Mr. Kanyenda, came to the restaurant and photographed the bystanders who were near the truck. He then drove off without talking to the plaintiff, or enquiring whether the bystanders were passengers on the truck.

The appellant averred that he was not furnished with a charge sheet alleging commission of any offence, nor was he given opportunity to exculpate himself. He was however served with a letter of dismissal on ^{4th} October 2011, in which it was stated that he was guilty of carrying unauthorized persons, and refusing to carry out instructions (for allowing unauthorized personnel to drive a company vehicle). After receiving this letter, he challenged the defendant to prove its allegations against him.

What followed was a letter dated 10th October 2011 from the defendant, advising that he stood dismissed, save for the amendment deleting the reason relating to allowing unauthorized personnel to drive a company vehicle.

The plaintiff took the view that the dismissal was unfair and wrongful, and sought redress in this action.

The defendant denied the alleged unfair and wrongful dismissal, asserting instead that it was warranted. In contrast to the plaintiff's averments, the defendant stated that the photographs were taken whilst the passengers were alighting from the defendant's truck, and that the Operations Director expressed disappointment that the plaintiff was carrying passengers despite being on final warning regarding similar offences. Whilst conceding that an error was made, the defendant averred that the same was corrected. That in fact the plaintiff was furnished with a charge letter on 3rd October 2011, giving him 24 hours in which to exculpate himself on the charge of carrying unauthorized personnel. The plaintiff refused to collect the letter, opting to exculpate himself verbally, and did so during a disciplinary hearing.

Upon receiving evidence from both sides, the learned trial judge noted that the defendant's Disciplinary and Grievance Procedure Code provided that a detailed charge was to be completed. The affected employee would be requested to write an exculpatory letter in his defence within 24 hours of the charge. Thereafter, the employer was obligated to investigate the charge and make a

full report on its findings and recommendations. The report would be addressed to the erring employee's supervisor and copied to the employee. The learned judge also noted salient contents of such a report.

The trial judge observed that the facts on record revealed that on 3rd October 2011, DWI saw the plaintiff around 09:00 hours and around 09:43 hours. He sent an email to Ronald Chipandwe and others. Thereafter Ronald Chipandwe wrote a notice of hearing to the plaintiff, requesting him to attend a hearing on 4th October 2011. The judge also took note of Minutes dated 3rd October 2011, which revealed that an exculpatory meeting, by the Human Recourse Officers and the plaintiff was held, where the plaintiff denied the charges leveled against him.

The learned judge noted that DW2 admitted that the charge was supposed to be raised by the plaintiff's supervisor, which was not done. He noted that the timelines in the Disciplinary Code indicated that a hearing could be held within the shortest possible period of time, so long as the procedure had been followed. The trial judge found that the plaintiff did not proceed to Kansanshi on 3rd October 2011, but went to Ndola where he was served with the charge letter, although he denied being aware of the disciplinary hearing which took place the following day.

The judge was of the view that whatever the case, Clause 3 of the Disciplinary Code required the respondent to conduct an investigation to establish whether

the plaintiff had committed the offence charged. The judge opined that the charge letter was not an investigation and that the defendant ignored its own rules and procedures in proceeding to conduct a disciplinary hearing in the absence of an investigations report. Therefore, the judge reasoned, the exercise of powers was not valid. He also opined that the administration of the disciplinary process was in a shambles because, even though he had accepted that the plaintiff attended the exculpatory meeting, the Minutes of the meeting produced in court were not signed and the notice of the disciplinary meeting was not acknowledged as received by the plaintiff, and not endorsed with any comment regarding whether or not it was served on him.

It was the learned judge's view that the speed with which the process was executed was extraordinary. Without an investigations report, there was no fair basis on which to conclude that the plaintiff had carried passengers illegally as charged. The dismissal was therefore, according to the judge, wrongful and the plaintiff entitled to damages.

The learned judge recalled that the measure of damages was the notice period, and that a court could depart from the measure only where the circumstances and justice of the case so demand. Such circumstances would be where the termination was done in a traumatic fashion that causes distress and mental suffering. He was of the view that the plaintiff had not shown or led evidence to

warrant departure from the normal measure of damages, as the evidence only revealed that the procedure was not followed.

The learned judge thus awarded the appellant one month's salary, which was the notice period stated in the employment contract.

The appellant was aggrieved at this paltry award, and appealed against it, on two grounds, whose gist is that the view that there was no evidence to warrant departure from the normal measure of damages was against the weight of the pleadings and evidence led before the court, and that the awarded damages went against the more recent awards of up to twelve months.

The arguments on these grounds were that the court should have taken into consideration the inconvenience and injustice the applicant was subjected to as the result of loss of employment on unsubstantiated grounds. The dim chance of the applicant securing a job in the current domestic and global economic environment should have been accorded due weight by the judge. *Learned counsel referred us to* ***Chansa vs Barclays Bank Zambia Limited PLC',*** and ***Lupemba vs First Quantum Mining and Operations Limited***[2], as support for these arguments.

The respondent filed a cross appeal, and tendered arguments in support of the cross appeal, and in opposition to the appellant's appeal.

It was argued that the Supreme Court has not only awarded 12 months' salaries as damages. To the contrary and more recently, the Supreme Court had awarded three (3) months' salaries and allowances in ***AEC Zambia PLC vs Shaft Simwinga***[3]. In the earlier case of ***Swarp Spinning Mills vs Sebastian Chileshe and Other***[4], the Supreme Court awarded the equivalent of six months earnings.

It was argued that the award of damages varied according to the circumstances of the case and the departure from the normal measure is only in deserving cases. That in the instant case, no evidence was led by the appellant to warrant the court's departure from the normal measure of damages. The appellant was a driver, and he had led no evidence to show that he had encountered difficulties in securing another job. It was contended that the appellant's job was a modest one, incomparable to those of graduates. His chances of getting employed were high. The injustice and inconvenience could therefore be atoned for by the damages awarded by the court, pursuant to the notice clause.

The cross appeal was brought on five grounds. The first of the respondent's grievance is that the finding in favour of the appellant was due to failure to evaluate the evidence, and contrary to the weight of the evidence and the law. In addition to this, the court erred in finding that the disciplinary process was a shambles for lack of investigations when the appellant was afforded an opportunity to be heard. Further, that it was an error to hold that

investigations were not conducted, when the respondent was in possession of evidence to support the allegations against the appellant. Alternatively, the court erred in failing to find that the breach, if any, of the rule requiring investigations did not go to the very core of the appellant's right to be heard. The respondent's other complaint was that the court erred in failing to find that the appellant had committed a dismissable offence, and in awarding costs to the appellant when he had only succeeded in three out of the seven claims.

The submissions in support of the cross appeal are that according to the findings of the trial judge, the appellant was served with a charge letter and attended an exculpatory meeting. He however refused to participate in the disciplinary bearing that was to take place the following day, even though aware of the same. It was argued that he spurned the opportunity given to him to attend the hearing, as the Minutes showed that he was so informed. *Reference was made to* ***Sikombe vs Access Bank (Zambia) Limited***[5] and ***Undi Phiri vs Bank of Zambia***[6].

It was submitted that the appellant's refusal to be heard could not react against the respondent who had given him opportunity to be heard. The respondent acted fairly and its decision should be supported, per ***National Breweries Ltd vs Mwenya***[7].

It was submitted that the court below, in one breath acknowledged that the respondent had reasonable grounds for instituting the disciplinary process

against appellant, while in another it stated that there was no fair basis on which to conclude that the appellant had carried passengers illegally as charged. According to learned counsel, the respondent adduced evidence which showed that the appellant was seen carrying unauthorised passengers in the respondent's motor vehicle. The fact that DWI saw the appellant with unauthorized passengers was sufficient evidence.

Learned counsel argued that an investigation was aimed at gathering evidence. It was not logically tenable to insist on an investigation when the evidence was already available. Reference was made to ***Chimanga Changa Limited vs Stephen Chipango Ngombe***[8]. It was learned counsel's view that the court below having noted that from the time lines in the Disciplinary Code it was clear that a disciplinary hearing could be held within the shortest time possible, it was an error for the court to then state that the speed with which the disciplinary process was carried out was extra-ordinary.

It was submitted that although the photographic evidence did not show that the unauthorized passengers were in the respondent's truck or alighting, this did not negate DW l's evidence that he saw the appellant carrying unauthorised passengers. The failure by DWI to take pictures of the unauthorised passenger was adequately explained. Learned counsel referred to ***Attorney General vs Phiri***[9] regarding the function of the court in disciplinary matters.

Learned counsel sought to argue that the appellant should not have been believed that someone was asking for a lift as this person should have done so on the driver's side. We note that this argument actually contradicts the evidence of DWI, who testified that as the two ladies were walking away, another one got to the passenger door, and DWI heard him ask for a lift. Learned counsel overlooked this evidence in her submissions.

It was submitted that it was incorrect for the court to conclude that the appellant was dismissed for his past conduct. Clause 6.37 of the Disciplinary Code provided for summary dismissal. Learned counsel referred to ***Biston Depo Fishing Company vs Anse***[110,] and ***Zambia National Provident Fund vs Chiruda***[11] on the effect of misconduct.

Regarding costs, learned counsel contended that the appellant having only partially succeeded, should not have been awarded costs. This argument was, according to counsel, supported by ***Tembo vs Hybrid Poultry Farm (Z) Limited***[12]. It was further argued that the respondent paid into court the dues the appellant was entitled to, and awarded as damages. Therefore, the respondent should not have been condemned in costs. Learned counsel relied *on* ***Mutale vs Zambia Consolidated Copper Mines***[13] as support for this argument.

We were urged to uphold the appeal.

We have given both appeals due consideration. We will deal with the cross appeal first, as it attacks the decision of the trial judge.

The learned trial judge made findings on the evidence led before him, and drew conclusions from those findings. One cardinal finding is that the infraction preferred against the appellant was not investigated, and that this rendered the exercise of disciplinary power by the respondent invalid. He also referred to the unsigned Minutes, as militating against the assertion that the appellant was notified of the date of hearing, despite having attended an exculpatory hearing.

It is apparent that what is sought by the respondent is scrutiny of the effect of the evidence led by the respondent regarding the charge preferred against the appellant, and not interference with findings of fact based on demeanor or credibility.

Interference with conclusions drawn by a trial court is warranted, where it is shown that a trial court erroneously took into account matters they should not have taken into account, or overlooked consideration of pertinent matters. Ultimately the described errors entail that the court did not take full advantage of hearing the parties and the evidence they led before the court. See ***Nkhata & Four Others vs Attorney General***[14].

It can thus be seen that there is a caveat on this court's treatment of evidence led before a trial court where issues of credibility arise. In this appeal, the facts reveal, as found by the trial judge, that the appellant received a charge letter, although he refused to sign it. He also attended the exculpatory meeting. The trial judge has been accused of failing to evaluate the evidence led by the parties. This complaint necessitates examination of the evidence on record and the conclusions arrived at by the trial judge.

The evidence on record, which was accepted by the trial judge is that the plaintiff was found by Artson Kanyenda, the operations director, as he was on his way. He had parked the truck at Mwaiseni. The learned trial judge also accepted that the plaintiff attended the exculpatory meeting. Indeed, the Minutes of the exculpatory meeting attest to this fact. It is curious however that having made this conclusion, the learned judge overlooked some of the contents of the Minutes of the exculpatory meeting.

These are that Mr. Chindo, in the presence of the Senior Human Resource Officer and the Human Resource Officer asked Mr. Kanyenda in his native language, (Lamba) why he was being so hard on him, and that he was sorry and would not do it again. When the Human Resource Officer asked Mr. Chindo if he had anything to say in his closing remarks, his response was that he had nothing to say as he believed that Mr. Kanyenda was just being unreasonable and that after all the photos he took would not even prove that

the passengers were in his truck. The Minutes further state that in closing remarks, Mr. Chindo was advised to report the next morning for the disciplinary panel to hear this case.

The learned judge's finding was that upon being directed to go to Ndola, Mr. Chindo did so, as revealed by the Minutes of the exculpatory meeting. Having accepted that the plaintiff went to Ndola and attended an exculpatory meeting which was minuted, the learned judge should have equally accepted that the plaintiff admitted having carried passengers in the truck, and that he was notified of, and asked to attend the disciplinary hearing the following day.

In addition to the foregoing, the learned judge observed that the timelines in the Disciplinary Code entailed that the matter could be dealt with within the shortest possible time, as long as the procedure was followed. His difficulty was that the matter was not investigated. It is on this point that the learned judge misdirected himself.

The evidence before him, as clearly indicated in the Minutes of the exculpatory meeting, which he accepted, was that the appellant admitted committing the offence, as he said he was sorry and would not do it again. This admission obviated the need to conduct investigations, which are aimed at establishing the facts.

The photographs taken by Artson Kanyenda showed two women standing by the truck, one of them checking something, and a young man talking to the driver. The next photograph showed the two young women walking away, while the young man stood by the door. Interestingly, the appellant had remarked that the photos taken by Mr. Kanyenda would not show that the passengers were in his truck.

When hearing employment matters, a court is not to transpose itself as an appellate court from the decision of the employer. Its mandate is to examine whether the employer had the power to discipline the employee, and whether that power was validly exercised. This principle was restated in ***Attorney General vs Jackson Phi ri***[15].

An employee who has committed a dismissable offence suffers no injustice as a result of the failure by the employer to follow laid down procedure, as was *held in* ***Zambia National Provident Fund vs Chirwa***[16]***.*** Contrary to the trial judge's view, we do not think the Supreme Court placed a caveat on this principle in ***Sikombe vs Access Bank***[5]. There, Malila JS said these words:

> ***"Where an employee has not committed any identifiable dismissible wrong, or such wrong cannot be established, the employer shall not be allowed to find comfort in the principle we expounded in the Zambia National Provident Fund vs Chirwa case."***

Our understanding of this dicta is simply that if an employee has not committed a dismissable wrong, the principle espoused in the *Chirwa* case would not apply. Similarly, where the alleged wrong cannot be established, the employer cannot take refuge in the *Chirwa* principle. These words do not negate what was stated in the *Chirwa* case. The *Chirwa* dicta was that if an employee has committed a dismissable offence, failure by the employer to follow procedure will not reprieve him. It did not refer to instances where no identifiable dismissable wrong had been committed, nor did it refer to cases where a wrong could not be established. We have not perceived the caveat the court is said to have placed on its decision in the *Chirwa* case.

Having stated the above, it follows that even if the charge against the appellant was not preferred by his supervisor, it was brought to his attention as conceded in cross examination. He refused to accept it and write an exculpation, but nonetheless attended an exculpatory meeting, and was advised to attend a disciplinary hearing the following day. He spurned this invitation and refused to appeal against the dismissal.

Having considered the facts accepted by the trial judge, our view is that the employer acted reasonably in the circumstances. It was seized of disciplinary power and exercised these powers validly. No investigations were required, as the appellant said he would not do it again. This employee had committed

similar offences, and been warned that punitive action would be taken against him.

On 22nd January 2011, the appellant received a final warning letter. Therein, he was informed that having been found with unauthorized passengers on 22nd January 2011, management found him guilty of failure to carry out instructions, and unauthorized use of company equipment. Management took other mitigating factors into account and charged him ZMK100 for each passenger. He was urged to refrain from this kind of behaviour failure to which management would take punitive action against him.

In dismissing the appellant, the respondent took his antecedents into account. The letter of 10th October 2011 states that the appellant was guilty of carrying unauthorized persons even after being served with a final warning letter and numerous verbal warnings. The respondent was entitled to take the past record of the employee and past conduct into account among other things. The offence of carrying unauthorized personnel carried a severe written warning for a first breach, and dismissal for the second breach. It was an error for the trial judge to state that the appellant was dismissed for past breaches when the respondent had dealt fairly with the appellant, only dismissing him when he persisted in carrying unauthorized passengers.

On the foregoing discussion, we find merit in grounds 1 to 4 of the cross appeal. The result is that we set aside the judgment of the court below, and

hold instead that the appellant was not wrongfully or unfairly dismissed. His appeal is dismissed as a result. It follows that the costs order made by the trial judge falls away. The respondent is awarded costs both here and in the court below, to be agreed and in default taxed.

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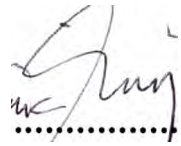
F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL



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D. L. Y. SICHIN A
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE