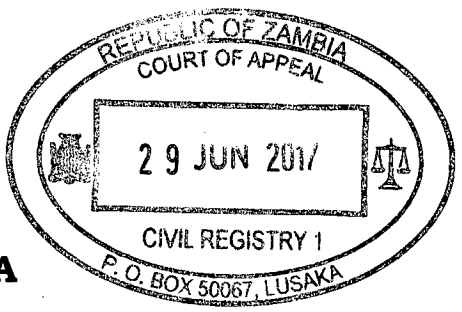
IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/085/2016**
AT THE LUSAKA REGISTRY **APPEAL NO. 1 OF 2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

SAVIOURS MUNDIA **APPELLANT**

AND

ZAMBIA SUGAR PLC **RESPONDENT**

Coram: Chisanga, JP, Mulongoti , Sichinga, JJA

On the 29th day of June, 2017

For the Appellant: *In Person*

For the Respondent: *Mr. A. Tembo of Messrs Tembo Ngulube and Associates*

JUDGMENT

SICHINGA, JA, delivered the Judgment of the Court

Cases referred to:

1. *Bridget Mutwale v. Professional Service Limited (1984) ZR 72*
2. *Roston Mubili Mwansa v. NFC Africa Mining Plc SCZ Appeal No. 12 of 2008*

3. *Zulu v. Avondale Housing Project Limited (1982) ZR 172*
4. *Khalid Mohamed v. Attorney General (1982) ZR 49*
5. *Zambia Electricity Supply Corporation Limited v. David Lubasi Muyambango SCZ Appeal No. 7 of 2006*
6. *Rainward Mubanga v. Zambia Road Services Limited (1987) ZR 43*
7. *Raine Engineering Company Limited v. Baker (1972) ZR 156*
8. *Ridge v. Baldwin (1963) 2 ALL E.R. 66*
9. *Phyllis B. Kasempa v. Attorney General HP/4918/1994 (unreported)*
10. *Contract Haulage v. Mumbuwa Kamayoyo (1982) ZR 13*
11. *Bedford Kang'ombe v. Attorney-General (1972) ZR 177*
12. *Buchman v. Attorney-General (1993-1994) ZR 131*
13. *Mususu Kalenga Building Limited and Another v. Richmans Money Lenders Enterprises (1999) ZR 27*
14. *Attorney-General v. Kakoma (1975) ZR 216*
15. *Attorney General v. Marcus Achuime (1983) ZR 1*

The appellant in this case was employed by the respondent as a general worker in December 2010, and in June 2012 he was appointed as a water co-ordinator, a position he served until he was dismissed by his employer. He was found to have misconducted himself at work by being under the influence of alcohol.

According to the appellant the facts were that on 7th July, 2015 he went to the place of work at 19:40 hours with the intention of seeking to be excused from work that day, as he had a family problem to attend to. The appellant was then subjected to a breathalyzer to test his alcohol content. The test result reading was 0.62mg/1. He admitted that he had consumed alcohol between 11:00 and 13:00 hours during the day. His explanation was that he was not on duty when he went to the place of work and subjected to the breathalyzer test.

On 8th July, 2015 the appellant complained to the Section Head about the test he had been subjected to by his supervisor. The Section Head counseled him and his supervisor, in the presence of a union representative, and he considered the matter closed. On 24th August, 2015, the appellant was formally charged with the offence of being at work under the influence of alcohol. In a letter dated 10th September, 2015, the appellant explained himself with regard to the charges he was facing. He denied the charge. After a hearing by a disciplinary committee, the appellant was found guilty

of the offence of Gross Misconduct (being at work under the influence of alcohol), and summarily dismissed.

Being dissatisfied with the verdict of the disciplinary committee, the appellant appealed this decision to the Agriculture Manager, who, upon reviewing his case upheld the summary dismissal. On 23rd October, 2015, the appellant appealed this decision to the Managing Director, who equally reviewed his case and found no merit to reverse the earlier verdict. This prompted the appellant to commence an action in the Industrial Relations Court seeking orders for the following reliefs:

1. *Notice pay*
2. *Damages for unlawful dismissal*
3. *Costs*
4. *Any other benefits the court could order.*

The appellant contended that he was unlawfully and unfairly dismissed by the respondent. He testified that he went to the work

place at a time when he was not on duty, and that is when he was subjected to a breathalyzer test.

The respondent denied dismissing the appellant unfairly or unlawfully, arguing that the appellant had reported for work whilst under the influence of alcohol contrary to its disciplinary rules. The Human Resources and Administration Manager narrated that upon receipt of a complaint from the appellant's work section that he had been found under the influence of alcohol at a level of 0.62mg/1 which was above the allowance level of 0.37mg/1, thus in contravention of the respondent's regulations, he charged the appellant with the said offence. A breathalyzer test was conducted on the appellant. It was the witness' comprehension that a person with the level of 0.62mg/1 was not in the position to safely carry out his work. The witness placed emphasis on the fact that the appellant was accorded due process to exculpate himself of the charges he was facing. He also testified that the appellant was supposed to report for work in a shift commencing at 18:00 hours and ending at 06:00 hours.

After considering the evidence before it, the trial court formulated the issue for determination to be whether or not the appellant was on duty on 7th July, 2015 when the alcohol test was conducted. The trial court reviewed the respondent's Disciplinary Code and found that the penalty for gross misconduct comprised in being at work under the influence of alcohol or drugs is summary dismissal. The trial court found that on the material day the appellant was supposed to report for work at 18:00 hours, and that the alcohol test on the appellant was conducted at a time when he was on duty. Further, that the disciplinary procedure was properly followed. The trial court found no merit in the appellant's claims and dismissed them all.

Aggrieved by that decision, the appellant appealed to this court advancing four grounds as follows:

"GROUND ONE

The trial court contradicted itself when it refused to accept my evidence in form of a handover copy who's writing is same to that of my exculpation letter on basis of signature but

referred to the evidence of the respondent in arriving at the conclusion that I was at work at 19:45 hours in form of minutes which are not signed."

GROUND TWO

The trial court misdirected itself in fact in failing to take into account that the respondent did not adduce any relevant evidence to support his allegations on the charge form and the dismissal letter.

GROUND THREE

The trial court misdirected itself both in law and facts failing to take into consideration that they have being some written contracts of service in both employments first and second and specified as accurately as possible the normal weekly hours of work as 40. As enforced by the Employment Act Article 30 clause h.

GROUND FOUR

The trial court misdirected itself both in law and facts failing to take into consideration the provisions of the collective

agreement which was legally approved in line with the Industrial and Labour Relations Act Article 71 clause 3a and interprets the forty normal weekly hours of work and stipulates them into normal hours per shift as 8."

At the hearing of the appeal, both parties relied on their filed heads of argument. As regards ground one, the appellant submits, in the main, from what we can decipher, that the minutes of the hearing by the disciplinary committee were not signed and thus could not have been official documents to be relied upon by the court below. In this connection he cited the case of ***Bridget Mutwale v. Professional Services Limited***[1] and to a holding therein that;

> ***"If prior presidential consent is not obtained for a sublease, the whole of the contract including the provision for payment or rent is unenforceable."***

The appellant then submitted that on the 8th July, 2015 he reported for work at 18:00 hours because he was in shift C. It is his submission that there was no merit in the trial court discarding his

handover copy evidence which was acknowledged by the respondent.

In responding to the arguments under ground one, Mr. Tembo, learned counsel, for the respondent accepted that the minutes of the disciplinary hearing produced by the respondent in the court below were not signed and for that reason the said minutes were in breach of the rules of evidence. He submits that the mere fact that the said rules violated the rules of evidence did not preclude the trial court from relying on them. Counsel relied on Section 85(5) of the Industrial and Labour Relations Act which orders the court to do substantial justice between parties before it without being impeded by the rules of evidence. Counsel also cited the case of ***Roston Mubili Mwansa v. NFC Africa Mining Plc***[2] to emphasis his point on substantial justice and the need for fairness and impartiality in determining a complaint. Mr. Tembo further pointed out from the record that the appellant did not object to the respondent producing the minutes of the disciplinary hearing at trial. He submitted that the court below neither contradicted itself

nor misdirected itself in refusing to accept the appellant's evidence. Counsel prayed that this ground should fail.

With regard to ground two, the appellant in the main submits that the respondent did not adduce evidence of the statement he is alleged to have made on (communication) radio to prove that he was misconducting himself. The appellant also contends that the respondent did not produce a printout or result slip to show that he had committed an offence. Further, on this ground, the appellant contends that the respondent did not produce a collective agreement which would clearly state the hours he was entitled to work. He submits that the respondent did not prove his case. The appellant referred to the cases of ***Zulu v. Avondale Housing Project Ltd***[3] and ***Khalid Mohamed v. Attorney-General***[4] where the Supreme Court stated that a plaintiff must prove his case even when a defence had failed.

In response to ground two, it is submitted on behalf of the respondent that the burden of proof was on the appellant to prove his case on a balance of probabilities in order to secure judgment in

his favour. It is submitted that the respondent's duty was limited to merely leading evidence to discredit the appellant's evidence, which the respondent did. The respondent submits that the appellant lamentably failed to discharge the burden of proof on a balance of probabilities to entitle him to judgment in his favour. In addition, the respondent submits that the appellant's arguments under this ground suggests that the court below was an appellate tribunal within the respondent's disciplinary procedure. In this regard, we are referred to the case of ***Zambia Electricity Supply Corporation Limited v. David Lubasi Muyambango***[5] where the Supreme Court held that:

> ***"It is not the function of the court to interpose itself as an appellate 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 counsel's contention that the court below did not interpose itself as an appellate tribunal in the respondent's disciplinary procedure but sat and examined if the respondent had the

necessary power to discipline the appellant. It is submitted that this ground of appeal lacks merits and should therefore fail.

In grounds three and four, the appellant appears to submit that the court below did not take into consideration the provisions of the contract he was working under with regard to hours he was meant to work, and further that the court below did not consider the provisions of the Industrial and Labour Relations Act on collective agreements.

In advancing his arguments the appellant cited the cases of ***Rainward Mubanga v. Zambia Road Services Ltd,***[6] ***Raine Engineering Company Limited v. Baker,***[7] ***Ridge v. Baldwin,***[8] and ***Phyllis Bubala Kasempa v. Attorney-General.***[9] The import of these authorities, according to the appellant, was that his dismissal was contrary to statutory provisions because the trial court failed to find that he was entitled to work 40 hours per week as stipulated in his contract.

seek to address statutory provisions. However, both grounds three and four have no substance or relevance to this appeal. In our view, the appellant's submissions reflect on factors which were not addressed to the trial court for consideration. The arguments are disjointed and fall beyond the proper issues highlighted above. We thus accept the respondent's submission in relation to grounds three and four that the issues raised therein were not subject of determination in the court below and are not now competently before this court. We are equally bound by the holdings in ***Buchman v. Attorney (supra) and Mususu Building Limited and Winnie Kalenga v. Richmans Money Lenders Enterprise (supra)***. Grounds three and four are bound to fail, and we dismiss them accordingly.

We now turn to deal with the question whether the appellant was on duty on the 7th July, 2015. The appellant's arguments largely challenge findings of fact in that respect. We find fortress in the case of ***Attorney-General v. Kakoma***[14] where the Supreme Court gave guidance in the following terms:

"A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard witnesses giving that evidence."

The evidence received by the trial court from the appellant was that he went to the office at 19:40 hours on 7th July, 2015. He said he was meant to report at 22:00 hours. The respondent's witness accepted that he reported at 19:40 hours and testified that the respondent had a system of three shifts, that is 06:00 hours to 14:00 hours; 14:00 hours to 18:00 hours; and 18:00 hours to 06:00 hours. He testified that the appellant was in the last shift 18:00 hours to 06:00 hours, and that he had reported late for work. When the appellant reported for work he was seeking permission to stay away from work. The appellant was unable to show the trial court that he routinely reported for work at 22:00 hours.

It is trite that the standard of proof is the balance of probabilities in a civil case. The court below evaluated the evidence tendered by both parties and resolved the issue at page J12 of its judgment:

"In our considered view the evidence of the respondent is preferable. This is because it is clear from the respondent's witnesses at the disciplinary hearing that the complainant did not report for work on time. We have no difficulty in accepting for a fact that the complainant was supposed to report for work at 18:00 hours that day."

It is clear from the record that the court below was not persuaded by the appellant's evidence to enable it accept his claim. It was entitled to take this position in view of the indication by the respondent's witness that the handover book had gone missing, as well as the contents of the minutes of the disciplinary meeting. Even though the minutes were not signed, we note that the appellant referred to the disciplinary hearing in his appeal to the Managing Director, at page 58 of the record of appeal.

On the basis of the evidence advanced we cannot fault the lower court in arriving at the conclusions that it did. It is trite law that an appellate court can only reverse findings of fact made by the trial

court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they are findings which, on a proper view of the evidence no trial court acting correctly can reasonably make. The case of ***Attorney General v. Marcus Achuime***[15] refers.

In casu, the trial court made the findings after evaluating the evidence before it and preferred the evidence of the respondent's witness after hearing and observing all the witnesses. We opine that the findings are not perverse or made in the absence of relevant evidence to entitle us to interfere with them. Accordingly, we uphold the trial court's finding that the appellant was supposed to report for work at 18:00 hours that day.

The second issue, as already alluded to, is whether the appellant was lawfully dismissed by the respondent. In arguing the second ground, the appellant alleges a misdirection by the lower court in failing to consider that the respondent did not adduce evidence to support his allegations on the charge form and the dismissal letter.

The issue as we see it, was whether the evidence warranted dismissal of the appellant.

The appellant in his testimony accepts that on the 7th July, 2015 he took some bottles of mosi beer between 11:00 hours and 13:00 hours. He said his supervisor smelt the alcohol on him, and that is what prompted him to call security officers who then administered a breathalyzer test on him. He said the reading of the test was 0.62mg/1. It is not in dispute that this was above the respondent's permissible level of 0.37mg/1. Having found that the appellant was on duty that day, he was clearly in contravention of the respondent's regulations. Perusal of the respondent's Disciplinary Code and Grievance Procedure produced in evidence reveals that being at work under the influence of alcohol or drugs constitutes an offence for gross misconduct, which offence the appellant was charged with. A disciplinary committee was constituted and proceeded to hear the appellant's case. He was found guilty and was dismissed. This procedure is not challenged by the appellant.

In his arguments, the appellant contends that the respondent did not adduce evidence to prove its case. He refers us to the case of ***Khalid Mohamed*** (supra) to buttress his argument. It is trite that the burden of proof places the responsibility of establishing a particular fact on its proponent. The facts in this case show that the appellant sought to assert that he was not on duty on the 7th July, 2015. He failed to discharge that burden before the lower court. It is not in dispute that the appellant's alcohol levels were beyond the respondent's recommended limit. In his arguments he placed the burden of proof on the respondent. His position is not consistent with the law because the burden was his to prove his assertions and not the respondent's. The case of ***Khalid Mohamed*** (supra) does not assist his argument in any way. The evidence reveals that the appellant himself confirmed the results of the alcohol test, which was conducted at 19:45 when he ought to have been on duty.

The court below cannot be faulted in holding that the dismissal was warranted, as the evidence before it amply supports that conclusion. We find no basis for interfering with the trial court's

decision, as it was well founded. The result is that grounds one and two equally fail, and are dismissed. This appeal is devoid of merit and is dismissed as a result. Each party will bear own costs.

As we have stated earlier, we take the view that all other arguments raised in grounds three and four are irrelevant, and dismissed accordingly.

The net result is that the whole appeal is dismissed.

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F.M. CHISANGA
JUDGE PRESIDENT

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.Y. SICHINGA
COURT OF APPEAL JUDGE