IN THE COURT OF APPEAL FOR ZAMBIA Appeal No 111/2018
HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

JACK NEEDHAM BELMONTE **APPELLANT**

AND

LUBAMBE COPPERMINE LIMITED **1ST RESPONDENT**

TLB's FOR HIRE LIMITED **2ND RESPONDENT**

NICHOLAS JACOBUS KRUGER **3RD RESPONDENT**

Chisanga JP, Kondolo & Majula JJA
On 25th September, 2019 and 30th December, 2019

For the Appellant: *Ms. K.N. Kaunda of K.N. Kaunda Advocates.*
For the 1st Respondent: *Mrs. A. Musonda Kawandami with Ms. T. Mulenga, both In-house Counsel.*
For the 2nd & 3rd Respondents: *Mr. S. Chisulo, SC. of Sam Chisulo & Company.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *The Attorney-General vs Marcus Achiume (1983) ZR 1.*
2. *Zambia Publishing Company Limited vs Pius Kakungu (1982) ZR 167.*
3. *Zambia China Mulungushi Textiles (Joint Venture Limited vs Gabriel Mwami (2004) ZR. 244 (SC).*
4. *Simon Mukanzo vs ZCCM Limited SCZ Appeal No.133/ 1999.*

5. *HAZ Farms Limited and Golden Harvest Estates Limited vs Kalera Muthanna Muthanna (1999 -1992) ZR.165.*
6. *George Chishimba vs ZCCM Limited (1999) ZR 198.*
7. *National Breweries Limited vs Philip Mwenya (2002) ZR 118.*
8. *Zambia Bata Shoe Company vs Damian Mtambila (2010) (Vol. 2) ZR 244.*
9. *Contract Haulage Limited vs Kamayoyo (1982) ZR 13.*
10. *Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa (1986) ZR 70 (SC).*
11. *Bank of Zambia vs Joseph Kasonde (1995 – 1997) ZR 238.*
12. *Buchman vs Attorney General (1993-1994) ZR 131*
13. *Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lenders Enterprise (1999) ZR 27*
14. *Blackson Phiri vs Bank of Zambia SCZ Appeal No. 130 of 2004.*

Legislation referred to:

Immigration and Deportation Act, No 18 of 2010 section 28(8)

Other Authorities referred to:

Salmond and Heuston on THE LAW OF TORTS, (2004) 20th Edition by R.F.V Heuston and R.A Buckley

1. Introduction

1.1. The appellant has appealed to this court against the entire judgment of the High Court sitting at Kitwe wherein that court dismissed all the appellant's claims which included damages for unfair and wrongful dismissal as against the 1st respondent, and damages for slander as against the 2nd and 3rd respondents.

2. Background

2.1. The history and background facts surrounding the appeal are as plain as they can be. The appellant who is South African by Nationality, was employed as a client site representative by the 1st respondent as per a contract of employment dated 1st July, 2010. Following his employment, the appellant was deployed to work at the 1st respondent mining site in Chililabombwe on the Copperbelt Province of the Republic of Zambia.

2.2. On 10th June, 2015, the appellant was summoned to attend a meeting with the 1st respondent's Chief Executive Officer and the Finance Manager at which he was quizzed about his sexual relationship with a woman by the name of Jannetta Erasmus. He was also questioned about whether or not he had received the sum of K60,000 from the 3rd respondent in September, 2014.

2.3. The appellant was subsequently suspended from his employment and laid off site to pave way for investigations. On 16th June, 2015, a private investigator by the name of Fred Strauch was engaged by Africa Rainbow Minerals (ARM), a shareholder in the 1st respondent, to investigate the appellant's alleged sexual misconduct and the issue of receiving money from the 3rd respondent. The investigations conducted by Strauch involved interviewing the appellant and other employees of the 1st respondent who responded by way of written statements.

2.4. After the investigations, the 1st respondent preferred five disciplinary charges against the appellant which included; bringing the company's name into disrepute, acts against the Code of Ethical Conduct, disregard of the company Rules and policies, gross negligence and dishonesty.

2.5. Subsequently, the appellant responded to the charges and a disciplinary hearing was held by the 1st respondent's Disciplinary Committee which culminated in the appellant being found guilty on two charges of bringing the company's name into disrepute and ethical misconduct. In consequence, the Disciplinary Committee summarily dismissed the appellant in accordance with the 1st respondent's Disciplinary Code. The appellant thereafter appealed against the dismissal to the 1st respondent's General Manager who upheld the decision of the Disciplinary Committee.

2.6. Following this development, the appellant commenced legal proceedings in the court below claiming the following reliefs:

1. As against the 1st respondent:
   (a) Damages for unfair and wrongful dismissal from employment;
   (b) Damages for loss of future earnings;
   (c) Damages for mental anguish, embarrassment and distress;
   (d) Payment of accrued bonuses of a total of US$179,225.58 before tax; and

(e) Payment of repatriation allowances including air tickets to South Africa, his place of engagement.

2. As against the 2nd and 3rd respondents:

(a) Damages for defamation in slander alleging that the plaintiff received a sum of K60,000 which he did not receive;

(b) Damages for loss of future earnings having lost his job on account of the 2nd and 3rd respondent's allegation that he received K60,000 construed to be a bribe when he did not receive it thus damaging his prospects of earning income in future;

(c) Damages for loss of permanent and pensionable job having been summarily dismissed from employment on account of the allegations by the 2nd and 3rd respondents that he received K60,000 in September, 2015 which the appellant did not receive.

(d) Interest and costs.

2.7. The trial court considered both the documentary and oral evidence that was placed before him and was of the view that the appellant's claims lacked merit. He accordingly dismissed them entirely.

3. **Grounds of Appeal**

3.1. The appellant was disenchanted with the judgment of the court below and has now sought to impugn that judgment on the basis of the following grounds:

1. *The court below erred in law and fact when it found that there was nothing wrong with the investigations conducted by one Fred Strauch.*
2. *The court below erred in law and fact when it found that the Human Resource Manager (DW1) recommended disciplinary action against the appellant on two grounds namely:*
   a) *bringing the name of the company into disrepute, based on the sexual relationship the appellant had with the wife of the company's contractor under the appellant's supervision; and*
   b) *ethical misconduct for his failure to declare interest before the same contractor moved into his company rented house; when evidence on record made no such conclusion as regards the basis of the charges.*
3. *The court below erred in law and fact when it found that the 1st respondent complied with the provisions of the Disciplinary and Grievance Procedure Code.*
4. *The court below erred in law and fact when it held that the appellant was rightly and/or fairly dismissed from employment.*
5. *The court below erred in law and fact when it declined to consider the claims for damages for mental anguish and loss of future earnings.*
6. *The court below erred in law and fact when it found that the appellant was not entitled to the payment of the claimed bonuses.*

7. *The court below erred in law and fact when it declined to order payment of repatriation allowance in disregard of the provisions of the Immigration and Deportation Act.*
8. *The court below erred in law and fact when it found that there was no evidence on which to hold the 2nd respondent liable.*
9. *The court below erred in law and fact when it held that 3rd respondent did not defame the appellant.*
10. *The court below erred in law and fact when it ordered costs by the appellant against all the respondents.*

4. Appellant's Arguments

4.1. At the hearing of the appeal, Ms. Kaunda counsel for the appellant relied on the appellant's heads of argument which she also augmented with oral submissions. She submitted in relation to the first ground of appeal that the use of Fred Strauch an investigator of ARM group was contrary to clause 2.71 of Disciplinary and Grievance Procedure Code of the 1st respondent. She argued that it was therefore an error for the trial Judge to make a finding that Fred Strauch represented a shareholder of the 1st respondent when this was in breach of the Code. According to Ms. Kaunda, the appellant was for that reason mishandled and mistreated by being subjected to a non-existent disciplinary process which was malicious and unfair.

4.2. In relation to ground two, it was contended that the finding by the court below to the effect that DW1 made recommendations for disciplinary action was not supported by the evidence. That this therefore means that the trial court did not properly

evaluate the evidence thereby making its decision liable to be set aside.

4.3. The thrust of the submissions with regard to ground three was that the court below was in error to substitute its own opinion with that of established facts. Learned counsel took issue with the finding by the learned trial Judge that DW1 recorded proceedings of the disciplinary hearing and submitted that this was not supported by the evidence on record. She contended that the Judge, therefore, fell in error by substituting his opinion from that of established facts.

4.4. Counsel pointed out that DW1 in his evidence conceded to not complying with the disciplinary code with regard to the steps outlined for an investigation and the conduct of the disciplinary hearing. Ms. Kaunda further forcefully argued that there was no accuser or complainant and that the disciplinary action was prompted by the 3rd respondent. She stressed that the lower court misapprehended the facts when it made a finding that Mr. Chola charged the appellant in the absence of a letter to support this finding. The learned Counsel went on to observe that the learned Judge proceeded to make a finding that DW1 recorded the proceedings of the disciplinary hearing when there was no evidence to that effect.

4.5. The gist of the arguments in relation to ground four was that the learned Judge refused to consider that the handing of charges to the appellant just before the disciplinary hearing was wrong and against the tenets of natural justice as well as the

provisions of the Disciplinary and Grievance Procedure Code. Counsel further submitted that it was wrong for the trial court to assume that the General Manager was the highest authority in the appeal process. It was argued that the appellant was unfairly treated when he was denied a second appeal.

4.6. Another limb or argument advanced in relation to ground four was anchored on the bible. Counsel highlighted various biblical principles the thrust of which was that he was not the only sinner in the organization. That there were other employees who were also sinners and therefore the fingers should not be pointed solely at the misdeeds of the appellant.

4.7. In ground five the submission was that the Judge failed to consider how the appellant passionately narrated and produced his bank account numbers and cards when questioned about the K60,000 or how he was laid off site on mere vindictive allegations. It was the position of Ms. Kaunda that the trial Judge failed to adjudicate on all matters in controversy as guided by the Supreme Court in the case of ***The Attorney-General vs Marcus Achiume***[1] where it was held inter-alia that a trial Judge must undertake a balanced evaluation of the evidence before him.

4.8. With regard to ground six it was stoutly argued that the lower court erred when it refused to order payment of bonuses that the appellant had already earned but had been postponed by the 1st respondent. Counsel referred us to pages 386 to 411 of

the record of appeal for the portion of the evidence to support the proposition.

4.9. In relation to ground seven, the thrust of the argument was that it was wrong for the trial court to decline to order payment of repatriation fees to the appellant in breach of the **Immigration and Deportation Act**. Counsel argued that this duty is absolute and founded on law and not contract.

4.10. The kernel of the argument in respect of ground eight is that the law as it relates to joinder of parties is that everyone whose interest is likely to be affected by the outcome of the trial must be joined to the action. It was her assertion that the 2nd respondent was the one that had a contractual relationship with the 1st respondent, hence its being joined to the proceedings.

4.11. It was the view of the appellant's Counsel in ground nine that the lower court erred when it held that the 3rd respondent did not defame the appellant. Counsel went on to cite the case of ***Zambia Publishing Company Limited vs Pius Kakungu***[2] where it was held that the law presumes good character unless and until the contrary is proved by a competent authority.

4.12. In closing, Ms. Kaunda urged us to reverse the order for costs for the respondents on the basis that the appellant was just seeking justice for the loss, embarrassment and shame he suffered at the hands of the respondents.

5. 1st Respondent's Heads of Argument

5.1. In response to ground one, Mrs. Musonda-Kawandami Learned Counsel for the 1st respondent submitted that the court below

properly directed itself when it arrived at the decision that there was nothing wrong with the investigations by the Africa Rainbow Minerals (ARM) Group Investigator Fred Strauch. That although Fred Strauch was not an employee of the 1st respondent, he was sent by ARM, South Africa which is a shareholder and holding company to the 1st respondent.

5.2. In response to the submissions under ground two it was submitted that the court below did not err when it found that the Human Resources Manager (DW1) recommended disciplinary action against the appellant. According to Counsel this finding of the lower court is supported by the evidence of the Manager, Human Resources which is appearing at page 244 of the record of appeal.

5.3. With regard to ground three, learned Counsel referred us to the record and argued that the 1st respondent followed the disciplinary steps that are provided for in the disciplinary code, which the court below also found was substantially complied with. The case of ***China Mulungushi Textiles Ltd vs Gabriel Mwami***[3] was cited for the principle that an employee who will be affected by an adverse decision should be given an opportunity to be heard. It was pointed out that in the present case, the appellant was heard by the Acting General Manager and Finance Manager on 10th June, 2015 when the offences came to light. He was also heard when the Group Investigator interviewed him and obtained a statement from him. Finally,

the appellant was heard when he attended the hearing of the appeal.

5.4. The gist of the submissions in respect of ground four were that the statements of witnesses interviewed by the disciplinary committee proved evidence of misconduct on the part of the appellant which no reasonable employer would tolerate. She cited the case ***Simon Mukanzo vs ZCCM Limited***[4] where it was held that when it is established that the appellant's conduct is one which his employer could not tolerate, the employer is at liberty to terminate the contract of employment regardless of the provisions of the Disciplinary and Grievance Procedure Code.

5.5. Turning to ground five it was contended that the court below did not err when it declined to award the appellant damages for mental anguish, embarrassment and distress. It was argued that at the time of hearing the testimony of the appellant by the court below on 26th June, 2017, the appellant presented himself as being in employment at Kalumbila Mine as Senior Mechanical Superintendent. According to Counsel, the appellant had mitigated his loss of employment with the 1st respondent and did not offer only evidence on loss of future earnings.

5.6. Moving on to ground six, it was submitted that the court below was on firm ground when it dismissed the appellant's claim on incentive bonuses which was based on the memorandum dated 30th September, 2014 from the 1st respondent. Counsel

asserted that the appellant did not meet the conditions set out in the rules governing incentive bonus hence the refusal by the 1st respondent to pay him.

5.7. In responding to the appellant's argument in ground seven it was submitted that the appellant was not entitled to repatriation allowance since he was a holder of a resident permit and not an employment permit for him to be covered by **section 28(8)** of the **Immigration and Deportation Act**.

5.8. It was argued that the case of ***HAZ Farms Limited and Golden Harvest Estates Limited vs Kalera Muthanna Muthanna***[5] does not aid the appellant in that it is distinguishable from the present case on the basis that ***Kalera Muthanna***[5] was on an employment permit for three years while the appellant in this case was a holder of a resident permit.

5.9. In response to ground eight it was the position of Counsel that the Order for costs against the appellant by the lower court was correct going by the case of ***George Chishimba vs ZCCM Limited***[6] which state that a successful litigant is always entitled to his cots unless it is shown that the said party is guilty of improper conduct in the prosecution of his claim.

5.10. It was submitted that there was no evidence in the present case to show that the respondent committed improper conduct in the proceedings to disentitle them to costs. Counsel accordingly prayed that the appeal be dismissed for lack of merit.

6. 2nd And 3rd Respondent's Arguments

6.1. In his oral submissions, Mr. Chisulo SC intimated to the court that his submissions would only be restricted to ground eight, nine and ten, as they were the only ones that affected his client. The thrust of his submissions with respect to ground eight were that there was no evidence in the court below to link the 2nd respondent to the publication of the alleged defamatory statement made by the 3rd respondent to the General Manager and the investigator, Mr. Strauch. He vociferously argued that there is nothing to connect the 2nd respondent which in any case is a limited company. Mr. Chisulo contended that the appellant failed to prove its case and therefore the trial Judge was on firm ground to dismiss the claim on this ground.

6.2. With regard to ground nine, it was submitted that all the statements that the appellant is complaining about were made within the confinement of the 1st respondent. That this meant that the respondents had a right to plead "qualified privilege" on the allegations of defamation. It was further argued that the presumption of good character of the appellant was destroyed by his own admissions. Counsel ended by urging us to dismiss the appeal.

7. Appellant's Arguments in Reply

7.1. In reply to the 1st respondent heads of arguments in ground one Ms. Kaunda reiterated that the 1st respondent was wrong to subject the appellant to the investigations of Fred Strauch as this was in contravention of the disciplinary and grievance

procedure code. Counsel pointed out that the said Fred Strauch was neither an employee nor supervisor of the appellant. Ms. Kaunda contended that it was the 1st respondent's human resource department that was mandated to conduct disciplinary proceedings and not a private investigator.

7.2. The reply to ground two from Ms. Kaunda was that the court below erred when it found that the Human Resources Manager recommended disciplinary action on two grounds only. The point taken by learned Counsel was that the evaluation of the evidence by the lower court was unbalanced in that the appellant was made to answer five charges, all of which had an impact on his welfare as he pursued his claim for mental anguish embarrassment and distress. It was contended that this ground of appeal should succeed to give a true reflection of the charges the appellant was made to answer.

7.3. With regard to grounds three and four the thrust of the submissions in reply are that there was no compliance with the grievance procedure code by the 1st respondent. Ms. Kaunda asserted that a dismissal will only be upheld by the court if it is proved that an employee had committed an offence. The case of ***National Breweries Limited vs Philip Mwenya***[7] was cited as authority for her proposition. She argued that in the present case, the 1st respondent was unable to prove in the court below that having a sexual affair outside the work place was a dismissible offence.

7.4. The main contention in respect to ground five was that the court below should have awarded damages as pleaded as it was clear that the appellant was subjected to mental anguish, embarrassment, distress and loss of future earnings. Counsel stoutly argued that at the time the appellant commenced these proceedings he was not in employment, hence his claim for loss of future earnings should also succeed.

7.5. Turning to ground six the contention of Counsel was that the appellant's claim for bonuses was dealt with by the trial Judge in a very summary fashion and he did not separate the short-term bonuses from the long-term bonuses. It was argued that this ground should succeed considering that the appellant was summarily dismissed from employment on baseless grounds.

7.6. The thrust of the submissions in reply with respect to ground seven was that the appellant is entitled to repatriation allowance as it is not an issue of contract but of established law.

7.7. With respect to ground ten it was submitted that although costs are awarded at the discretion of the courts, the discretion in this matter was unfairly exercised in that the appellant was merely seeking justice for being summarily dismissed. We were accordingly urged to allow the appeal and set aside the judgment of the court.

8. Consideration and verdict

8.1. The appellant's grievance in ground one stems from the fact that investigations were conducted by Fred Strauch. Turning to the

provisions of the disciplinary code, in particular clause 2.7.1, it provides as follows:

"When investigating a case, the Human Resource Official will ensure that all relevant statements are recorded in writing from the complainant, the accused and any witnesses on the official statement form. The accused must be given the opportunity of naming all those witnesses who he/she thinks are necessary to ensure a fair hearing of the case. Investigations are to be conducted without undue delay. Statements recorded by internal/hired security should be supplemented by those recorded by the Human Resources Official." *(Underlining ours)*

8.2. It is clear from the above that the 1st respondent was obliged to conduct investigations promptly and in the course of so doing was also at liberty to record statements by internal or hired security which in turn would supplement those obtained by the Human Resource Officers. That being the case there was nothing untoward that the 1st respondent did in soliciting investigation services from Fred Strauch. This is against the backdrop that the code itself in our view permits the contracting of external security. The relationship between Fred Strauch and the 1st respondent, considering the whole sequence of things, does not affect this particular case or prejudice the appellant. He had the legal mandate to investigate whether he was a shareholder or not.

8.3. The celebrated case of ***Contract Haulage Limited vs Kamayoyo***[9] buttresses the point that a failure to comply with certain procedure before taking disciplinary action does not

make such dismissal null and void. It would be a breach of contract which may give rise to a claim for wrongful dismissal.

8.4. Furthermore, even if there be a valid argument regarding non-compliance with procedural rules, Gardner, JS's words, in delivering judgment on behalf of the Supreme Court in ***Zambia National Provident Fund vs Yekweniya Mbiniwa Chirwa***[10] are apt:

"Where it is not in dispute that an employee has committed an offence for which the appropriate punishment is dismissal and he is also dismissed, no injustice arises from a failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity."

8.5. In *casu* there is a statement at page 78 of the record authored by the appellant where he admits to having a sexual relationship with Janetta, wife of a contractor. A portion of the admission is produced hereunder:

"I admit that we did have a sexual relationship on a regular basis in Zambia and on one occasion in South Africa at the Protea Hotel, OR Tambo airport, Johannesburg, South Africa. The South African incident occurred on Friday 17th April, 2015. We stayed in the Protea Hotel until Sunday morning, 19th April, 2015. Janetta met me at the airport on my request and she went back to Middleburg on Sunday morning and I flew back to Ndola, Zambia. The purpose of the visit was that I was in the process of divorcing my wife and Janetta was in the process of divorcing

her husband. Janetta did mention to me after this incident that she was feeling bad about it and that we should stop it, but we carried on with the relationship after that. Braam Pretorius booked the hotel accommodation for me and I refunded him. I cannot recall the exact amount."

8.6. He further admitted that Nick Kruger (a contractor of TLB) paid for three air tickets for him which he paid back in full afterwards. He denied receiving K60,000. On the totality of the evidence on record and based on the appellant's own admission, wrong doing was established.

8.7. The view we take is that the disciplinary process was neither malicious nor unfair for reasons which shall become clear in ground two:

8.8. In the second ground of appeal, the appellant is attacking the finding that it was the Human Recourses Director who recommended disciplinary action. It is not in dispute that Strauch did instruct the Manager Human Resources to proceed and constitute a committee to hear the allegation leveled against the appellant (pages 190 – 193 of the record).

8.9. The issue as to when exactly the charges were prepared is an attempt by the appellant to clutch at straws. We say so because the charges were prepared on 17th June, 2015 and the hearing was on 19th June, 2015. What is of critical importance is whether these charges were laid down before the appellant to answer to.

8.10. Rules of natural justice require that an employee must be afforded an opportunity to be heard on the charges against him before dismissing him. There are a plethora of authorities that have articulated the principles of natural justice that no man shall be condemned, unheard, in Latin - *audi alteram partem.* We recall the case of ***Zambia China Mulungushi Textile (Joint Venture) Limited vs Gabriel Mwami,***[3] where it was stated that:

> *"Tenets of good decision-making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard."*

8.11. In a later case of ***Zambia Bata Shoe Company Ltd vs Damiano Mtambilika,***[8] the Supreme Court went further in expressing the view that once rules of natural justice have been complied with, one cannot succeed on the basis that the employer had failed to follow its disciplinary code.

8.12. The case of ***Bank of Zambia vs Joseph Kasonde,***[11] which was relied upon by the Judge in the lower court is very instructive on the need to furnish an accused person with details and particulars of the offence to enable him defend himself. The Judge found that the appellant was furnished with the charges before the case hearing commenced. He went on to find that there was ample evidence to support the charge of bringing the name of the company into disrepute and that of unethical conduct.

8.13. A legion of authorities has outlined the function of the courts not to sit as appellate tribunals against the decisions of employers' internal tribunals. It has repeatedly been emphasized that the function of the court is restricted to considering whether there were facts established to support the disciplinary measures. In other words, there must be a substratum of facts to support the exercise of disciplinary measures.

8.14. We are satisfied that the appellant was availed an opportunity to be heard on 19th June, 2015 by the disciplinary committee. The point here that bears repetition is that the letter by the appellant confirms his indiscretion even if we were to take away all the other allegations. As a matter of fact, what amounts to a hearing can be by way of an exculpatory letter and not just physical presence.

8.15. We therefore find ground two destitute of merit and we dismiss it.

8.16. Turning to the third ground of appeal, the appellant is disconsolate with the fact that the 1st respondent did not comply with the provisions of the **Disciplinary and Grievance Procedure Code.** We have expressed our views regarding whether or not the Disciplinary and Grievance Procedure Code was complied with.

8.17. What is of significance is the fact that the appellant was called to attend the disciplinary hearing (pages 190 – 193 of the record of appeal). The issue regarding Fred Strauch being a foreign

investigator is misplaced. In our view the appellant, by raising this argument, is seeking to wave a red herring. The form the charge letter took, which is the letter by Fred Strauch does not take away the fact that the appellant was made aware of the charges levelled against him and afforded an opportunity to exculpate himself. At the heart of the matter, the real question to be asked is whether or not the rules of natural justice were complied with, which we hold they were.

8.18. The appellant is contending that there was no accuser or complainant and that the disciplinary action was triggered by the 3rd respondent. That the finding by the learned trial Judge that DW1 recorded proceedings of the disciplinary hearing is not supported by the evidence on record and the Judge, therefore, fell in error by substituting his opinion from that of established facts.

8.19. Whilst indeed there is no evidence of DW1 having recorded the proceedings of the disciplinary hearing, this does not change the fact that the spirit of the disciplinary code was followed. We are fortified in saying so at the risk of being repetitive that having been given the letter, albeit on the day he was called for hearing, the appellant can now not be heard to say he did not know what issues the 1st respondent had against him.

8.20. The question as to who the complainant or accuser was can be discerned from the letter from pages 190 – 193. It clearly states that the 'companies name' was being brought into disrepute. Details are expressed in the letter. We take the view

that it was clear that it was the company i.e. 1st respondent that was aggrieved by the conduct of the appellant. The list of charges includes acting against the code of ethical conduct, disregard of company rules and policies, gross negligence and dishonesty. All these charges raised are in relation to offences committed against the company. We are therefore baffled by the assertion that the appellant was not aware of his accusers. The names of his accusers were furnished in the letter by the group investigator – Fred Strauch.

8.21. We see no basis whatsoever to fault the learned trial Judge in the court below for arriving at the finding that the 1st respondent complied with the provisions of the Disciplinary and Grievance Procedure Code. Ground three accordingly fails.

8.22. In the fourth ground of appeal the appellant is criticizing the court below for holding that the appellant was rightly and fairly dismissed from employment.

8.23. The question as to whether the dismissal was rightly and fairly done is tied down to the entire disciplinary process that was undertaken. This ground of appeal is intertwined to grounds 1,2, and 3. Having found that the appellant was afforded an opportunity to be heard for reasons advanced the finding by the trial Judge cannot be assailed. He was on firm ground in arriving at such a finding as it was on a balanced evaluation of the evidence.

8.24. Counsel for the appellant in her submissions has gone to great lengths to try and persuade us that the sexual affair although

admitted had nothing to do with the appellant's employment relationship with the 1st respondent. Counsel has called in aid the Bible where God forbade the stoning to death of a woman accused of adultery. In this regard Counsel appears to be suggesting that there are other employees who are equally not clean and committed worse sins. She has gone on to condemn the 1st respondent for intolerance and made allegations of vengeance. In her lengthy submissions on this ground, no points of law were raised. The view we take is that these were moral arguments which do not assist the appellant in any way.

8.25. All in all, we find that the hair-splitting exercise conducted does not aid the appellant in relation to ground four and therefore dismiss it for want of merit.

8.26. Pertaining to the fifth ground, the appellant is attacking the court below for its refusal to consider the claims for damages for mental anguish and loss of future earnings. We have combed the record and find that there was indeed no evidence led to substantiate these claims.

8.27. We do not see how investigations being conducted by a foreigner and being called for a disciplinary meeting amounts to mental anguish. We are startled by Counsel going as far as suggesting that the interview by a foreign investigator falls in the category of mental anguish. The nationality of who conducted the investigations is not relevant.

8.28. We uphold the findings of the trial Judge and dismiss ground five for lack of merit.

8.29. With regard to ground six, the appellant contends that the court below erred in law and fact when it found that the appellant was not entitled to the payment of the claimed bonuses. We have scrutinized the arguments before us as well as the analysis by the trial court in arriving at its decision. The approach of the court below in addressing the claim for bonuses is to be found at pages J18-J19 where the learned judge said the following: -

"I accept that during the plaintiff's employment there was in place a bonus scheme which was governed by the Long Term Bonus Incentive Scheme Rules. Under clauses 3.4 and 7.1 of the said Rules, Final Awards (Bonuses) were payable inter alia, to eligible participants who were in service and in good standing on the last day of the period under which it was claimed. Those participants who left employment through dismissal or resignation forfeited all rights to such awards (clause 7.4)."

8.30. The learned trial judge further considered a memorandum from the 1st respondent on the issue dated 30th September 2014 addressed to the appellant which was couched as follows:

> *"the conditional award (LTI) again pre-tax, which have been reserved for you for the next three year period is as follows:*
>
> *FY 2012 (payable October 2015) $47,526.23*
> *FY 2013 (payable October 2016) $34,377.43*
> *FY 2015 (payable October 2017) $28,022.99"*

8.31. Having considered the memorandum in light of the scheme rules governing bonuses the court below concluded that since the appellant was dismissed on 22nd June 2015 and the FY

2012 bonuses were payable in October 2015, the appellant was not entitled to the bonuses.

8.32. We wish to point out that our examination of the record reveals that the position taken by the judge was supported by the evidence. For instance, our perusal of clause 7.1 of the scheme rules confirms that the participant was entitled to the final award if he/she was in service and in good standing on the last day of the measurement period. For our part, we entirely agree with the position taken by the learned trial judge. This ground of appeal is accordingly dismissed.

8.33. We now turn to consider ground seven. The appellant's counsel's brief argument around this ground was that the duty of an employer to repatriate a foreign employee is founded on statute and not dependent on contract. We have considered the arguments of counsel around this ground of appeal in light of **section 28(8)** of the **Immigration and Deportation Act**, which provides as follows:

"28(8) An employer shall, on termination of an employment contract of, or the resignation or dismissal of, a foreign employee who is the holder of an employment permit, issued under subsection (1), be fully responsible for the repatriation of the former foreign employee and other costs associated with the deportation of that former foreign employee if that former foreign employee fails to leave Zambia when no longer in employment."

8.34. From the cited provision, it is clear that the law places an obligation on an employer to repatriate a foreign employee within a reasonable period after termination of employment or

dismissal. This position was affirmed by the Supreme Court in the case of ***HAZ Farms Limited and Golden Harvest Estates Ltd vs Kelera Muthanna Muthanna,***[5] in which the Court ordered payment of repatriation allowance to an expatriate employee even after he had found employment within Zambia. The provisions of statute, therefore, over-rides any contractual provision.

8.35. A careful perusal of the record reveals that the appellant possesses a resident permit (page 69 of the record). The provisions of the aforecited **Immigration and Deportation Act** state that a foreign employee who is the holder of an employment permit shall be repatriated. It is clear that according to statute, an employer is obligated to repatriate an employee within this category. In the case of an employee who has a resident permit, there is no such obligation for the employer to repatriate the employee.

8.36. The obligation would only arise if it were provided for either in the Act or the employment contract. There is therefore a distinction to be drawn between a foreigner who is on an employment permit and one who is on a resident permit. A resident permit encompasses most things a citizen can do. In *casu,* the appellant cannot seek to benefit from section 28(8) of the Act on account of the fact that the qualification for repatriation is only for an employment permit holder. In light of the forgoing it behoves us to state that the prayer for repatriation lacks merit and we dismiss it accordingly.

8.37. Moving to ground eight and nine, we propose to address these two grounds together because in our view they are related. The major grievance by the appellant is that the allegation by the 3rd respondent that he gave K60,000 to the appellant was defamatory. We note from the record that the appellant admitted that he had got some money from the 3rd respondent. He provided no proof that he had paid this money back. Having made this admission, it fell on him to prove that he settled his dues. That not having been done, we are of the view that the sting of the statement made by the 3rd respondent was justified, in that it was shown that the appellant had solicitated for money for his use from the 3rd respondent. It should be remembered that on a defence of justification, which the 3rd respondent preferred, it is not necessary to prove that the statement is literally true; it is sufficient if it is true in substance and if the erroneous details in no way aggravate the defamatory character of the statement or alter its nature. See **Salmond and Heuston** on **THE LAW OF TORTS TWENTIETH EDITION (2004)** at page 163.

8.38. Before we conclude on this matter, we wish to deal with the argument raised by state counsel Chisulo at the hearing that the respondents had the right to plead qualified privilege on the allegations of defamation to which the appellants counsel, Ms. Kaunda vehemently objected. This was the first time this defence was being raised by the respondents and it is trite law that an issue not raised in the court below cannot be raised on

appeal. The cases of ***Buchman vs Attorney General*** [12] and ***Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lenders Enterprise***[13] articulate this principle. We are therefore constrained not to entertain this argument.

8.39. For reasons advanced in the preceding paragraphs we hold both ground eight and nine which hinge on defamation are without merit and are accordingly dismissed.

8.40. We shall address the last ground with regard to the issue of costs. We recall and align ourselves to the observations of the Supreme Court in the case of ***Blackson Phiri vs Bank of Zambia,***[14] where it was held that costs follow the event. The lower court cannot therefore be faulted for exercising its discretion in the manner that it did.

9. Conclusion

9.1. All in all, having found that all the ten grounds of appeal are destitute of merit we hold that the appeal has failed in its entirety and is dismissed. Costs follow the event to be agreed and in default, taxed.

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F.M. Chisanga

JUDGE PRESIDENT

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M. M. Kondolo

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE