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### Rabson Sikombe v. Access Bank (Zambia) Limited SCZ Appeal No. 240/2013

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***Rabson Sikombe v. Access Bank (Zambia) Limited SCZ Appeal No. 240/2013***  
*Chanda Chungu*<sup>1</sup>

**Facts**

The employee was employed as a Transaction Officer with effect from the 17th of November 2008. He was suspended from duty on the 15th of May, 2009 following an investigation into the sum of K804 million, unauthorized overdraft on an account held in the respondent's Bank by a company called ZCON, it being alleged that the appellant failed to manage the credit portfolio by not constantly reviewing the overdrawn account, leading to the customer's overdrawn position exceeding the approved limit of K350 million.

It was further alleged that the employee had provided false information that the client had an approved facility of K1.2 million and, thereby, misleading the Operations and Branch staff to action the transactions. This conduct, according to the respondent, amounted to gross misconduct, contrary to the employer's Staff Handbook. He was subsequently suspended and thereafter summarily dismissed.

**Holding**

The Supreme Court held that the employee was given the opportunity to be heard on the issues relating to the ZCON account. The burden was on the employee to show that the right to an opportunity to be heard was violated. Further, the Supreme Court stressed that where there is no prescribed manner by which the employer affords the employee an opportunity to be heard, it is imperative that the employer gives a chance to the employee to defend himself in some way. In the circumstances, the employee had been given a chance to be heard in some form.

As it related to summary dismissal, the court held that where an employee commits a serious offence, the employer is not restricted by procedural requirements and contractual procedures. In such circumstances, dismissal is justified as he committed a serious, dismissible offence.

Lastly, the Supreme Court refused to accept the employee's argument that he was not bound to the terms of the contract, and Staff Handbook including those that provided for summary dismissal. This was because the contract of employment provides for the provision on summary dismissal on grounds of misconduct and expressly incorporated the Staff Handbook as a document that shall also govern the employee's terms and conditions of employment.

**Significance**

The Supreme court explained the importance of this provision (referring to Section 26A of the now repealed Employment Act which is like Section 52 (3) of the Employment Code Act) in *Rabson Sikombe v. Access Bank (Zambia) Limited*,<sup>2</sup> where the Court in a judgment delivered by Malila JS (as he was then) stated that:

Section 26A does embody a cardinal principle of natural justice, namely, that a party should not be condemned unheard. Before an employee is dismissed on conduct related grounds, he should be afforded an opportunity to say something in his own defence.

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<sup>2</sup> SCZ Appeal No. 240/2013.

The above is important because it emphasises the need to give an employee the opportunity to be heard before their dismissal on disciplinary grounds.

Prior to the enactment of the current Employment Code Act, Section 26A (which was in Part IV of the Employment Act which only applied to employees on oral contracts of employment and provided for the opportunity to be heard before dismissal on the grounds of conduct or performance), did not apply to those on written contracts of employment. In this case, the Supreme Court applied the requirement for the need to be heard, notwithstanding the fact that the employee was serving on a written contract of employment.

This shows Judge Malila's activist approach and dedication to fairness in ensuring every employee is afforded the chance to be heard, regardless of the type of contract they serve on. Justice Malila recognised 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.

In Zambia, where an employer does not follow the laid disciplinary or other procedure outlined in the contract of employment, but the employee has committed a serious offence warranting dismissal, such action will not be wrongful. The rule in *Zambia National Provident Fund v. Yekweniya Mbiniwa Chirwa* which has since been applied in several subsequent cases does not apply where an employee has not committed a dismissible offence. As the Supreme Court pointed out in *Rabson Sikombe v. Access Bank (Zambia) Limited*<sup>3</sup>:

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 v. Chirwa* case.

In such circumstances, where the offence committed is not as serious, the employer cannot deviate from the disciplinary procedure. Justice Malila JS did however that clarify that:

We must, however, stress that the position that we have taken with regard to an employer's failure to follow procedural imperatives, is predicated on the commission by the employee of a dismissible offence or a transgression which the employee admits, or is otherwise established by unimpeachable evidence.

According to the Supreme Court, there are three instances where an employer need not follow laid down procedures prior to dismissing an employee. This is where an employee commits a serious offence, that is dismissible, or where the employee admits to an offence, that is dismissible or there is insurmountable evidence that he/she committed the grave offence.

It is submitted that where an employee commits a dismissible offence and the employee either admits the offence or there is insurmountable and unassailable evidence proving the offence committed, the resultant dismissal will not be wrongful or unfair for failing to observe the procedures laid down in the contract of employment.

This case is also important for the incorporation of documents to a contract. The Supreme Court in *Rabson Sikombe* rejected an argument by the employee that he was only bound to the

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<sup>3</sup> SCZ Appeal No. 240/2013.

contract of employment and not the other documents affecting the employment relationship. In the *Rabson Sikombe* case, the employee attempted to argue that he was only bound to the letter of offer of employment and his contract and not the staff handbook which laid out disciplinary measures. In a judgment delivered by Malila JS (as he was then) the Supreme Court held that:

We quite frankly do not think that this ground of appeal is worth much of the appellant's time, let alone that of this court. The law is trite that a party is bound by the terms of any agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of contract in this regard. Suffice it to state that we agree with the submissions of the learned counsel for the respondent on this point... Clearly the provisions of the staff handbook were incorporated into the appellant's employment contract and applied with full force and effect as if the appellant had signed them specifically.

The above statement from the Supreme Court clearly demonstrates that whether the contract of employment refers to another document, the document shall apply to the contract of employment. The Supreme Court thereby confirmed the principle under contract law that a contract need not be the only document that regulates a contractual relationship where other documents are referred to, and expressly incorporated as applying to the contract.

The above holding resonates with the approach in *United Bank of Africa Zambia Limited v. Joseph Kafwariman and 14 others*,<sup>4</sup> whereby the Supreme Court confirmed that conditions of service may be derived directly from company handbooks if the employment contract is silent on certain material terms, but the handbook makes provision. In this case, the Court held that the leave allowance in the handbook applied to the employees. Like any other implied terms of the contract of employment, incorporated terms bind the employer, especially when the employee expressly agrees to abide by them, or they have been brought to the employee's attention.

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<sup>4</sup> SCZ Appeal No. 51/2013.