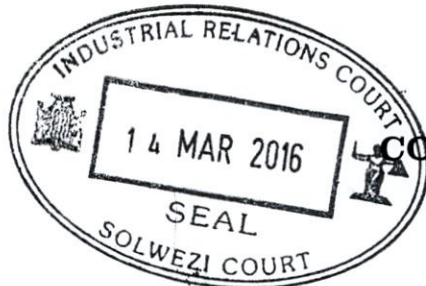


**IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT SOLWEZI**

COMP/25/2015

BETWEEN:

EVARISTO TAMBATAMBA



COMPLAINANT

AND

LUMWANA MINING COMPANY LTD

RESPONDENTS

BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

- 1. Hon. W.M. Siame**
- 2. Hon. J. Hasson**

For the Complainant : Mr. M. Kaputula of Legal Aid Board, Kitwe

For the Respondents : Mr. N. Siamondo of Messrs Corpus Legal Practitioners

JUDGMENT

Date : 14th March, 2016

Cases referred to:

- 1. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR, 172**
- 2. Galaunia Farms Ltd v National Milling Corporation Ltd (2004) ZR 1 (SC)**

This Complaint was filed by M/Evaristo Tambatamba against Lumwana Mining Company Limited. We shall, therefore, refer to M/Evaristo Tambatamba as the Complainant and to Lumwana Mining Company Limited as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

- a. A declaration that the dismissal was wrongful, unfair and unlawful;
- b. Payment of salaries and allowances due to the Complainant from the date of dismissal to date of judgment;
- c. Damages for mental anguish, inconvenience and loss suffered and occasioned by the Respondent's action in (a) above;
- d. In the alternative an order that the Complainant be deemed as having been retired and entitled to his full terminal benefits hereto;
- e. Interest on the amounts found due and payable;
- f. Any other relief the court may deem fit;
- g. Costs.

The duty for this court is to ascertain whether or not the Complainant has proved his claims.

The Complainant's evidence was that he was employed by the Respondents on 4th August, 2006 as a Senior Mines Surveyor. In 2010 he was promoted to the position of Survey Superintendent. At

that same time the Complainant was a Pastor for Light House Ministries which has a branch in Lumwana, Solwezi, called Lumwana Christian Church. In 2011 the Complainant was ordained as Senior Pastor. According to the Complainant himself, the Complainant worked for the Respondents' faithfully while at the same time running the church.

Around June or July 2012 officials from the Ministry of Mines visited Lumwana Mining Company to enforce Mine Boundary Rules. The officials from the Ministry of Mines stated to the Complainant that their mine boundary was not cleared. The Complainant then reported to Mr. William Van Brugel who was Technical Services Manager. The Technical Services Manager tasked the Complainant to work on the process of having the Lumwana Mine Boundary cleared.

The Complainant submitted names of companies which could clear the boundary. According to the Complainant, in August, 2012 a contract was awarded for the clearing of Lumwana Mine Boundary. The contract was awarded to Ignition Construction Company Ltd. This award was made pursuant to a decision by the Contracts Office. The works were completed at the end of September 2012. The role for the Complainant was to ensure that the boundary was cut as prescribed in the title deed for the Respondent.

The Complainant further told this court that in about November or December of 2012 M/Gilbert Kashif who was an employee of Ignition Construction Company Ltd, the company which cleared the boundary for Lumwana Mines made a donation of K30,000 (rebased) to the church where the Complainant was Pastor for construction of the church building. This donation was received by the Complainant and used it to purchase building materials. The building materials were worth K100,000 (rebased). The church opened an account with Mac Steel who was the supplier of the building materials and were paying in instalments.

In November, 2014 the Complainant was approached by Security Personnel of the Respondents who wanted a statement from the Complainant regarding an allegation against the Complainant that the Complainant received a bribe of K30,000 in the award of a contract to Ignition Construction Company Ltd. The Complainant obliged and gave the statement.

The Complainant was eventually charged with two (2) offences. Those offences were:

1. Violation of Company Regulations and Barrick Policies and/or Barrick Code of Business Conduct and Ethics.
2. Offering or taking a bribe or an attempt to do so

The Complainant stated that after he was charged, he was given an option to resign or to attend the disciplinary hearing. The Complainant asked for early retirement instead. The Complainant

told this court that on 6th January, 2015 he was told that his application for early retirement was approved. However, when the Complainant finally received a letter responding to his application for early retirement he discovered that according to that letter, his application for early retirement was rejected and was proceeding for the disciplinary hearing.

The disciplinary hearing was held on 27th January, 2015 and on 28th January, 2015. The Complainant was summarily dismissed. When the Complainant appealed against his dismissal to the General Manager, his dismissal was upheld.

The Respondents called three (3) witnesses. We shall refer to them as RW1, RW2 and RW3 respectively.

RW1 was M/Haggai Chileya a Procurement Coordinator for the Respondents. The evidence for RW1 was that at the material time RW1 was a Contracts Specialist. His job was to buy services and to contract on behalf of the Respondents. RW1 stated that he got a requisition for tree cutting services from his supervisor. After going through the requisition RW1 realized that the value was too much to allow without a sole bid document. RW1 wrote to the Technical Services Department which was the end user for that project requesting them to raise a sole bid document. A sole bid document is a document justifying single sourcing. Single sourcing is done when there is only one supplier or if they represent the only in country source for the goods and services you want to source.

RW1 got a feedback from the Complainant who was in the End User Department indicating that the job to be done was urgent and made a commitment to do the job within the shortest possible time. That justification was not accepted by Contracts Department because the job which was to be done was tree cutting along the Lumwana Mine Boundary. The job for tree cutting is basic and could be done by the people in the three (3) surrounding chiefdoms around Lumwana Mine. The Complainant insisted that the job required surveying services adding that only Ignition Construction Company Ltd or Mutwile Company could do that job. What followed was a series of meetings between Sustainability Department and Technical Services Department to ascertain how the job could be awarded on commercial and technical merits. Eventually it was resolved that the Contracts Department gets additional quotations from Lumwana Community Business Association (LCBA), Mutwile Company and Ignition Construction Company Ltd. After the quotations were obtained the adjudication showed that LCBA was cheaper than Mutwile Company and Ignition Construction Company Ltd. There was disagreement between Contracts Department and Sustainability Department because Contracts Department believed that the job of cutting trees along the boundary for Lumwana Mine was basic and could be done by the local populace but Sustainability Department believed that there was a survey component required which skill was not possessed by the local people. It was then decided that the job be split among the three (3) companies. That was done.

Later RW1 was summoned by the Respondents' Security Department to give a statement. RW1 was being asked if the procedure concerning the award of the contract was proper. That statement was produced as exhibit "DT1".

RW2 was M/Golden Mpundu a Senior Investigator in the Security Department for the Respondent.

The evidence for RW2 was that in August 2014 the Security Department received information that there was bribery and corruption in respect of the tree cutting project which was given to Ignition Company. That report was sent to the control room of the Respondents by an anonymous person. The anonymous reporter gave a specific contract of 2012 in which he alleged that the Complainant received K30,000 (rebased) in respect of that job. Acting on that report investigations were instituted.

RW2 interviewed Gilbert Kashif who was Contract Manager for Ignition Construction Company Ltd during that job but who then was no longer in employment. Gilbert Kashif admitted that he received K30,000 (rebased) from Sony Karim to give to the Complainant and he did. Sony Karim was the Director for Ignition Construction Company Ltd. When Sony Karim was interviewed he denied giving K30,000 (rebased) to Gilbert Kashif to give to the Complainant. When the Complainant was interviewed he admitted receiving K30,000 (rebased) from Gilbert Kashif.

RW3 was M/Mutemwa Malambo a Human Resource Information Supervisor for the Respondents.

RW3 attended the hearing for the Complainant's case. He stated that the Complainant was charged, the hearing was held and verdict was passed. The verdict was a dismissal. The Complainant appealed against his dismissal but the dismissal was upheld. We have looked at the submissions by both parties and are well guided.

The facts of this case are clear. The facts are that:

1. The Complainant was employed as Survey Superintendent by the Respondents.
2. At the same time the Complainant was a Pastor in the Light House Ministries running a branch at Lumwana in Solwezi called Lumwana Christian Church.
3. In 2012 there was a tree cutting job to be done to clear the Respondents' boundary.
4. That job was given to Ignition Construction Company Ltd. RW1 stated that the job was given to Ignition Construction Company Ltd at the insistence of the Complainant who was Survey Superintendent in the end user Department.
5. According to the Complainant himself, the job was completed at the end of September 2012. The Complainant further stated that in about November or December 2012 he received a donation of K30,000 (rebased) from Gilbert Kashif who was Project Manager for Ignition Construction Company Ltd which was awarded the tree cutting project. The Complainant

said that this money was a donation by Gilbert Kashif to the Complainant's church meant for the construction of the church building. We have noted as a fact that this donation was made barely two (2) months after the completion of that tree cutting project. Also, that the Complainant met Gilbert Kashif during that tree cutting project. We have seen the Respondents' Code of Business Conduct and Ethics. This was produced as exhibit "ET9". We have looked at "ET9". At page 5 of "ET9" it is stated that **"Barrick respects the right of employees and Directors to take part in financial business and other activities outside their jobs."** Under the same page it is shown that conflict of interest is forbidden. The same page also states that:

"Barrick employees and Directors must not seek or solicit any gifts or other benefits for personal or individual use from Barrick's actual or potential business associates or suppliers."

We have looked at the statement which the Complainant gave to the Respondents during the course of investigations in this case. That statement was produced and exhibited as "ET3". We have looked at "ET3". At paragraph 4 of "ET3" is shown that the Complainant informed Gilbert Kashif that he was a Pastor and that he mentioned this with a view of finding contacts for donations. Gilbert Kashif was then managing the tree cutting project on behalf of Ignition Construction Company Ltd, a company which was in a business association with the Respondent. The Complainant later

received K30,000 (rebased) as a donation from Gilbert Kashif to the Complainant's church. The Complainant did not declare this donation to the Respondents.

The Complainant maintained that the donation was to the church. We have seen no evidence that the church received that donation. The Complainant maintained that he used that money to liquidate an outstanding debt at Mac Steel for building materials for the church. We have noted that the donation was in cash and there is no dispute that it was cash. We have noted that what was paid to Mac Steel was a cheque payment. There is no explanation why the cash was converted to cheque when paying Mac Steel. The Complainant did not make one payment. He made two (2) payments. There is no explanation why the cash donation was split into two (2) cheque payments. This is evidenced by "DT3". "DT3" are two (2) receipts of payments to Mac Steel. These are receipt number 70696 on cheque number 000002 and receipt number 70697 on cheque number 000003.

We have looked at the charge which was preferred against the Complainant. There were two (2) charges:

1. Violation of company regulations and Barrick Policies and/or Barrick Code of Business Conduct and Ethics contrary to Clause 2.3 of Disciplinary Policy which was produced and exhibited as "ET7".
2. Offering or taking a bribe or an attempt to do so contrary to Clause 2.11 of the same Disciplinary Policy which is exhibit

“ET7” herein. The joint particulars of the offence read as follows:

“... Evaristo Tambatamba received K30,000 as gratification from Ignition Construction Company Ltd for the tree cutting contract awarded to them along Lumwana Mine Lease which occurred on unknown date in the year 2012.

The relationship between Mr. Evaristo Tambatamba and Gilbert Kashif came about by virtue of being employees of Barrick and Ignition Construction Company respectively; as such it was unethical for Mr. Tambatamba to receive such an amount of money from a business partner. It is in conflict with Barrick Business Code of conduct and ethics as well as the anti-bribery and anti-corruption policy.”

Suffice to state that at the time this money changed hands Gilbert Kashif was still an employee of Ignition Construction Company. It was about two (2) months after the tree cutting project had been concluded.

When this case was going on, the Complainant requested to go on early retirement. We have seen no provision where an employee under investigations or who is facing a disciplinary charge could be retired. Indeed that application for early retirement was rejected. There is no evidence to show that the application for early retirement was accepted. The offences which the Complainant was charged with were both dismissible.

We have looked at the case of **Wilson Masauso Zulu v Avondale Housing Project (1)** where the Supreme Court held that:
It is accepted that ... a Plaintiff who fails to prove his case cannot be entitled to judgment whatever may be said of the opponent's case."

Again in the case of **Galaunia Farms Ltd v National Milling Corporation Ltd (2)** the Supreme Court held that:

"A Plaintiff must prove his case and if he fails to do so, a mere failure of the opponent's defence does not entitle him to judgment."

Indeed on the facts above we are not satisfied that the Complainant has proved his case.

We have found this case to be destitute of merit and we accordingly dismiss it.

We shall order no costs.

Leave to appeal to the Supreme Court within 30 days from today is granted.

J13

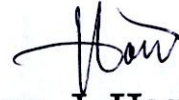
Delivered and signed at Solwezi this the 14th day of March,
2016.



Hon. E.L. Musona
JUDGE



Hon. W.M. Siame
MEMBER



Hon. J. Hasson
MEMBER