



COMESA



COURT OF JUSTICE

IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR
EASTERN AND SOUTHERN AFRICA –
FIRST INSTANCE DIVISION
AT LUSAKA, ZAMBIA

Coram: S. Rugege, Lord Principal Judge; A. Nyankiye, J. M.
Ogoola, M. Tadesse, L. Malaba, LJJ

Registrar: Nyambura L. Mbatia

REFERENCE NO. 1 of 2013

COLLINS HWALIMA DUBE.....APPLICANT

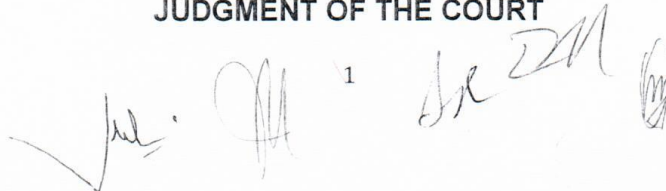
Versus

**COMMON MARKET FOR EASTERN AND
SOUTHERN AFRICA.....RESPONDENT**

For the Applicant: Mr. Isaiah Chifumbe Ng'onga of Messrs I.C.
Ng'onga & Company, Agent for the Applicant

For the Respondent: Mr. Gabriel Masuku, Agent for the
Respondent

JUDGMENT OF THE COURT

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I. **The Background:**

1. This is a Reference filed by a former COMESA staff member ("the Applicant") against his former Employer, COMESA (the "Employer" or "Respondent") The Applicant was aggrieved by the decision of the Secretary General to discharge him from the service of COMESA through summary dismissal. The dismissal was stated to be on allegations of his involvement in the forgery of a COMESA *Note Verbale*.

II. **The Facts:**

2. The Applicant was an Employee of COMESA, employed for four years as a chauffer. By the Secretary General's letter of 30th September, 2009 (**Annex 4 to the Reference**), the Applicant's Contract of Employment was renewed in his position of Chauffer, assigned to work for the Assistant Secretary General (Administration and Finance), in the General Service Category, at level GS5. On 2nd October 2009, the Applicant duly accepted the terms of his renewed contract by signing the duplicate of that contract, and returning the same to the COMESA Administration.
3. On 2nd November, 2010, the Secretary General summarily dismissed the Applicant "**with immediate effect**". In his Summary Dismissal letter of that date (**Annex 6 to the Reference**), the Secretary General stated that:

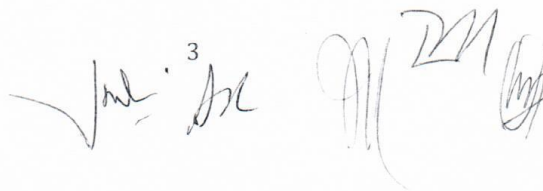
"Following receipt of the Police report involving the forgery of COMESA Note Verbale to Finland

Val. Dr² M^{DM} J

Mission in which you were involved and charges have been preferred against you in accordance with Rule 71 as read with Rule 65(b) and 67(b) of the COMESA Staff Rules and Regulations, I hereby summarily dismiss you from the service of COMESA with immediate effect.

4. On 29th November, 2010, the Applicant recorded a warn and caution statement at the Police Station in which he denied either knowledge of, or involvement in the alleged forgery of the *Note Verbale*. Subsequently, the Police turned him into a State witness against Patrick Nyirenda and Kabika Akakondo, the principal suspects in the forgery. On 16th November, 2010, Mr. Akakondo wrote a letter (**Annex 2 of the Reference** to Applicant's Replies to Respondent's Replies and Defence) to the Secretary General stating that the Applicant was not involved in the forgery.
5. By letter of 18th November, 2010 (**Annex 9 of the Reference**), the Applicant appealed to the Secretary General to consider reinstating him at COMESA given that he had denied involvement in the forgery and that Mr Akakondo had confirmed this in his warn and caution statement.
6. The Secretary General responded on 29 November, 2010 (**Annex 10 of the Reference**) in a letter dismissing the appeal.

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7. On 18th January 2013, the Applicant wrote to the Secretary General requesting a review of his summary dismissal (**Annex 11 of the Reference**) There being no response from the Secretary General, the Applicant sent a reminder on 4th March 2013 – whereupon on 18th March 2013 (**Annex 13 of the Reference**), the Secretary General replied informing him that he was not in a position to deal with the matter any longer and that the Applicant be at liberty to proceed to the COMESA Court to make his case.

8. The Applicant then filed the instant Reference in which he contended that his summary dismissal was unfair, erroneous, unlawful and malicious.

9. On the basis of the above contentions, the Applicant sought the following Orders:

- “1. That the Applicant’s summary dismissal was wrongful and unlawful as commission of forgery was not established before summary dismissal was meted and that by virtue of Article 27 of the COMESA Treaty the Court should invalidate the summary dismissal.*
- 2. That the Applicant be reinstated to his original position in the Respondent as Driver.*
- 3. That the Applicant be paid all salaries and allowances due and other benefits from the*

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date of summary dismissal to the date of reinstatement.

4. That the Applicant be awarded damages for mental torture arising from wrongful/unlawful dismissal.
5. That the Respondent do further bear the costs of all proceedings before [this] Court."

II The Proceedings Before this Court:

10. On 27th March 2013, the Applicant applied for a Certificate of Urgency for the Court to hear the matter expeditiously. This was in an attempt to avoid the litigation expenses that would be occasioned to the Applicant due to this Court's then imminent relocation from its temporary seat in Lusaka, Zambia, to its permanent home in Khartoum, Sudan.

11. The Applicant's Urgency Application was denied. The Applicant then applied for a stay of the proceedings until he could raise the necessary funds to continue the case. This was granted and the case adjourned *sine die*. The Respondent then lodged a Preliminary Application in which it claimed that the Reference was time-barred, and that the matter raised in the Reference was *sub judice* before the Zambian courts, and was an abuse of court process.

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12. In an Order delivered in Khartoum on 17th September 2014, the Respondent's Application was dismissed. The Court reserved for a later date, the detailed reasons for its Order. Those reasons are provided in the following sections of this Judgment.

i. Whether the Reference was time-barred

13. Learned Counsel for the Respondent raised the issue that the Reference was time-barred under Rule 76 of the Staff Rules and Regulations, on account of the Applicant's inordinate delay of 2.5 years. In this regard, while it is true that the letter of the Applicant's Summary Dismissal was dated 2nd November 2010, the Applicant and the Respondent continued to engage each other in communications which kept the matter alive until 18th March 2013, when the Secretary General finally advised the Applicant as follows:

*"Having carefully considered the matter and the fact that the decision to turn you into a state witness.... was taken by the law enforcement authorities of the Republic of Zambia, I regret to inform you that I am not in a position to deal with this matter any longer and **that you be at liberty to proceed to the COMESA Court of Justice to make your case.**"*

[Emphasis added].

14. That advice was the trigger for the dispute to come to the Court. With the finality of the Secretary General's letter of 18th March 2013,

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the matter was ripe for the Court's attention. Thus, the time for filing the Reference started to run from that date: 18th March 2013. Accordingly, the Applicant's deadline to file the Reference within 3 months (under Rule 75.1) would not run out until 18th June 2013. By filing his Reference on 27th March 2013, the Applicant was well within the prescribed time. In any case, the deadlines stipulated in Rule 76, on the other hand, are pegged on the completion of the "decision of an Administrative Appeals Panel". These deadlines are inapplicable in the instant case, in as much as there was no Administrative Appeals Panel established. But even if Rule 76 were held to apply, then the Applicant would have had even a longer deadline within which to file the Reference—namely one year under Rule 76 instead of "three months" under Rule 75.1.

Accordingly, the Court finds that there was no delay in filing the Reference. There was no time-bar.

ii. Whether the matter was *Sub judice*

15. As earlier indicated, part of the Respondent's arguments in the Preliminary Application was that the matter raised in the Reference was *sub judice* before the Zambian courts, and was an abuse of court process. However, the Court observed that case that was pending before the Zambian court at that time was a criminal matter in which the Applicant was not an accused person but a witness. Whereas the present matter before this Court is an administrative matter relating to

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dismissal. The Court found, therefore, that the matter was neither *sub judice* nor an abuse of process.

Issues For Determination Of the Court in the Reference

The considers the following to be the substantive issues between the Parties that require its determination:

- 1. Whether a “dispute” within the meaning of Article 27 of the COMESA Treaty has arisen between the Applicant and the Respondent.**
 - 2. Whether the Secretary General had a just cause warranting his decision for summary dismissal of the Applicant.**
 - 3. Whether the Secretary General in exercising his power of summary dismissal, complied with a fair procedure.**
 - 4. Whether the Parties are entitled to the respective reliefs sought**
- A. Whether there was a dispute between the Applicant and the Respondent.**

16. In both his pleadings and oral submissions the Respondent contended that the Applicant failed or omitted to show that there was “a dispute” between the Applicant and the Respondent.

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17. For his part the Applicant drew the Court's attention to Article 27 of the COMESA Treaty as the basis for disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat or of the terms and conditions of employment of the employees of the Common Market.

The Court's Analysis of the Issue

18. There was indeed, a dispute between the two Parties. An employee was summarily dismissed by his employer. The employee was aggrieved by the decision of his employer. In his Reference (Paragraph 13), the Employee contended that:

"...the Applicant's summary dismissal... was unfair, erroneous, unlawful and malicious"

19. There can be no doubt that the Parties were embroiled in a **dispute**. The divergent positions of the two Parties - show the existence of a "dispute" as envisaged in the clear wording of Article 27(1) of the COMESA Treaty namely:

"The Court shall have jurisdiction to hear disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market."

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**B Whether the Respondent had Sufficient Grounds to
Warrant Summary Dismissal**

20. The Applicant in the Reference seeks to invalidate the Secretary General's administrative action of summary dismissal. In effect, a major ground for his prayer is that the Secretary General's decision was based not on sufficient facts or evidence, but on mere allegations. He contends that the Secretary General's decision arose from an allegation in the Police report that he was involved in the forgery of the COMESA *Note Verbale*. Throughout his pleadings and his oral testimony before this Court, as well as in his Counsel's submissions, the Applicant insisted that he was innocent of involvement in the forgery. He stated that, indeed, he was absolved of any wrongdoing on the following grounds.

- i. he was exonerated by Mr. Kabika Akakondo who, on 16th November, 2010, wrote to the Secretary General stating that the Applicant had no part at all in the forgery.
- ii. the police eventually turned him into a State witness in the Zambian criminal court; and,
- iii. the criminal matter was put to rest by the judgment of the Zambian Court which acquitted the only two accused persons, Mr. Nyirenda and Mr. Akakondo.

21. In summary, therefore, the Applicant contended that the Secretary General had no basis to reach the decision of summary

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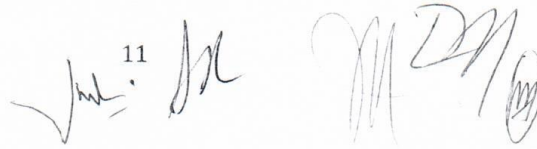
dismissal. The Applicant testified before the Court confirming the claims stated in his pleadings.

22. For his part, the Respondent insisted that the Applicant was involved in the forgery. The Secretary General's letter of summary dismissal dated 2nd November, 2010 said so; namely, that the Police report implicated the Applicant in the forgery, and warranted his summary dismissal with immediate effect.

23. On 29th November, 2010, in response to the Applicant's letter for review of the matter, the Secretary General wrote in his letter dismissing the appeal that the appeal was frivolous and vexatious; and that, given Kabika's warn and caution statement "corroborating your participation in aiding and abetting a crime", summary dismissal was warranted.

24. In its written Reply to the Reference, the Respondent argued that following the Police report, the Respondent, "concluded that Applicant's involvement and conduct in the forgery warranted summarily terminating his service with COMESA". The Respondent added that:

"Applicant's action and involvement in the forgery demonstrated a lack of honesty, integrity and was unlawful (Rule 65(b))... and was of such a serious nature to warrant summary dismissal (Rule 67(b)) as it was

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threatening continued comity, cooperation... between Finland and COMESA".

25. At the oral hearing before this Court, the Respondent produced two witnesses who testified in support of the Respondent's case as will be discussed later in the judgment.

The Court's Analysis of the issue

26. The power of the Respondent to summarily dismiss an employee who has committed serious misconduct is not disputed. It is provided for in the COMESA Staff Rules and Regulations. In particular, Rule 71 provides as follows;

"71. Summary Dismissal

*The Council may dismiss a professional staff member summarily. **In the case of a General Service staff member the power of summary dismissal may be exercised by the Secretary General.**" (Emphasis added).*

27. The Court takes cognizance of the fact that summary dismissal is a very serious sanction which is only reserved for serious misconduct or serious breach of the contract rendering the continuation of the employment relationship untenable. It is said to be an extraordinary sanction only to be resorted to in extraordinary circumstances. In addition, as a general principle guiding disciplinary

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measures in employment relationships, there must be proportionality between the misconduct and the sanction; the more serious the misconduct the more severe the sanction. As was said in the Privy Council decision in **Clouston & Co. v Corry [1906] AC 122**,

“now the sufficiency of the justification depended on the extent of misconduct. There is no fixed rule defining the degree of misconduct, which will justify dismissal. Of course there may be misconduct which will not justify the determination of the contract of service...On the other hand, misconduct which is inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal”

28. Thus, whether summary dismissal is justified or not depends on the circumstances of the case. As was stated by Finn J.A. in **Blackburn v Victory Credit Union Ltd [1998] 36 CCEL 2nd 94**

The courts do not consider an act of misconduct, in and of itself, to be the grounds for dismissal without notice unless it is so grievous that it gives rise to an inference that the employee intends no longer to be bound by the contract of service. There is no definition which sets out precisely what conduct or misconduct justifies dismissal without notice, and rightly so. Each case must be defined on its own facts.

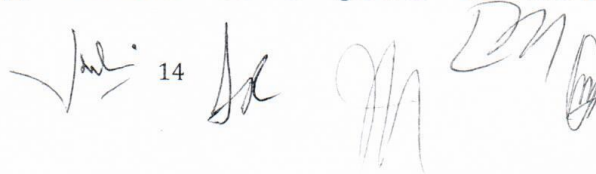
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29. In the more recent case of **McKinley v BC Tel [2001] 2RCS** the Supreme Court of Canada stated at page 183,

“case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact and to be addressed through an analysis of the particular circumstances surrounding the employee’s behavior. In this respect courts have held that facts such as the nature and degree of misconduct and whether it violates the ‘essential conditions’ of the employment contract or breaches an employer’s faith in an employee, must be considered in drawing factual conclusions as to the existence of just cause”

30. The power of summary dismissal is one that must be exercised responsibly, judiciously, advisedly and on the basis of the gravity and seriousness of the staff member’s misconduct. Summary dismissal is a drastic sanction. It robs the staff member concerned of the benefits of the full-blown process of a disciplinary committee. Accordingly, the basis for his summary dismissal must be commensurate with the **seriousness** of his misconduct. On this point, the case of **McKinley v BC Tel** referred to above clearly states as follows.

“Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally

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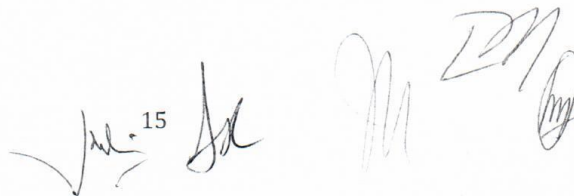
disreputable as 'dishonesty' might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labeled 'dishonest' would further unjustly augment the power employers wield within the employment relationship."

31. The Ontario Supreme Court in **Lewis v Ontario Plymouth Chrysler LTD.**, [2001] CanLII 28306 (ON SC) relying on **McKnley** above made the following observation:

"To permit unproven (and ultimately unproved) allegations to be the basis of a termination for just cause, except in the most extraordinary circumstances, would be an egregious result..."

32. We agree; and are inclined to adopt the principles expounded in the cases cited above.

33. The question therefore is whether based on the principles above and the relevant COMESA Rules and Regulations, the Respondent was justified in summarily dismissing the Applicant. As stated above the Staff Rules and Regulations empower the Secretary General to summarily dismiss an employee for serious misconduct. In the normal disciplinary case, the matter must be referred to a disciplinary committee. However, Rule 67 provides:

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"67. A disciplinary case may not be referred to the disciplinary committee:

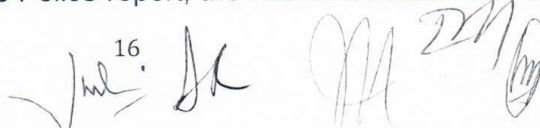
a) ...

*b) In respect of summary dismissal imposed by the Secretary General in cases where the **seriousness of the misconduct warrants immediate separation from the service**". [Emphasis added]*

34. Nevertheless, from the reading of the relevant Rules one can observe that summary dismissal can be resorted to only if a set of facts is sufficiently established,--namely, that there is an alleged misconduct, that the alleged misconduct must be serious and that immediate separation must be warranted by the proved facts.

35. In the instant case, the Secretary General's dismissal letter mentions the Police report as having been the basis for his decision to summarily dismiss the Applicant. The Court was never availed that Police report, despite its specific request for it. The report was never included in the Respondent's pleadings. No witness was ever called to the Court's oral hearing to testify on the content of the Police report.

36. Another source that the Respondent claims to have relied on in maintaining the decision on summary dismissal was the warn and caution statement that Mr. Akakondo allegedly made to the Police. This statement was said to have implicated the Applicant in the forgery. However, like the Police report, the Akakondo statement was

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