

never included in the Respondent's pleadings, nor was any witness called to testify to it. Indeed, it was never otherwise availed to this Court, notwithstanding its having specifically been asked for as shown in the following exchange during the oral hearing on 3rd May, 2015 (page 89 of the Court proceedings).

"Court: ...Secondly, in the Letter of 'Appeal Against Summary Dismissal', there is reference to Kabika's warn and caution statement which is said to clearly corroborate [the Applicant's] participation in the crime...Why did you not supply us with these documents?"

Mr. Masuku: ...It was not introduced in this matter for the simple reason, my Lord, that it had to do with a criminal trial...It did not have a direct bearing on this matter and we had no plans of inviting Mr. Akakondo to come and give evidence...

Court: But you clearly rely on itSo how can you say it only concerned the criminal case only and not your case?"

37. The Respondent introduced two witnesses who testified at the oral hearing in support of its defense. The first witness was Mr. Titus Chisha, COMESA's Security Officer who allegedly carried out an internal investigation into this matter of the forgery of the *Note Verbale*. During his testimony, Mr. Chisha explained to the Court

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that, in the course of his investigation, he interviewed Mr. Akakondo and the Applicant; and that they both made express admissions to their involvement in the forgery. The witness said that he submitted his report on all this to COMESA on 28th October 2010. In answer to a question by the Court why the signed report was not in the Court file, he said that the signed report which he had submitted was destroyed when COMESA building was set on fire. He, however produced what he claimed to be a copy of the document that he had submitted to the Respondent.

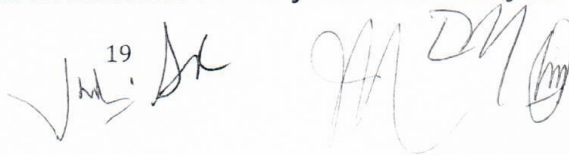
38. After the testimony of Mr. Chisha, Counsel for Respondent requested the Court for leave to introduce the said copy of Chisha's investigation report into the record. Although this document was not included in the list of documents annexed to the pleadings of the Respondent, the Court decided to admit it in to the record in the interest of justice. On examination, the Court found that the content of the said document was not different from the testimony orally presented to the Court by Mr. Chisha.

39. The Respondent also called Mrs. Mary Gachonde, who was a Human Resources officer when the Applicant was dismissed. She testified that she was informed by the Finnish Embassy of the alleged forgery which apparently had originated in the COMESA Secretariat, and that she instructed the COMESA security officer, Mr Chisha to conduct investigation on the matter. She also confirmed that the security officer made the investigation and submitted a report to the administration. She informed the Court that this report stated that Mr Hwalima Dube was involved in obtaining a COMESA document which

was given to a person who was not an employee of COMESA to present to the Finnish Embassy in order to obtain a visa. On being asked by the Court who had removed the letter from COMESA and consequently altered it, the Witness stated: "The report indicated that Mr. Hwalima was involved". When further asked in what way Hwalima was involved, the Witness responded: "Your honour those details were not in that report". The Witness went on to state categorically that the decision to separate Mr Dube was based on the finding of the security personnel. (see page 29-30 of the proceedings)

40. As alluded to earlier, the two documents which seem to have informed the decision of the Respondent: namely, the Police report and the warn and caution statement were not availed to the Court. Moreover, as far as the warn and caution statement by Mr Hwalima Dube is concerned, there is a contradiction between what the Applicant and the Respondent contended. On the one hand, in his letter to the Secretary General on 18th November, 2010, the Applicant claimed that **"Mr Akakondo, my co-accused has even confirmed in his warn and caution statement taken by the Police, that I was not part of the alleged forgery issue, me what I know is that I only introduced Edward to Mr Akakondo just as mere friends at a Bottle store"**. (Annex 9 to the Reference). On the other hand in his reply the Secretary General stated:

*"we regret to inform you that **Mr Kabika [Akakondo]** warn and caution statement clearly corroborates your*





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participation in the crime. Therefore we find your purported appeal to be frivolous and vexatious and that according to the investigation carried out by the police, the seriousness of your alleged misconduct, aiding and abetting a crime warrants immediate separation from service”.

41. It is clear that the respective positions of the Applicant and the Respondent regarding the content of the warn and caution statement are contradictory. The Court therefore, holds that the Respondent's purported reliance on the alleged Police report and Kabika Akakondo's warn and caution statement does not assist in determining whether the summary dismissal was justified.

42. As regards the testimony of the Respondent's witnesses the Court finds it unhelpful because of the following.

- i) As far as Mr. Chisha's testimony is concerned, the Court finds it unreliable because it is inconsistent with what he testified in the Criminal case against Akakondo and Nyirenda. During his testimony in the Zambian courts the witness testified that when the COMESA Registry staff, who are responsible for circulating the *Note Verbale* were first interviewed, they all denied any knowledge. However, the second time they were interviewed, according to this witness,

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"Accused No.2 [Akakondo Kabika] allegedly admitted having gotten the Note Verbale from COMESA and gave it to Edward a relative to Patrick Nyirenda. Accused 2 was then arrested and after his arrest he allegedly said although he was introduced to Edward he was the only one involved".

43. On the other hand before this Court, the witness testified that both Akakondo Kabika and Hwalima Dube had admitted their involvement in the forgery which is inconsistent with what he testified in the Zambian courts. The Court further finds the witness's reference to the admission by the Applicant unreliable since he did not secure a written statement to that effect which could be used in evidence.

- ii) As regards the second witness of the Respondent, Mrs Mary Gachonde, her testimony did not attest to personal knowledge of the role of the Applicant in the alleged forgery affair. When questioned on the specific role of the Applicant she kept repeating that he was involved without specifying what his role was.

44. For all these reasons, the Court is unable to find that the Respondent had sufficient evidence on which to base the decision to summarily dismiss the Applicant.

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C. Whether in imposing the sanctions of Summary Dismissal the Respondent complied with due process requirements.

45. On this issue, the Applicant contends that his summary dismissal was unfair, erroneous, unlawful and malicious as the Respondent

- i. denied the Applicant's right to be heard pursuant to COMESA Staff Rules and Regulations
- ii. failed or ignored to establish an ad hoc investigative panel to investigate and satisfy that the Applicant had committed the crime alleged pursuant to Rule 64(5) of COMESA Staff Rules and Regulations
- iii. rushed to erroneously invoke Rules 65(b), 67 and 71 and thereby presumed the Applicant guilty before trial and conviction by the court and deprived the Applicant a universal constitutional right of presumption of innocence until proved guilty.

46. Applicant further argued that even if Applicant was liable to summary dismissal, the Secretary General was under an obligation to comply with rule 64(5) to satisfy himself that the allegations were genuine.

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47. The Applicant relies on a number of documents in order to prove that the procedural requirements pertaining to summary dismissal were not complied with. These include the letter of dismissal dated 2nd November 2010, which stated that he was summarily dismissed from his service of COMESA "with immediate effect". He also filed and relied on his own letters of appeal against his dismissal and requests for the setting up of an administrative appeals panel to review his case as well as the part of the constitution of Zambia, which relates to the right to be presumed innocent until proved guilty. The Applicant, Mr. Dube testified during the oral hearing confirming his arguments and claims against the Respondent.

48. In its replies to the Reference, the Respondent denied the allegations of the Applicant. On the specific issue of non-compliance with procedural requirements relating to summary dismissal, the Respondent argued that Rule 67(b) exempts referral of a disciplinary case to the disciplinary committee where summary dismissal is being imposed by the Secretary General for serious cases of misconduct and argued the Applicant's matter was in this category. The Respondent submitted that as this was an administrative procedure and not a criminal process, the COMESA Staff Rules and Regulations had been followed by the Respondent, which found the Applicant's conduct deserving of immediate separation.

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49. The Respondent, save for denying as untrue, did not address the Applicant's claim regarding alleged failure to comply with Rule 64(5) relating to the fact that Secretary General may terminate the service of a Staff member for inefficiency or any other serious breach of conduct on the basis of a report by an *ad hoc* investigative panel. In his closing remarks Counsel for the Respondent resonded to a question by the Court arguing that in case of a serious misconduct such as was alleged to have been committed by the Applicant, requirements of due process in Rule 65(1) and (2) are ousted.

The Court's Analysis of the issue

50. In the main, issues of due process are addressed in Rule 66 of the COMESA Staff Rules and Regulations. The Rule states:

"66. Due Process

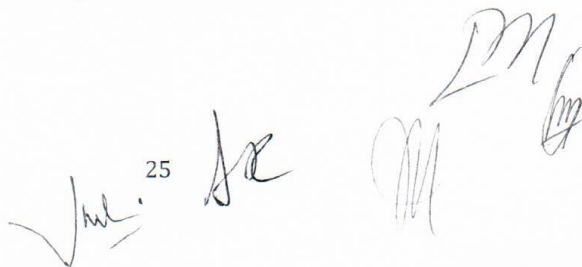
1. *No staff member may be charged for an offence under these Rules without communicating to him or her in writing the allegations made against him or her.*
2. *No disciplinary proceedings may be instituted against a staff member unless he or she has been given at least fifteen working days to enable him or her answer the allegations in writing.*
3. *Except in the case of summary dismissal, no disciplinary measure shall be applied against a staff member unless the matter has been considered by the disciplinary committee.*

4. *A staff member against whom disciplinary proceedings have been instituted may call witnesses, including from among the staff."*

51. The essence of the above provision is that although the Secretary General has the discretion to determine whether certain misconduct warrants summary dismissal, the exercise of that discretion is subject to the requirements of due process set out in Rule 66. These requirements are that before a staff member is charged of any misconduct, there should be a written communication of the allegations against him, and that the staff member should be given at least fifteen days to answer to the allegations in writing. The only exception with regard to summary dismissal is that there is no need to refer the matter to a disciplinary committee before a disciplinary measure is taken. It may be argued that Rule 67(2) envisages a situation where immediate separation is warranted. However, this Court believes that the power under Rule 67(2) should be exercised in a manner consistent with the due process requirements provided under Rule 66.

52. In the Secretary General's letter of summary dismissal, it is clear that even though he stated that charges had been preferred against the Applicant, in fact no charges had been preferred at all neither in the letter, nor in any other document.

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The block contains handwritten signatures and initials. On the left, there is a signature that appears to be 'J. M.' followed by the number '25'. To the right of this, there are several sets of initials and signatures, including 'J.R.', 'M.', and a larger, more stylized signature that looks like 'M. G.'.

53. The matter of lack of communication of charges against the Applicant was specifically put by the Court.

"Court: The letter of dismissal of 2nd November saying you have been dismissed summarily and charges have been preferred against you we are asking which are these charges; what was this gentleman charged with which justified this sanction?"

"Mr. Masuku: My Lord, in as much as that is concerned, I would submit that it was a typo in the sense that...the respective provisions [of Rules 71, 65(b) and 67(b)] do not provide for charges to be drafted. So to that I would humbly submit that there was a typo".





54. The Court finds that the Secretary General's Letter communicating his decision to summarily dismiss the Applicant failed to notify the Applicant of any specific charge or accusation of his wrong doing, against which the Applicant would or could then defend himself. That after all, is the purpose and objective for requiring such communication under Rule 66(1). The letter merely referred to his involvement in the forgery of the *Note Verbale* to the Finland Mission without any details. The necessity of having precise charges and the need to avail the evidence to a person charged with misconduct was discussed in **In re Limage (No.3) Judgment No.1878 of the Administrative Tribunal of the ILO** where the employer was found to have denied due process because of not communicating the

charges to the employee and not availing copies of the evidence against her. In this case, Applicant was never availed the police report and the Akakondo warn and caution statement taken by the police nor the COMESA internal investigation report all which the respondent refers to both in the pleadings and the oral hearing as having influenced the decision to dismiss.

55. As regards the issue of Appeal as an integral element of the required fair procedure for summary dismissal, the facts of the instant case were as follows. Aggrieved by the Respondent's decision to summarily dismiss him, the Applicant wrote to the Secretary General on 18th November, 2010 requesting a review of his case and reinstatement in the service. The Secretary General wrote back to the Applicant a letter dated 29th November 2010 stating that, after due consideration the Respondent found the appeal to be "frivolous and vexatious" and declined to set up an administrative appeals panel..

56. It is clear that the Applicant's appeal was not dealt with in accordance with the Rules. Rule 74 on 'Appeals to Administrative Appeals Panel' states that:

"74(1) A staff member who is aggrieved by an administrative decision of a disciplinary committee or policy organ taken under these rules shall first appeal to an Administrative Appeals Panel set up under these Rules.

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(2) An Administrative Appeals Panel shall be set up by the Secretary General within six (06) months of an appeal being lodged by a staff member".

57. The Court finds that the instant matter falls under this Rule, as the decision to summarily dismiss was an administrative decision. However, no Administrative Appeals Panel was set up with regard to Applicant's appeal.

58. With all the above, the Court finds that the Applicant was denied his right to be informed of the charges against him, the right to answer to the charges and his right to have his appeal considered by an Administrative Appeals Panel as envisaged by the COMESA Staff Rules and Regulations.

D. Whether the Parties are entitled to the Reliefs sought

59. The Applicant's prayers in the Reference were as follows:

- i. A declaration that the summary dismissal was wrongful and unlawful and inconsistent with Article 27 of the COMESA Treaty.
- ii. Reinstatement of the Applicant to his former position in COMESA as Driver.
- iii. Payment of the Applicant's salaries and allowances due and other benefits from the date of summary dismissal to the date of reinstatement.

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- iv. Award of damages for mental torture arising from the Applicant's wrongful/unlawful dismissal.
- v. Award of costs against the Respondent.

60. The Respondent opposed the Applicant's prayers. In particular the Respondent challenged the quantum of the Applicant's monthly salary-namely, that the net salary should exclude an amount of USD 38.74 of overtime pay. Likewise, the Respondent stated that while the Applicant to medical expenses, such expenses

- a. were claimable only for expenses actually incurred (i.e. "expend money first and then submit a claim"); and
- b. reimbursable only upto 80% of the actual expenses, subject to a maximum of COM\$3,750 per annum

61. In the main, apart from prayer number (i), the Court found that the Respondent's challenges to the Applicant's prayers were restricted to the above two points. There would, therefore, appear to be no other contentions or challenges to the Applicant's other prayers-namely, prayer numbers (ii), (iii) and (iv). In the Court's view, therefore-and given especially that the applicant has succeeded on all the substantive issues in this Reference, the Court has no option but to grant the Applicant's prayers. The Court's position on the specific prayers is as follows:

- i. **Declaration of unlawful dismissal**-The Court concludes that, indeed, the Respondent's action in summarily dismissing the Applicant without just cause and without

procedural fairness (as discussed in detail elsewhere in this Judgment), was wrongful and unlawful.

- ii. **Reinstatement**-The parties did not argue this prayer in any detail. However, the Court takes cognizance of the well established principle of employment relations to the effect that an employee cannot be forced onto an employer against the employer's will. In the instant case, it is quite evident that the employee-employer's relationship has been poisoned. There can no longer be any trust between the Applicant and COMESA. The Court would therefore decline to reinstate the Applicant as prayed.
- iii. **Salaries/allowances**: By his Contract of Employment (letter of 30th September, 2009), the Applicant was entitled to an annual salary of COM\$ 3,525; 30 days annual leave; reimbursement of education allowances of up to 75% of actual education expenses up to a maximum of Com\$ 2,888; Dependency allowance of COM\$230 per child per annum up to a maximum of four children under 18 years or 21 years in the case of a dependent still pursuing full time education; housing allowance of 7% of the annual basic salary; and reimbursement of up to 80% of actual medical expenses incurred by the Applicant or his family up to COM\$ 3,750 per annum.

Having found as the Court has done above, that the Applicant's dismissal was wrongful and unlawful, the Court holds that he is entitled to the benefits of his contract, except

for education and medical allowances for which the Applicant produced no proof of having incurred any such expenses. For the purpose of his entitlement to the said benefits the period of entitlement **starts from** the date of his dismissal (2nd November, 2010), until the date of the expiry of his four-year contract (i.e 2nd October, 2012).

- iv. **Damages:** The Applicant's claims for damages were not supported by evidence. Accordingly the Court declines to award any.
- v. **Costs-**The Court awards to the Applicant the costs of this Reference and of Preliminary Application No.1 of 2014; to be taxed by the Registrar.

The Court Order

In the result, the Court orders as follows.

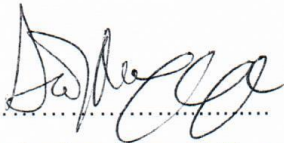
- 1. The summary dismissal of the Applicant was wrongful, unlawful and procedurally unfair.**
- 2. The prayer for reinstatement is denied**
- 3. The Applicant is entitled to the benefits of his contract for the period commencing from the date of his dismissal to the date of expiry of expiry of his four year contract, ie 2nd October 2012 except for the medical and education allowances.**
- 4. The claim for damages is dismissed**

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5. The Applicant is awarded costs for this Reference and for the Preliminary Application No1 2014, to be taxed by the Registrar.

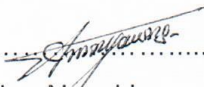
IT IS SO ORDERED

Done at Lusaka this 11th day of May, 2015



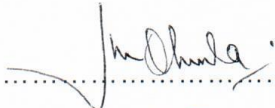
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Hon. Prof. Justice Samuel Rugege

- Principal Judge



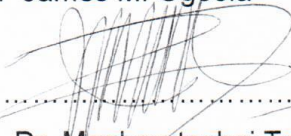
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Hon. Adrien Nyankiye

- Lord Justice



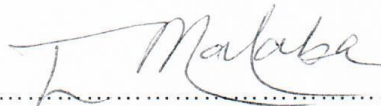
.....
Hon. James M. Ogoola

- Lord Justice



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Hon. Dr. Menberetsehai Tadesse

- Lord Justice



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Hon. Luke Malaba

- Lord Justice

