THE REPUBLIC OF UGANDA

In the Court of Appeal of Uganda

At Kampala

Civil Appeal No. 0193 of 2017

(An appeal from the decision of the Industrial Court of Uganda at Kampala before Ruhinda-Ntengye, DJIC., and Tumusiime-Mugisha, J. with Panellists: Fidel Ebyau, Nganzi Harriet Mugambwa and Frankie Xavier Mubuuke dated 16th March, 2017 in Labour Dispute Claim No. 0057 of 2015)

Eseza Catherine Byakika :::::::::::::::::::::::::::::::::::::: Appellant

Versus

National Social Security Fund ::::::::::::::::::::::::Respondent

Coram: **Hon. Lady Justice Elizabeth Musoke, JA**
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

I have read through the lead Judgment of Honourable Justice Elizabeth Musoke, JA and I agree with her decision to dismiss the appeal with no order as to costs.

I have nothing useful to add.

Dated at Kampala this 30th day of July 2020.

Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 0193 OF 2017

Eseza Catherine Byakika:: APPELLANT

VERSUS

Natinal Social Security Fund:: RESPONDENT

(Arising from the decision of the Industrial Court of Uganda before Ruhinda-Ntegye, DJIC and Tumusiime-Mugisha,J. with panalists Fidel Ebyau, Nganzi Harriet Mugambwa and Frankie Xavier Mubuuke dated 16th March, 2017 in Labour dispute Claim No.0057 of 2015).

CORAM:

HON. Lady Justice Elizabeth Musoke, JA

Hon. Justice Stephen Musota, JA

Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Elizabeth Musoke, JA.

I agree that for the reasons she has given and the orders she has proposed, this appeal should be dismissed with no order as to costs.

Dated at Kampala this.....30th.....day of .....July.....2020

.....

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0193 OF 2017

ESEZA CATHERINE BYAKIKA:::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

NATIONAL SOCIAL SECURITY FUND:::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the Industrial Court of Uganda at Kampala before Ruhinda-Ntegye, CJIC., and Tumusiime-Mugisha, J. with Panelists: Fidel Ebyau, Nganzi Harriet Mugambwa and Frankie Xavier Mubuuke dated the 16th day of March, 2017 in Labour Dispute Claim No. 0057 of 2015.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

Background

On 6th June, 2013, the appellant accepted an offer of employment with the respondent NSSF. She assumed duty in her position on 1st July, 2013. At the time of her dismissal from employment, the appellant worked in the position of Head of Human Resources and Administration. The employment relationship between the appellant and NSSF was governed by, inter alia, an Employment Contract (Exhibit P.1) and the Communications Policy (Exhibit P.2).

In a letter of 28th May, 2015 (Exhibit P.3), the Managing Director of the respondent NSSF wrote to the appellant saying that he had received credible information of the appellant having given an interview to the media, where she spoke about proceedings of the NSSF board. The Managing Director informed the appellant that she had no authorization to give such interviews, and that, her conduct, if proved, would amount to a flagrant disregard of the policies and procedures embodied in the NSSF's Communication Policy, Human Resource (HR) Manual and her contract of employment. In that same

letter, the Managing Director suspended the appellant from employment. Investigations into the alleged misconduct commenced on that day.

In a letter of June 9th, 2015 (Exhibit P.4), the Managing director informed the appellant that the investigations into her alleged misconduct had been concluded. The Managing Director stated that the appellant would be required to face the Staff Disciplinary Committee on Thursday, 11th June, 2015 to defend herself against two offences: 1) Flagrant disregard of Fund policies, procedures, regulations or rules; and 2) Breach of confidentiality. The particulars of the offences were spelt out in that letter. The Managing Director told the appellant that she was at liberty to adduce her evidence in accordance with the Human Resources Manual of Policy and Procedures.

After the hearing conducted on 11th June, 2015, the Disciplinary Committee made a report (Exhibit D2). According to the said report, NSSF the respondent constituted a committee of 6 persons who heard the allegations against the appellant. At the date of the hearing, the appellant was present and she was accompanied by her lawyer Mr. Tebyasa Ambrose. The allegations against the employee were put to her, as well as the evidence in support of the allegations. The employee's defence was also considered.

The disciplinary committee found that on the evidence adduced before it, the case against the appellant had been made out against her, on a balance of probability. The committee concluded that the employee had acted in breach of Clauses 11.1 and 11.4 of her Employment contract; as well as in breach of section 12.3 of the Communication Policy. The committee therefore, recommended dismissal of the appellant from employment.

The Managing Director of the respondent NSSF communicated the decision to dismiss the appellant in his letter to the appellant dated 22nd June, 2015. The appellant's internal appeal against the decision of the disciplinary committee was not considered because it was allegedly filed out of time. (See: Exhibit P.7).

The appellant challenged her dismissal from the employment of the respondent by instituting a claim in the Industrial Court on 27th August, 2015. In its decision of 16th March, 2017, the Industrial Court dismissed the appellant's claim holding that the appellant had been lawfully dismissed from

employment, by the respondent NSSF, after she had breached her contract of service.

Being dissatisfied with the decision of the Industrial Court, the appellant now appeals to this Court. The grounds of appeal in her memorandum of appeal are as follows:

"1. **The Learned Trial Judges and Honorable Panelists erred in law and fact when they held that the Appellant had breached the duty of confidentiality as provided for in her employment contract.**

2. **The Learned Trial Judges and Honorable panelists erred in law and in fact when they misconstrued the Appellant's alleged disclosure of fraud in the Respondent organization as constituting confidential information within the meaning of the law and thereby arrived at a wrong conclusion.**

3. **The Learned Trial Judges and Honorable Panelists erred in law and in fact when they admitted and relied on hearsay evidence contained in unauthenticated newspaper reports and an (sic) authenticated audio clip contrary to the provisions of the Evidence Act, Cap. 6 and the Electronic Transactions Act, 2011 and thereby occasioned a miscarriage of justice.**

4. **The Learned Trial Judges and Honorable Panelists erred in law and in fact when they held that the Respondent's violation of the Appellant's right of appeal against the decision of the Disciplinary Committee was inconsequential in the circumstances and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.**

5. **The Learned Trial Judges and Honorable Panelists erred in law and fact when they neglected, ignored and misconstrued the fact that the disciplinary committee relied solely on hearsay evidence of a delegate other than the Appellant's Disciplinary Officer or Investigator contrary to the Respondent's Human Resource Manual and thereby occasioning a miscarriage of justice.**

6. **The Learned Trial Judges and Honorable Panelists erred in law and in fact when they held that the Appellant was lawfully dismissed and thereby not entitled to the remedies sought which resulted into a miscarriage of justice.**

7. **The Learned Trial Judge (sic) erred in law and in fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion causing a miscarriage of justice."**

Representation.

At the hearing of the appeal, Mr. Mukwaya Deo, learned counsel represented the appellant, who was in Court. Mr. George Omunyokol, learned counsel represented the respondent. The parties, with leave of the Court, adopted their respective conferencing notes and written submissions, filed prior to the date of the hearing, in support of their respective cases, which I have considered in coming up with my decision.

Appellant's case.

In his written submissions, counsel for the appellant chose to argue grounds 1 and 2 jointly; followed by grounds 3, 4, 5 and 7 jointly; and lastly ground 6 separately.

Grounds 1 and 2.

It was the contention for the appellant that the Industrial Court had erred in reaching the conclusion that the information revealed by the appellant about the affairs of the respondent was confidential information, the disclosure of which would be considered as a breach of the duty of non-disclosure of confidential information as contained in the appellant's employment contract. It was asserted that the information which the appellant had revealed was not confidential at all in the circumstances. In support of the foregoing contentions, counsel for the appellant submitted on the following lines:

Firstly, that the Industrial Court had misconstrued the law and the facts in finding that the information the appellant had revealed about the affairs of the respondent, in so far as that information related to fraud in the respondent, that such information would be taken as confidential. Counsel submitted that a construction by the Industrial Court of such information would instead foster the concealment of fraudulent practices in the respondent, which would affect its role in safeguarding the savings of workers.

Secondly, that in any case, the disclosure by the appellant could not be said to have undermined the credibility of the respondent or brought it into disrepute. This is because the person referred to in the relevant information had been found guilty of fraudulent practices in the course of his

employment, and had been disciplined with a demotion. This showed that the respondent was safeguarding its integrity by disciplining errant employees. With the commendable steps taken by the respondent, it was contradictory of the respondent to take the disciplinary proceedings against the appellant. The disciplinary proceedings were, therefore, aimed at victimizing her for speaking out against employees of the respondent who had been involved in fraud.

Thirdly, that for information to qualify as being confidential, such information had to be synonymous to a trade secret. The alleged information in this case was not a trade secret of the respondent, and as such it could not be referred to as being confidential. Counsel relied on **Thomas Marshall (Exports) Ltd vs. Guinle [1978] 3 ALLER 193; Saltman Engineering Co. Ltd & Others vs. Campbell [1963] 3 ALLER 412; Printers & Finishers Ltd vs. Holloway & Others [1964] 3 ALLER 731** and the definition of trade secrets in the **Trade Secrets Protection Act, 2009** to support his submissions.

Fourthly, that as the information disclosed by the appellant about the affairs of the appellant was not specified in writing and thus may have already been in the public domain at the time it was talked about by the appellant to the media, it did not qualify as confidential. **Baker vs. Gibbons & Others [1972] 2 ALLER 759**, was cited as the authority for the above proposition.

Fifthly, that since the appellant had earlier disclosed the alleged confidential information relating to fraud to the respondent internally, she had to be considered as a whistle blower. This was because the appellant had provided information which had been used at a disciplinary hearing, where a staff member of the respondent had been found guilty of fraud. As a whistle blower, the appellant could not be victimized, and counsel for the appellant submitted that as a whistle blower, the appellant was at liberty to reveal any information about the respondent. It followed, therefore, that the information which had been revealed by the appellant as a whistleblower lost any sense of confidentiality. Counsel relied for the above proposition on **Sections 2 (2), 9, 10, and 11** of the **Whistle Blowers Protection Act, 2010** and the case of **Hibbins vs. Hesterway Neighbourhood Project [2009] 1 ALLER 949**.

The sixth line was that it was erroneous for the Industrial Court to take into consideration the respondent's Whistle Blowers Policy when construing the meaning of confidential information in the appellant's employment contract.

The seventh line taken by counsel for the appellant was that the underlying rationale for including a confidentiality clause in the appellant's contract of employment was in conflict with the generally accepted rationale for such clauses. In counsel's view, the rationale for protection against disclosure of confidential information is to be understood in the context of restraint of trade and trade secrets. Therefore, as no question of restraint of trade or revelation of trade secrets arose in the employment relationship between the appellant and respondent in this case, no question of confidential information would arise. Counsel relied on **Haynes vs. Doman [1899] 2 Ch. D 13** in support of his contention.

The eighth line of argument was that relevant information could only qualify as confidential if it had an intrinsic commercial value to the business of the respondent. The respondent is a scheme mandated by the Government of Uganda, through an Act of Parliament, to provide social security services. It therefore follows that issues related to fraud by the employees of the respondent have no commercial value to it. In counsel's view, information that has commercial value to the respondent includes: the names of its members; the members' account numbers; the entitlement for each member; the financial status of the respondent NSSF, among others.

As to the ninth argument, it was submitted for the appellant, relying on **Commercial Plastics vs. Vincent [1965] 1 QB 623**, that, what amounted to confidential information must always be precisely specified in the relevant employment contract. This was not the case in the appellant's employment contract. The failure by the respondent to specify what could be called confidential information in the appellant's employment contract, and those of other employees of the respondent, meant that there could be no allegations of having disclosed confidential information by the appellant and/or its other employees. Any such imprecise clauses are deemed to be too wide to enforce. Therefore, it was erroneous for the Industrial Court to conclude that any information about the respondent's business could be

taken as confidential information to which the duty of non-disclosure was attached.

The next line of argument taken by counsel for the appellant was to contend that the relevant information could not qualify for protection because it related to fraud, and it was the duty of the appellant to reveal that information relating to fraud to the public. Counsel argued that it was necessary to ensure that the duty of confidentiality does not extend to unlawful activities, such as fraud. Counsel cited **Initial Services Ltd vs. Putterill & Another [1968] 1 QB 396** where Salmon, L.J stated, that whereas the relationship of master and servant throws a blanket of confidence over all information of any kind, which the servant may acquire in the course of and by reason of his employment, about his master's business, however the blanket of confidence may occasionally be lifted because there are exceptions to the duty of confidence. Counsel further cited **Lion Laboratories vs. Evans & Others [1985] 1 QB 526**, as authority that court cannot restrain disclosure or exposure of fraud, criminal conduct and iniquity where it is in the public interest to do so, so as to punish the criminal offenders.

Counsel for the appellant then further submitted that the information in issue was already in the public domain and was no longer confidential. Counsel contended that because there had been a disciplinary hearing based on the relevant information, it became public information due to the fact that proceedings of disciplinary hearings are considered to be public. Counsel cited **Section 66 of the Employment Act, 2006;** and **Seagar vs. Copydex [1967] 2 ALLER 415**.

The other argument presented by counsel for the appellant was that the duty of confidentiality was a creature of equity and not borne out of any contract. He cited several cases to buttress this point: **Attorney General vs. Guardian Newspaper & Others (No.2) [1988] 3 ALLER 545; the Seager case (supra).** Counsel further submitted that at equity, the duty of confidentiality carried distinct principles when it applied in a private capacity, that is between individuals; and when it applied in a public capacity, that is in relation to government secrets and other related subjects, as explained in the **Attorney General vs. Guardian Newspaper case (supra).** In

relation to confidentiality in a public capacity, as it applied to the respondent, counsel pointed out that it was necessary before any information could be said to be confidential, for it to be injurious to the public interest. In the present case, counsel contended that the information in question about disciplinary proceedings affecting an employee of the respondent could not be said to have been injurious to the public interest.

The next argument by counsel for the appellant was that it was the newspaper to which the information was revealed by the appellant, which in law can be said to have breached the duty of confidentiality and not the appellant. For this proposition, counsel cited **Lion Laboratories vs. Evans case (supra)** and the **Attorney General vs. Guardian Newspaper Ltd case (supra)**.

Moreover, the appellant's counsel further reasoned that the publication which was made in this case could have been stopped by the respondent, but it chose not to. Counsel pointed out that one of the witnesses for the respondents, Arim Barbara Teddy (RW1), had testified that the respondent had prior knowledge of the intention by the Red Pepper to report about the information received from the appellant. Counsel said that as the respondent chose not to stop the said publication, it can be inferred that the appellant had been released from the contractual obligation to keep the respondent's information confidential.

Counsel further submitted that the alleged confidential information disclosed by the appellant, fell in the categories of the limitations at equity for which disclosure was allowed. The said limitations on the duty of confidentiality at equity were that: 1) the principle of confidentiality only applies to information to the extent that it is confidential; 2) the duty of confidence applies neither to useless information nor to trivia; 3) although the basis of the law's protection of confidence is that there is a public interest that confidential information should be preserved and protected by law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. Embraced within this limiting principle is the defence of iniquity to the effect that one cannot be made the 'confidant of a crime or fraud'. This principle has now progressed to extend to matters of which disclosure is required in public interest.

The submissions by counsel for the appellant on grounds 1 and 2, therefore, may be understood as contending that for all or some of the reasons mentioned in the arguments above, the alleged information revealed by the appellant was not confidential information, which the appellant had a duty not to disclose pursuant to her employment contract with the respondent. Therefore, that the Industrial Court's findings otherwise were erroneous and should be reversed.

Grounds 3, 5 and 7

In the submissions on these grounds, counsel for the appellant faulted the Industrial Court for approving the process by which the appellant got to be dismissed from the employment of the respondent. Counsel contended that there was neither procedural nor substantive fairness in the said process, and further submitted that:

Firstly, the disciplinary proceedings against the appellant were conducted while primarily relying on inadmissible hearsay evidence. This is because the disciplinary officer who investigated the matter against the appellant did not appear to present his/her evidence at the disciplinary hearing against her. It was one Mr. Richard Wejuli, the Corporation Secretary of the respondent who presented the findings of the disciplinary officer, with the identity of the said officer being kept anonymous. This meant that the report in issue, having been presented by a person other than its maker was hearsay and was inadmissible.

Secondly, in regard to the alleged hearsay evidence, it is the contention for the appellant that the said evidence could have been admissible only if the appellant had been given a chance to cross-examine the disciplinary officer, her accuser. Counsel cited **R vs. Horncastle & Others [2009] UKSC 14** to the effect that before a witness whose evidence is crucial to determination of a matter is kept anonymous, there must be cogent reasons to justify his absence. Counsel submitted that because no evidence was given for keeping the disciplinary officer anonymous, the reliance on his/her evidence had rendered the disciplinary proceedings against the appellant unfair.

Thirdly, that the newspaper article which was presented as evidence against the appellant was hearsay and therefore, inadmissible. Counsel cited **Kamba**

Saleh vs. Attorney General, Constitutional Petition No. 0038 of 2012 for the legal proposition that newspaper reports constitute hearsay evidence. Counsel further cited **Nursing and Midwifery Council vs. Eunice Ogbonna [2010] EWCA 1216**; **Police Appeals Tribunal vs. Michael Squire [2016] EWCA Civ. 1315**; all legal authorities which counsel contended, contained principles to the effect that where a tribunal seeks to rely on hearsay evidence, the giver of that evidence must be brought before the tribunal and have him/her subjected to cross-examination before such evidence can be relied on.

Counsel further submitted that the deficiencies with the hearsay evidence could not be said to have been cured by the audio recording which was played before the tribunal, and which was intended as corroboration.

Counsel contended that the reliance on hearsay evidence had caused a miscarriage of justice in the circumstances, and prayed to this Court to reverse the holdings of the Industrial Court that a disciplinary hearing need not follow strict rules of procedure similar to the rules of Courts as being a wrong legal proposition. Counsel cited **R (Bonhoeffer) vs. General Medical Council [2011] EWHC 1585** in support of these submissions.

Counsel further asserted that the respondent had been denied a fair trial because she was dismissed based on evidence of very low probative value, having been submitted by an anonymous witness. The evidence was also unreliable, as it had not been subjected to cross-examination. In the circumstances, counsel contended that the trial of the appellant was carried out in a manner which violated **Article 28** of the **1995 Constitution** and **Section 66** of the **Employment Act, 2006**.

Counsel asked this Court to allow grounds 3, 5 and 7 of the appeal, which were all aimed at proving that the Industrial Court had reached an erroneous finding that the appellant had been given a fair hearing.

Ground 6

This ground is on the remedies available to the appellant, were this Court to reverse the decision of the Industrial Court and find that she was wrongfully dismissed from the employment of the respondent. Counsel submitted that the appellant would be entitled to the following for wrongful dismissal: 1)

Three months' salary in lieu of notice at Ug. Shs. 23,000,000/= per month amounting to Ug. Shs. 69,000,000/=; 2) Salary arrears for the remaining period of the contract of 12 months at 23,000,000/= per month amounting to Ug. Shs. 276,000,000/=, the potential salary increments to the appellant should also be taken into account; 3) Annual gratuity for a period of 2 years at Ug. Shs. 4,600,000/= per year amounting to Ug. Shs. 9,200,000/=; Annual leave allowance for a period of 2 years at Ug. Shs. 29,900,000/= per year amounting to Ug. Shs. 59,800,000/=; 4) Performance bonuses at 20% of gross monthly salary for a period of two years amounting to Ug. Shs. 9,200,000/=. The amounts in 1 to 4, to the tune of Ug. Shs. 432,200,000/= relate to the total entitlements of the appellant under her contract of employment which was wrongfully terminated.

In addition, counsel prayed to this Court to award general and aggravated damages of Ug. Shs. 200,000,000/= to the appellant for unfair dismissal, with interest of 24% per annum from the date of judgment until payment in full.

Respondent's case.

In the written submissions for the respondent, counsel for the respondent supported the decision of the trial Court and strongly opposed the appeal. Counsel for the respondent argued the grounds of appeal in the manner below.

Grounds 1 and 2.

In the written submissions, counsel for the respondent supported the decision of the Industrial Court and contended that the learned trial Judges and the Honourable Panelists of that Court were right to hold that the appellant breached the duty she owed to the respondent to keep the respondent's information confidential which was stated in Clause 11.4 of her contract of employment; and in 12.2 and 12.3 of the Respondent's communication policy.

The appellant had admitted to disclosing information relating to the respondent to the press. The appellant had said that she told the newspapers about certain instances of fraud she had unearthed in the respondent. Counsel contended that it was not open to the appellant to speak about

internal matters of the respondent. The appellant was a highly qualified person who knew the correct procedure and/or forum for reporting such instances of fraud. The same should have been reported to either the police or the Inspectorate of Government, but not the press. But she chose to go to the press, something which the Industrial Court was right to hold to be in breach of her contract of employment.

Counsel submitted to Court that the cases and statutes relied on by counsel for the appellant in the submissions on grounds 1 and 2 were wholly inapplicable to the circumstances of this case.

Counsel asked this Court to find that grounds 1 and 2 of the appeal must fail.

Ground 3.

Counsel made three contentions in reply to the submissions for the appellant on this ground. Firstly, that no issue was raised in the Industrial Court touching on the admissibility of the evidence of the alleged unauthentic newspaper reports or the alleged unauthentic audio clip. For that reason, counsel submitted that no such issue should arise now on appeal. Secondly, that, even assuming that the issue could arise on appeal, since no objection was made to the admission of the exhibits in issue at the trial, their admission into evidence cannot be challenged now, on appeal. Thirdly, counsel for the respondent offered another reason why the admission of the said reports cannot now be challenged, submitting that in the trial Court, counsel for the appellant had cross examined the respondent's witnesses on the evidence in issue.

For the above reasons, counsel prayed to this Court to hold that ground 3 of the appeal has no merit.

Ground 4.

Counsel for the respondent supported the industrial Court's holding to the effect that the right of appeal of the appellant in the circumstances was inconsequential. What matters, according to counsel for the respondent, is that the appellant had breached a fundamental term of her employment making her liable for summary dismissal.

Counsel for the respondent also agreed with the Industrial Court's holding that all it required was for the respondent to conduct a disciplinary hearing prior to dismissing the appellant. At that disciplinary hearing, the respondent employer had to give the appellant the opportunity to be heard and to respond to the charges/allegations which had been levied against the appellant before an impartial tribunal.

In the instant case, the appellant was required to attend a disciplinary hearing, she was told of the charges to which she would answer for at the said disciplinary hearing. At the disciplinary hearing she admitted the charges when she admitted to having given interviews to the media without authorization of the respondent's Managing Director. The appellant admitted that such conduct was in breach of her contract of employment.

Counsel for the respondent contended that no miscarriage of justice had been occasioned to the appellant arising out of the non-consideration of her appeal. This was because she was able to file a claim in the Industrial Court which was adjudicated upon.

Counsel asked Court to disallow ground 4 of the appeal.

Ground 5.

Counsel for the respondent supported the findings of the Industrial Court with regard to the fact that the evidence of an anonymous disciplinary officer was adduced at the disciplinary hearing by a delegate, Mr. Richard Wejuli the respondent's Corporation Secretary. He submitted that the Corporation Secretary was the head of department, who could present evidence on behalf of the disciplinary officer whose identity remained anonymous. No prejudice was occasioned on the appellant. The appellant did not even object to that practice during the relevant disciplinary hearing.

Counsel also submitted that the authorities relied on in the submissions for the appellants were inapplicable.

He invited court to disallow ground 5 of the appeal, as well.

Grounds 6 and 7.

In reply to the submissions on this ground, counsel for the respondent, reiterated that the appellant breached her contract of service in a manner

that justified summary dismissal. Her employer, the respondent, conducted a disciplinary hearing where she was heard and found guilty of breaching her employment contract. Thereafter, she was lawfully dismissed. Counsel then submitted that there is no basis whatsoever, for granting the appellant any of the remedies she seeks from this court.

Further, that the decision of the Industrial Court was arrived at after the said court had evaluated the relevant evidence in its entirety, and was therefore a correct decision.

For those reasons, counsel prayed to this court to disallow grounds 6 and 7 of the appeal, too, as they lacked merit.

In conclusion, counsel urged this Court to dismiss the appeal on all grounds, with costs to the respondent, and to uphold the Industrial Court's award.

Rejoinder.

In rejoinder, counsel for the appellant reiterated the submissions made in support of the appellant's case.

Resolution of Appeal.

I have carefully read the Court record, considered the respective parties' cases set out in their conferencing notes as well as their written submissions, and the law and authorities applicable to this appeal.

This appeal is from the decision of the Industrial Court of Uganda. An appeal to this Court from the decision of the Industrial Court is only on points of law, or where this Court is asked to determine whether the Industrial Court had the jurisdiction to try the matter in issue. **See: Section 22 of the Labour Disputes (Arbitration and Settlement) Act, 2006.** As **Madrama, JA** recently stated in **Uganda Development Bank vs. Florence Mufumba, Court of Appeal Civil Appeal No. 241 of 2015,** an appellant from a decision of the Industrial Court has a right of appeal to this Court on points of law only.

All the six grounds of appeal contain points of mixed law and fact. I would have ordered for the said grounds to be struck out for offending the law set out above, but in the interests of justice, I will extract and consider only the points of law in the appellant's grounds of appeal.

The Black's Law Dictionary gives the following definitions of a point of law also referred to as a question of law:

> **"QUESTION OF LAW**
>
> **question of law. 1. An issue to be decided by the judge, concerning the application or interpretation of the law <a jury cannot decide questions of law, which are reserved for the court>.2. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion <under the sentencing guidelines, the punishment for a three-time offender is a question of law>.3. An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is <both parties appealed on the question of law>.4. An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury <whether a contractual ambiguity exists is a question of law>. — Also termed legal question; law question."**

I would adopt the third definition of a point/question of law which states that a point of law is an issue about what the law is on a particular point; an issue which parties argue about, and the court must decide, what the true rule of law is.

In my view, the following points of law arise out of grounds 1, 2, 3, 4, 5 and 7 of the appeal, which have been stated earlier in this judgment: 1) The proper construction of the confidentiality clause in the appellant's contract of employment. 2) The alleged unauthenticated newspaper report and the unauthenticated audio clip which were relied on to prove the allegations against the appellant. 3) The point of law surrounding the role of the anonymous disciplinary officer at the disciplinary hearing. 4) The point of law on the legal implication of the failure to consider the appellant's internal appeal?

1) The proper construction of the confidentiality clause in the appellant's contract of employment.

A contract of employment, like any other contract is legally enforceable in the courts of law. According to **Section 10 (1)** of the **Contracts Act, 2010**, "A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with

the intention to be legally bound." Where a term in any contract is disputed before any court, it is for the court to give the most appropriate construction to the words used in the contract. The court makes such construction while applying well known principles.

The common law rules of contractual interpretation, were reformulated by Lord Hoffmann in **Investors Compensation Scheme vs. West Bromwich Building Society [1998] 1 ALLER 98**, where he laid down five rules, which may be applied. He said, inter alia that:

> **"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."**

In **Wood vs. Capita Insurance Services Limited [2017] UKSC 24**, Lord Hodge while discussing the principles of contractual interpretation, stated that:

> **"The court's task (when called upon to interpret a contract) is to ascertain the objective meaning of the language which the parties have chosen to express their agreement."**

In my opinion, the ascertainment of the meaning of the words used in a contract, barring certain exceptions not material to this appeal, requires giving the literal meaning to the words in the contract.

The relevant clauses in the employment contract of the appellant (Exhibit P.1) were as follows. Clause 11.4 which stipulated that:

> **"Save in the proper performance of the Employee's duties, the Employee shall not, either during employment or after its termination, make any statement or give any interviews to the media in relation to the Employers (sic) business or any of its Employees without the prior written consent of the Managing Director."**

The respondent's Communication Policy (Exhibit. P2) laid out other relevant matters as follows. The relevant parts of the Communication Policy are laid out below:

> **"12.1 Authority to release information to the media.**

Only the Managing Director shall authorize release of information to the media about the Fund. No information shall be released to the media without his/her express approval."

"12.2 Relationship with the media

By virtue of the respective jobs, some members of staff may from time to time come in contact with the media. Members of staff are expected to portray a positive stance when in contact with the media. When faced with inquiries, members of staff shall politely refer the media to Head of Marketing and Communications or the Public Relations Manager."

"12.3 Media Interviews

Members of staff may not give interviews to the media for any purpose connected to the Fund, a client or professional matter without prior consent of and authorization from the Managing Director and the Head of Marketing and Communications."

"12.4 Telephone interviews

Members of staff may not answer telephone enquiries from the media. All such enquiries must be referred, politely, but without giving the information, to the Managing Director's office or the Head of Marketing and Communications."

"12.5 Media Articles

Members of staff may not write articles about NSSF operations for the media or for publication without the consent of the Managing Director.

Members of staff are, however, free to write and publish articles in the media other than those related to the Fund's businesses and operations. The articles must, however, not commit or be construed to commit the Fund or in any way jeopardize the business of the Fund."

The proper construction to be given to the above relevant clauses is to take the ordinary meaning of the words used. The words employed show that the appellant was strictly forbidden from giving interviews to the media without the consent of the Managing Director of the respondent.

In my view, counsel for the appellant's reference to the duty of confidentiality at equity or common law; and reference to such things as the **Trade Secrets and Protection Act, 2009**, as guiding in the interpretation of a

clear provision of the contract was misconceived. What is relevant in the present case, is the proper construction of certain clauses of the appellant's employment contract with the respondent. This is what is in issue. As mentioned above, that construction is to be done, while applying well-known principles of construction of contracts.

Therefore, to answer the first point of law, the proper construction of the contract of employment of the appellant is to be done with regard being had to the principles of construction of contracts, specifically the principle that the ordinary meaning of the words used in the contract should be applied in such construction. Applying that principle, this Court holds that pursuant to the Employment Contract in issue, it was specifically forbidden for the appellant to give any interviews to the media about the affairs of the respondent without first seeking the permission of the Managing Director of the respondent.

The next point of law for my consideration relates to the alleged unauthenticated newspaper report and the unauthenticated audio clip which were relied on to prove the allegations against the appellant.

It is important to keep in mind that the genesis of the charges of misconduct against the appellant by the respondent NSSF was giving a media interview, which the appellant was not authorized to give. This was confirmed in the Managing Director's letter of 28th May, 2015 (Exhibit P.3), wherein the Managing Director wrote to the appellant informing her of the said unauthorized media interview.

Indeed, it was the case for the respondent, at the trial, that the appellant had admitted to having conducted a media interview without the Managing Director's Authorisation. **(See: Paragraph 6 (a) of the respondent's memorandum in reply to the appellant's claim in the trial Court.)** The respondent asserted that the said acts of the appellant amounted to breach of her contract of employment for which she could be validly dismissed from employment. RW2 Gerald Paul Kasaato, who headed the disciplinary committee which investigated the allegations against the appellant stated in his written witness statement that:

"That it was the case of the Fund against the claimant, among others, that on 27th May, 2015, the Claimant at Nakawa High Court well aware of her employment contract (clause 11.4) while serving as Head of Human Resource made an unauthorized interview with the Red Pepper Publications. Further that the Claimant breached the employment contract and the Human Resource Manual Policy (sic) and procedures when she gave an interview to the media in relation to the Fund's business without the prior written consent of the Managing Director."

According to the report of the committee which conducted the disciplinary hearing of the allegations against the appellant, at page 304 of the record, the relevant evidence presented to prove the allegations against the appellant was as follows: 1) An audio clip in which the appellant was heard speaking to the media; 2) A story in the Red Pepper of 28th May, 2015 which was deemed to corroborate the audio clip; 3) An email from the Managing Director at about 6:30 p.m in the evening of 27th May, 2015 which confirms that the interview was not authorized. Apparently, at about the same time, the Managing Director made a telephone call to the appellant to establish whether she had talked to the press. The appellant apparently replied by accepting that she had indeed talked to the press. A letter confirming the appellant's alleged admissions was shown to the appellant at the disciplinary hearing.

Therefore, what is abundantly clear from the evidence adduced at the disciplinary hearing is that the appellant gave interviews to the media about certain affairs of the respondent.

But the appellant is contending in this appeal that the trial Court should not have relied on the evidence of the audio clip or the newspaper article, claiming that the said evidence is hearsay.

According to the **Halsbury's Laws of England (Civil Procedure (Volume 11 (2009) 5th Edition) at paragraph 764**, "Hearsay evidence is evidence given by a witness in court of a statement made by some other person out of court, when such evidence is tendered to prove the truth of the statement."

In **Subramaniam vs. Public Prosecutor [1956] 1 W.L.R 965 at 970**, it was held that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is inadmissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."**

In the instant case, the respondent employer sought to establish the fact that the appellant had given the media interviews in issue by the alleged hearsay evidence of the newspaper article and the relevant audio clip. The respondent employer did not seek to establish the truth of what was contained in the relevant evidence. For that reason, it may be said, applying the distinction in the **Subramaniam case (supra)**, that the evidence of the newspaper article and the audio clip, was not hearsay.

In regard to whether there was need to bring the journalist who wrote the article in the Red Pepper for cross examination at the disciplinary hearing, reference is made to **R (on the application of Johannes Philip Bonhoeffer) vs. General Medical Council [2011] EWHC 1585 (Admin**), where it was stated that:

> **"There is, in my judgment, no absolute rule whether under Article 6 or in common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him."**

The Court further stated that the need to cross examine a witness at the disciplinary hearing is dependent on the peculiar facts of the case. It further stated that:

> **"Prima facie, the arguments for affording the Claimant the opportunity to cross-examine Witness A are in my view formidable. The Claimant is an extremely eminent consultant paediatric cardiologist of international repute. The allegations against him could hardly be more serious. They involve allegations of sexual misconduct, the abuse of young boys and young men and the abuse of a position of trust. If proved, they would have a potentially devastating effect on his career, reputation and financial position. Not only is the evidence of Witness A the sole evidence against the Claimant in support of most of the allegations against him, but insofar as those allegations involve alleged misconduct**

towards other victims, those victims were interviewed by the MPS and denied that the allegations were true."

The persuasive reasoning in the above case is that there is no legal entitlement for a person facing a disciplinary hearing to cross examine each witness who may possibly testify against him/her, provided that the fairness of the disciplinary process can be said to be guaranteed. In my view, where for example, considering all the circumstances, the evidence in question adduced against the speaks for itself, then notwithstanding that the said evidence may be hearsay, such evidence will be admissible and may be relied on.

In the instant case, the allegations against the appellant were that she had given an unauthorized interview to the media. Prima facie, there was a media story tending to show that she had given the said interview. The newspaper story at page 320 of the record was in the Red Pepper Newspaper of 28th May, 2015, contains information attributed to the appellant. For instance, the heading of the story was written in reported speech that:

"Byakika: Thieves Taking me down to eat workers' money."

Then the article itself contains further information that:

"...Byakika who is out on bail said this case was engineered by thieves in the NSSF who want to steal workers' money unchecked. "They have been giving false information that I have been fired from my job but here is my official communication. My leave ends on May 31, 2015 and I assure you I will be in office on Monday," Byakika said as she flipped the official email, she sent to all NSSF branches informing them that she will be on leave from May 14, 2015 to May 31, 2015.

She said Peter Odeke who has been having issues with the Public Procurement and Disposal of Public Assets Authority (PPDA) is the one who is spreading malicious information about her. "I will continue getting thieves in the fund 'paka bwebanankuba esasi' (until when they will shoot me). I will get them and fire them all. She said.

She said Odeke was even being demoted from being a manager to a records officer and he did not object because he was aware, he was guilty. She said the NSSF board has already recommended Odeke's dismissal."

The above story was written by one Alex Bukumunhe, who had spoken to the appellant after she finished attending a court session at Nakawa Chief Magistrate's Court.

Further, there was a separate audio clip proving that the appellant had given another interview. There was also further evidence that the appellant had admitted in a phone call to the Managing Director that she had given an interview to the media.

At page 305 of the record, the following appears from the report of the proceedings at the disciplinary hearing:

> **"b) the Disciplinary officer then played the audio recording featuring the employee making statements to the press. The words in the audio are as follows:**
>
> **3.2.1 The audio-a verbatim quotation**
>
> **The statement has both an English and Luganda version:**
>
> **Voice 1-the employee: "I'm not indicted as the Newspapers are saying. I am on leave; all those things are malicious allegations against me because of the fraud I have discovered in the company."**
>
> **Voice 2-the interviewer or person asking a question: "Thank you very much: can you try some Luganda".**
>
> **Voice 3-the employee: "Tebanaba Kungoba kuva kumulimu, nze nasaba okugenda ku livu, naye bino byonna ebiri mu kooti, it is because of obubbi bwe nakazuula mu Fandi. Ate Sijja Kulekeraawo okubuzuula--- and that's my role. Njakubuzuula ne bwenakola batya".**
>
> **Voice 4----the interviewer: Thank you very much. May God Bless you." (sic)**

Further, at page 305 of the record, when it was put to the appellant that the contents in the audio clip were similar to the contents in a newspaper article in the Red Pepper, she confirmed that she had made the statements in issue. At that point, the disciplinary officer then asserted that since the appellant had accepted that she indeed spoke to the press, it was clear that she had done so without authorization from the Managing Director, which breached her employment contract.

In her defence, the appellant conceded that the voice in the audio clip was hers, and that she had spoken to the media. But she sought to state that

speaking to the media did not mean that she had given a media interview **(See: page 307 of the record)**. Moreover, that the statements in the Red Pepper were aimed at redeeming her image, which the Red Pepper had tainted over time.

But according to the report of the disciplinary committee, the appellant seemed to have changed her tune later in the disciplinary hearing, when she said that the picture accompanying the newspaper article shows that she was running away from the media and could not have given an interview. Considering all the circumstances of the case, I hold that the evidence of the newspaper article and the relevant audio clip recording was rightfully relied on.

One further point I wish to add is that there is a basis from the common law for the authority that a disciplinary committee, in exercising its jurisdiction, is not a judicial body in the ordinary sense, and as such it is not bound by strict rules of evidence. **See: General Council of Medical Education and Registration of the United Kingdom v Spackman [1943] 2 All ER 337.** The role of a disciplinary committee hearing allegations of misconduct against an employee is to find out the truth in the allegations made. As long as the committee acts fairly towards the employee, its findings should not be minimized, merely because it did not apply strict legal rules. After all, as Lord Reid stated in **Ridge vs. Baldwin & Others [1963] 2 All ER 66**, what is important is that before reaching a decision to dismiss an employee, the employer is bound to observe what are commonly called the principles of natural justice, that before attempting to reach any decision they were bound to inform him/her of the grounds on which they proposed to act and to give him/her a fair opportunity of being heard in his/her own defence.

Therefore, in conclusion, the evidence of the newspaper article and the audio clip could be relied on for five reasons. Firstly, because the appellant had admitted to having made the statements attributed to her in that evidence, although she later attempted to offer explanations about why she had given the interviews. Secondly, because the evidence of the newspaper article and the audio clip was not hearsay and was admissible. Thirdly, even if the said evidence was hearsay in the legal sense, the strict rules of hearsay are not applicable to a disciplinary committee hearing, as such committees, not

being judicial bodies as such are not expected to adopt the strict rules of evidence applied in a court of law. Fourthly, the evidence of the newspaper article "spoke for itself", and as such it was unnecessary to bring the journalist who wrote the article to testify before the disciplinary committee, especially given that the appellant had accepted that she made the statements attributed to her in the newspaper article. Fifthly, given that the appellant confirmed at the disciplinary hearing that she had made the statements attributed to her in the audio recording, and had also earlier admitted to the Managing Director that she had been talked to by the media regarding the statements attributed to her in the relevant newspaper article, it is not correct for counsel for the appellant to assert that those pieces of evidence were unauthenticated. The appellant authenticated the pieces of evidence herself.

It is also of significance, as pointed out by counsel for the respondent, that the appellant is choosing to challenge the authenticity of the newspaper article and the relevant audio clip now on appeal, having not challenged the said items at the disciplinary hearing or in the trial Court. This is therefore an afterthought by the appellant, who is desperate to resurrect an issue she did not pursue vigorously in the Industrial Court.

The third point of law is the one surrounding the role of the alleged anonymous disciplinary officer at the disciplinary hearing.

Counsel for the appellant submitted that the disciplinary officer/investigator in respect to the allegations against the appellant was not present during the disciplinary hearing and that it was instead, a delegate of the said disciplinary officer, one Mr. Richard Wejuli, the Corporation Secretary of the respondent who presented the findings of the disciplinary officer, with the identity of the said officer being kept anonymous. Counsel for the appellant submitted that the evidence of the delegate was hearsay evidence which should not have been relied on.

In response, counsel for the respondent submitted that it was not open to the appellant to raise that point now, given that it was not raised in the trial Court, and neither was it raised at the disciplinary hearing.

Indeed, at page 302 of the record, the report from the disciplinary committee hearing indicates that the disciplinary officer was not present, but his/her evidence was presented by one Mr. Richard Wejuli, then Corporation Secretary of the respondent NSSF.

It is hard for this Court to determine exactly what the role of the disciplinary officer was in the circumstances. The evidence that there is on record is that this officer was connected with carrying out some investigations into the allegations against the appellant. From those investigations, evidence was produced and put before the committee, with the appellant being given a chance to review and respond to that evidence. In my view, the role of the disciplinary officer is akin to that of an investigating officer, in a criminal matter whose successful prosecution does not hinge on the calling of the said investigating officer to give evidence as a witness in court. In the instant case, the evidence and findings of the disciplinary officer could be presented by another person, without any prejudice being occasioned on the parties.

The Industrial Court held the same view, and I have no reason to fault that view, at page 15 (a) of the record, that:

> **"We respectfully disagree with counsel for the claimant that Delegate has no authority. Mr. Richard Wejuli like the head of department would have done, presented the investigation report and proposed charges to the committee. In our opinion he had the authority and right to do so as a delegate of the head of department. We don't see how the claimant could have been prejudiced.**

The fourth and final point of law concerns the legal implication of the failure to consider the appellant's internal appeal?

I will say on this point that under the Employment Act, 2006, there is no mention of the requirement to put in place an appeals mechanism in the context of a disciplinary committee's decision to propose dismissal of an. Therefore, the practice of internal appeals is not a statutory obligation but is rather by courtesy of the employer. It cannot therefore be said that any legal prejudice will befall an employee whose internal appeal is not handled properly, or at all. **Section 66** of the **Employment Act, 2006** only envisages hearings at first instance by the disciplinary committee. Thereafter, if the employee feels aggrieved by the wrongful dismissal, he/she

may institute a matter before a competent court or person for determination as to the lawfulness of the dismissal in question. In my view, the Industrial Court was right not to attach undue weight to the handling of the appellant's internal appeal.

I would dispose of the points of law in this appeal in the manner proposed above.

As to the disposition of the whole appeal: I have concluded herein above that whether or not the appellant breached her contract of employment, was a matter to be resolved having regard to the words used in her contract of employment. I also concluded that there were stipulations in the said contract of employment which made it strictly forbidden for the appellant to give interviews to the media about the affairs of the respondent without authorisation. I found that there was admissible evidence put to the appellant at the disciplinary committee hearing that she had given such interviews to the media without the necessary authorization. Therefore, there was justification for the respondent employer to conclude that the appellant had breached her contract of employment, in a manner for which the appellant could be liable to be dismissed from employment. The points of law in this appeal, therefore, have no merit and are dismissed.

As to costs, I would make no order as to costs. This is because there is sufficient public interest in cases of this nature which involve investigating the treatment afforded by statutory bodies like the respondent to its employees in matters concerning dismissal from employment. The appellant had the right to ask court to investigate the manner in which herself, and potentially other employees like herself, are dismissed from employment. I will therefore not require her to pay costs either of this appeal or in the court below.

I feel it necessary to address the contentions of the appellant that since the information she had given to the media was related to fraud, it was her duty to take such information to the media, and as such she was absolved from the requirement to respect the terms in her contract of employment. I must say that it is now trite law that there is freedom of contract, even in contracts of employment. An employee is expected to abide by the written terms of her employment contract whatever the motivation of the employer to include

those terms in her employment contract. On this point, I have not found it necessary to discuss whether the appellant was acting as a whistle blower when she spoke about the alleged fraud by some employees in the NSSF because in my view, the issue of whistle blowing is wholly irrelevant to the requirement for her to respect the terms stipulated in her contract of employment.

For the reasons given above, I would affirm the decision of the Industrial Court in holding that the appellant was lawfully dismissed from her employment with the respondent NSSF. This appeal stands dismissed, but with no order as to costs.

As Hon. Justice Stephen Musota, JA. and Hon. Justice Remmy Kasule, Ag. JA. also agree, the disposition of this appeal shall be in the manner proposed in this judgment.

Dated at Kampala this.....30th.....day of.....July.....2020

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Elizabeth Musoke

Justice of Appeal.