CONTRACT HAULAGE LIMITED v MUMBUWA KAMAYOYO (1982) Z.R. 13 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S. AND MUWO, AG. J.S.
14TH APRIL, 1981 AND 22ND JULY, 1982
(S.C.Z. JUDGMENT NO. 2 OF 1982)
APPEAL NO.10 OF 1980

Flynote
Employment - Contract of Service - Termination - Master and Servant Relationship - Effects of.

Headnote
The appellant appealed against declaration by the High Court to the effect that the purported dismissal of the respondent by the appellant was null and void; in which case the respondent would be entitled to, reinstatement. The appellant argued that the employment was under a master and servant contract; if the respondent was wrongly dismissed he was entitled only to damages, and there was no question of breach of natural justice being applicable and thus the dismissal was not null and void.

Held:
(i) In a pure master and servant relationship there cannot be specific performance of contract of service and the master can terminate the contract with his servant at any time and

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for any reason or for none; if he does so in a manner not warranted by the contract he must pay damages for breach of contract.
(ii) Where there is a statute which specifically provides that an employee may only be dismissed if certain proceedings are carried out, then an improper dismissal is *ultra vires:* and where there is some statutory authority for certain procedure relating to dismissal a failure to give an employee an opportunity to answer charges against him or any other unfairness is Contrary to natural justice and a dismissal in those circumstances is null and void;
(iii) There is no statutory authority for specific procedural steps to be taken before an employee in a parastatal organization may be dismissed.

Cases cited:
(1) Raine Engineering Co. Ltd. v Baker (1972) Z.R. 156.
(2) Ridge v Baldwin [1963] 2 All E.R. 66.
(3) Vine v National Dock Labour Board [1956] 3 All E.R. 939.
(4) Kangombe v Attorney-General (1972) Z.R 177.
(5) Malloch v Aberdeen Corp. [1971] 2 All E.R. 1278.
(6) Barber v Manchester Regional Hospital Board [1958] 1 W.L.R. 181.
(7) Palmer v Inverness Hospitals Board of Management 1963 S.C. 311.
(8) Vidyodaya University Council v Silva [1965] 1 W.L.R. 77.
(9) Glyn v Keele University [1971] 1 W.L.R. 487.
(10) Davidson v The National Agricultural Marketing Board 1975 (1) A.L.R Comm. 1.
(11) Kasema v Attorney-General 1972 (3) A.L.R .Comm. 432; (1972) Z.R. 185

Legislation referred to:
Parastatal Bodies Service Commission Act, 1976, Cap.18(repealed).

For the appellant: H. H. Ndhlovu, Jacques and Partners.
For the respondent: M. F. Sikatana, Veritas Chambers.

Judgment

GARDNER, AG. D.J.C.:

This is an appeal from a judgment of a judge of the High Court in which a declaration was made to the effect that a purported dismissal of the respondent's employment by the appellant was null and void.

The respondent was a stores clerk in the employ of the appellant, a road haulage contractor.

The facts of the case were that in June, 1976, the respondent having been granted twenty-four days leave was arrested by the police in connection with a charge of murder. When he did not return from leave the appellant company wrote a letter to him notifying, him that he was suspended from employment. Subsequently a Mr Mbuzi, a Senior Supplies Officer for the appellant wrote a letter dated the 14th of September, 1976, which read as follows:

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> "Re: Termination of Service
>
> Following up the letter from the Depot Manager, Mongu, dated 31st August, 1976, which briefly explained the details about your activities in which involves of your suspension indefinitely, when you follow para. (1) and (11) which has carried more weight to your disappearance from work.
> The Management now take the decision of terminating your service with effect from 7th August, 1976, the date in which you were supposed to resume duties of which you fail to turn up for work, and having heard that you are involved in a police case of which we are not prepared to wait the police results, therefore the company has terminated your service.
>
> Yours faithfully
> For/Contract Haulage Limited
> (Signed)
> M.M. Mbuzi"

The respondent instituted an action against the appellant claiming a declaration that his dismissal was null and void. The learned trial judge made such a declaration and it is against that declaration that this appeal is made.

In his judgment the learned trial judge decided that the conditions of service of the respondent were to be determined under a document referred to as the "Joint Industrial Council Agreement". Clause 18.7 of this agreement reads as follows:

> "18.7 An employee who shall absent himself from work for period in excess of 7 days without reasonable explanation shall be deemed to have left the employer's service without notice."

It is of the utmost importance to note that under the same agreement there is a provision, namely cl. 23, to the effect that both parties were entitled to terminate the agreement by thirty days' notice.

The essence of the appellant's appeal is that the respondent was employed under an ordinary master and servant contract, and if he was wrongly dismissed, he is entitled only to damages for wrongful dismissal. The essence of the respondent's reply is that, because the respondent was dismissed in a manner which was in breach of natural justice, his dismissal was null and void and he was entitled to the declaration made by the learned trial judge. On behalf of the respondent it was argued, firstly, that the respondent was employed in a parastatal organisation and, therefore, his disciplinary provisions of the contract in the same way that the Public Service Commission, as a statutory body, must apply statutory disciplinary provisions. It was argued that

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a failure to conform to the procedure set out in the contract would render any termination of the

contract null and void. Secondly, it was argued, that the contract itself provided for a means of terminating the contract that the respondent was dismissed because he had been absent without leave for more than the number of days stated in the contract, that he had not been given an opportunity to answer the charges against him, that he had a reasonable excuse for being absent (namely, his detention, by the police), and his being denied natural justice made his dismissal null and void.

We were referred to a number of cases and, in particular, *Raine Engineering Co. Ltd v Baker* (1), in which Doyle, C.J., quoted the following passage of a speech by Lord Reid in *Ridge v Baldwin* (2) at p. 71:

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

In the *Raine Engineering* case (1), Doyle, C.J., also referred to the case of *Vine v National Dock Labour Board* (3), in which, at p. 944 Viscount Kilmuir said:

> "This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that states conferred on him. It is, therefore, right that, with the background of this scheme, the court should declare his rights."

The advocates for both the appellant and the respondent were asked by the court to comment on the Parastatal Bodies Service Commission Act, 1976 (Cap. 18/197), and it was agreed that the Act, which provided that a Parastatal Bodies Service Commission could make regs. for employment and termination of service, did not come into effect until after the date of the respondent's dismissal, and that in any event no such regs. were made, and the Act itself has since been repealed. The importance of taking into consideration the existence or non-existence of the Act is to ascertain

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whether there are statutory provisions which provide for specific procedural steps to be taken before an employee of a parastatal organisation may be dismissed. It is clear that there is no such statutory authority.

In the *Ridge v Baldwin* case (2), Lord Reid said at p. 71:

> "So I shall deal first with cases of dismissal. These appear to fall into three classes, dismissal of a servant by his master, dismissal from an office held during pleasure and dismissal from an office where there must be something against a man to warrant his dismissal."

The case of *Ridge v Baldwin* (2) related to the dismissal of a chief constable whose terms of dismissal were governed by the Municipal Corporations Act, 1882, which gave power to a watch committee to dismiss a chief constable. The case decided whether or not the watch committee had exercised its discretion properly having regard to the fact that the rules of natural justice required that the chief constable concerned, should be given an opportunity of being heard before his

dismissal. It was held by the House of Lords that, because the case of the chief constable fell into the class of case where there must be something against a man to warrant his dismissal, his purported dismissal was null and void.

In the case of *Kangombe v Attorney-General* (4), Silungwe, J., (as he then was) held that the dismissal of an employee contrary to the statutory provisions of the Teaching Service Commission Regs. of 1971 was null and void.

I respectfully agree with the decisions in these cases, and the question to be decided in this case is whether the contract between the appellant and the respondent was a pure master and servant contract, or whether in view of the fact that the appellant is a parastatal organisation, it should be bound in any way by the rules which relate to statutory authorities. In my view, the question of whether or not a dismissal is in breach of contract or null and void is one of jurisdiction. Where there is a statute which specifically provides that an employee may only be dismissed if certain procedures are carried out, it can properly be argued, as in the *Kangombe* case (4), that an improper dismissal is *ultra vires*. In the same way, where there is some statutory authority for a certain procedure relating to dismissal, a failure to give an employee an opportunity to answer charges against him or, indeed, any other unfairness may be said to be contrary to natural justice to the extent that a dismissal under such circumstances would be null and void. In the case of *Malloch v Aberdeen Corp.* (5), at p. 1294, Lord Wilberforce considered pure master and servant contracts and other contracts of employment as follows:

> "The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant causes, one is normally in the field of the common law of contract *inter partes*, so that principles of administrative law, including those of natural justice, have

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> no part to play. The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful: no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both of these arguments, but they, particularly the first, must be carefully used. It involves the risk of a compartmental approach which, though convenient as a solven, may lead to narrower distinctions than are appropriate to the broader issues of administrative law.A comparative list of rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied (see *Barber v Manchester Regional Hospital Board* (6), *Palmer v Inverness Hospitals of Management Board* (7), *Vidyodaya University Council v Silva* (8), *Vine v National Dock Labour Board* (3), *Glynn v Keele University* (9)). One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment of service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements, exist, then, in my option, whatever the terminology used, and even though in some *inter partes* aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in dismissal being declared to be void."

This passage was considered by Cullinan, J. (as he then was), the case of *Davidson v The Natural Agricultural Marketing Board* (10), when he said at p. 29:

> "It seems to me that in effect Lord Wilberforce has expanded or rather more specifically defined the third class of cases described by Lord Reid in *Ridge v Baldwin* (2), as

'dismissal from an office where there must be something against a man to warrant his dismissal' and that the third class is in fact an offshoot of the first two classes of cases. For example, the facts of *Ridge v Baldwin* (2), *Malloch v Aberdeen Corp.* (5), and *Kasema v Attorney-General* (11) would seem to indicate the case of a dismissal from an office held during pleasure governed by, to use Lord Wilberforce's words Malloch v Aberdeen Corp. (5) at p.1597, other incidents of the employment laid down by statute, or regulations, or code of employment or agreement'; again, the facts of *Vine v National Dock Labour Board* (3) would seem to indicate the dismissal of

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a servant by his master where, essential procedural requirements, had not been observed."

The learned judge went on to hold that a chartered accountant employed by the National Agricultural Marketing Board for a fixed period of employment, the contract to be terminated other than on disciplinary grounds on three months notice by either party, did not hold an office during pleasure nor was there any element of public employment or service, nor was there anything in the nature of an office or status which was capable of protection and that he was certainly not protected by statute. The learned judge therefore found in that case that there was nothing more than a master and servant relationship, and failure to observe the rules of natural justice did not render the dismissal void. In the course of that judgment the learned judge stated, obiter, that, had the plaintiff been a permanent and pensionable employee, some of the ingredients specified by Lord Wilberforce in the *Malloch* case (5) might apply. In the case at present before this court, although, on behalf of the respondent, it was argued that the respondent was a clerk in permanent and pensionable employment, there was no specific evidence to that effect and, even if the respondent was entitled to a pension, which does not appeal in the Joint Industrial Council Agreement, there is no doubt that his service could be terminated under s. 23 of the Joint Industrial Council Agreement by the giving by either party of thirty days' notice. The respondent cannot be said to have been employed under a contract giving any such protection as suggested as a possibility by Lord Wilberforce.

Throughout the relevant cases there is reference to breach of natural justice, usually referring to circumstances where an employee has been dismissed for disciplinary reasons without being given a reasonable opportunity to be heard in his defence. And, in the present case, this was the argument put forward on behalf of the respondent. The learned trial judge found that, in view of the fact that the respondent was not given an opportunity to explain the circumstances that led to his arrest, this was a denial of natural justice and the dismissal was unlawful.

In my view, the use of the expression "breach of natural justice" in the present case may lead to two misconceptions. The first, that, as result the respondent has no remedy at all save in a declaration and reinstatement. This is incorrect because he has a remedy in damages. Secondly, that the appellant would not have dismissed the respondent if it had known than he would be released by the police ten months later. This is also incorrect. The appellant's letter of 14th September, 1976, was not a letter of dismissal for disciplinary reasons as such, but was no more than a letter of termination of contract, the appellant specifically stating that it was not prepared to await the outcome of the court case. The breach of contract in this case was that the appellant terminated the contract summarily. This was not a case for invoking any of the provisions of the Disciplinary Code, but one for termination by notice under s. 23 of the Joint Industrial Council Agreement.

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I have no hesitation in finding that there was nothing more than a pure master and servant relationship between the parties and the respondent is in no different position from that of an employee of any other company whose procedure for termination of contract is not affected by the elements outlined by Lord Wilberforce in *Malloch* (5) reproduced above. Any breach of any of the terms of the contract between the appellant and the respondent as to the mode of termination can give rise only to remedy in damages. In this case, the contract provided that the respondent should have been given one month's notice. He was not given such notice and his contract was therefore improperly terminated. He is entitled to the usual damages which arise from such a

situation, that is to say, he is entitled to thirty days' salary in lieu of notice.

I would allow this appeal and set aside the declaration. In its place I would grant damages to the respondent consisting of his usual salary and allowances for thirty days in lieu of notice, with interest thereon at the rate of seven per cent, from the 14th September, 1976, until the date of this judgment.

In view of the fact that the learned trial judge found that there was an improper dismissal of the respondent, I would not interfere with the award of costs that court. In this court I would award costs to the appellant.

Judgment
CULLINAN, J.S.: I have had the advantage of reading the judgment of the learned President of the court and I concur in that judgment.

Judgment
MUWO, Ag. J.S.: I also concur.

Appeal allowed

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