

AVONDALE HOUSING PROJECT LIMITED (1982) Z.R. 172 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, DC.J., AND MUWO, J.S.
24TH NOVEMBER AND 15TH DECEMBER, 1982
(S.C.Z. JUDGMENT NO.31 OF 1982)
APPEAL NO.7 OF 1982.

Flynote

Civil procedure - Adjudication - Need for all matters in dispute to be adjudicated upon.

Civil procedure - Appeal - Courts powers - Right of appellate court to interfere with or reverse the findings of the lower court.

Headnote

The appellant was employed by the respondent as an Assistant Accountant. His employment was terminated by a letter dated 19th December, 1978, alleging that the appellant had carried out certain transactions which were irregular and dishonest. The appellant then brought an action for wrongful dismissal which was dismissed by the trial court. He appealed against the dismissal of the claim and an order made in relation to his claim for the return of certain household goods or their value.

Held:

- (i) The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.
- (ii) The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.

Cases cited:

- (1) Khalid Mohamed v The Attorney-General (1982) Z.R. 49

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For the appellant: S. S. Phiri, S. S. Phiri and Co.

For the respondent: B. S. K.Chiti, Legal Counsel, Zambia State Insurance Corporation.

Judgment

NGULUBE, D.C.J.:

This is an appeal, in the first place, against the dismissal of the appellant's claim against the respondent for damages for wrongful dismissal and, in the second place, against the nature of the order made in relation to the appellant's claim for the return of certain household goods or their value. I propose to begin with the claim for wrongful dismissal.

The appellant was employed by the respondent as an assistant accountant. By a letter dated 19th December 1978, the respondent terminated the appellant's employment with them in the following terms:

"Re: Termination of Employment

1. On 13th December, 1978, you prepared Invoice No.151 being a document belonging to Zambezi Enterprises Ltd. a company which you had no authority to work for without permission from this company.
2. On the same day you signed the same order on behalf of Zambezi Enterprises Ltd.
3. On the day in question you caused Avondale Housing Project Ltd. Purchase Control Stamp to be appended to the said invoice. Without the Contract Manager's authority, you approved the said *pro-forma* invoice and presented it to Mr Tharkara for payment and collected a cheque of K995.86. The cheque in question was not passed to Mr Musonda. Up to now the fictitious goods which were supposed to be purchased from Zambezi Enterprises Ltd have not been delivered.

I could not see the purpose of ordering paint from the above company because painting at the moment is sub-contracted.

4. On 14th December 1978, you prepared another Invoice No 150 to the same company for the electrification of S/D224/A378a Lusaka, a property which is supposed to be purchased by you.
5. You prepared a cheque of K1,800 which was stopped by the Project Manager.

Having considered both cases, I am unable to keep you in such a position of trust. I therefore hereby terminate your employment with this company with immediate effect. You will be paid one month extra in lieu of notice. But you will only be paid after the company has recovered the sum of K995.86 which you managed to obtain from the company on behalf of Zambezi Enterprises Limited."

The appellant's contention in the court below was that the allegations contained in the respondent's letter were without foundation and unjustified. It was his contention further that the transactions referred to in the invoices mentioned in the letter were neither irregular nor dishonest

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as suggested by the respondent, but were in fact transactions in the normal course which had been duly approved. For these reasons the appellant contended that the dismissal was wrongful and without justification. In dismissing the appellant's claim the learned trial Commissioner accepted the respondent's contention to the effect that the transaction were in fact irregular and unauthorised.

On behalf of the appellant, Mr Phiri has asked this court to reverse the findings, made by the trial court. He submits that the respondent had in fact not adduced any evidence to support the allegations contained in the letter of dismissal, and that, in the circumstances, the learned trial commissioner erred in finding the appellant guilty of those allegations, especially having regard to the fact that his, superiors had scrutinised the documents and authorised the payments. Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.

With regard to invoice No 151 mentioned in the letter of dismissal, Mr Phiri argues that there was an official order in support which must have been prepared by an authorised officer, and that, in the premises, the fact that only the appellant signed on it could not lead to the conclusion that there was any irregularity. I would agree with Mr Chiti that this submission is untenable. It glosses over a number of suspicious features and other evidence. Thus, in relation to the order number quoted in this invoice, there was evidence from Mr Sata, on behalf of the respondent, that the order book in which that particular order number appeared was not in use and had been removed without the authority of the respondent company. There was the evidence also that the goods reflected on the invoice were in fact never received by the respondent, and that, in any event, painting jobs had been sub-contracted. There was also the complete absence of any evidence from the company named on the invoice, evidence which could, in my view, easily have been adduced by the plaintiff and ought to have been adduced, having regard to the nature of the allegations which were made in the dismissal letter, a letter written within matter of days of the transaction called into question. The argument that the respondent had not adduced evidence in support of the allegations surrounding invoice No.151 cannot, in my view, possibly be upheld. Similar considerations apply in relation to invoice No.150 which the respondent's witness, Mr Power, had stated was signed by him through inadvertence and without really having applied his mind to it. I do not think that the appellant can be heard to say that the mere fact that Mr Power had signed it automatically removed any suspicion that might arise. On the contrary, here again, there was no evidence from the company alleged to be the supplier, and there was no evidence that the appellant had consulted and obtained prior approval from Mr Power. In addition, there was evidence that in fact payment of the cheque was stopped and that the transaction would

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only have benefited the appellant since the materials to be obtained were to be fitted to a house the appellant was to have purchased. Furthermore, there was evidence that electrical jobs had been sub-contracted. In the face of all these circumstances and factors which the evidence disclosed, I cannot see how the learned trial commissioner can be faulted as his findings which were fully justified by the evidence before him. I believe that it is the view of all the members of this court that there are no grounds upon which we can reverse the findings below.

There is one observation I wish to make before leaving this subject. Mr Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process, however, I have also pointed out the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case. As we said in *Khalid Mohamed v The Attorney-General* (1):

"Quite clearly a defendant in such circumstances would not even need a defence."

It follows from what I have said that I would dismiss the appeal relating to the claim for wrongful

dismissal.

I now turn to the appeal against the nature of the order made in relation to the appellant's claim for the return of certain household goods or their value. The learned trial commissioner had stated in his judgment, and I quote:

"The ruling of the court is if the defendant company seized these goods that seizure was without justification in view of the failure to have the plaintiff prosecuted. It is therefore the court's order and the court orders, that all the goods belonging to the plaintiff be given to him at once and the damaged ones be repaired or paid for. In other words the goods should be in the condition they were when the plaintiff last held them in his possession.

If on the other hand the plaintiff intentionally left them with the defendant he is ordered to remove them from the defendant's premises and is debarred from claiming damages for loss, damage to property and other damages unless he can show malice on the part of the defendant. If he does show the malice then he is at liberty to claim damages to that degree. To that extent the claim for return of the goods or their value succeeds."

Both sides agree that the learned trial commissioner had left the parties in some doubt and had not adjudicated upon certain aspects of the claim. The appellant had listed a number of goods, some of which it

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was agreed belong to him. These goods, which the court below inspected, were ordered to be returned to the appellant. Some of the goods were found to be damaged while others, so the appellant alleged, were missing. In relation to the goods which were missing, there were some whose ownership was disputed as each side claimed to be the owner. Indeed, there appears to have been a dispute as to whether in fact some of the goods on the list had ever existed. All these matters called for adjudication but, unfortunately, were left undetermined. I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided. In the circumstances of this case I believe that it is the view of all the members of this court that the ends of justice will be met by remitting the claim in relation to the goods back to the High Court with the direction that the learned trial commissioner do make all the necessary findings and thereupon do make all the necessary orders and awards. I would, accordingly, so order.

Order, accordingly