CHIPATA RURAL COUNCIL (1983) Z.R. 26 (S.C.)

SUPREME COURT
NGLULUBE, D.C.J., GARDNER AND MUWO, J.J.S
28TH FEBRUARY, AND 24TH MARCH, 1983
(S.C.Z. JUDGMENT NO. 6 OF 1983)
(APPEAL NO. 1 OF 1982)

Flynote
Civil Procedure - Pleadings - Courts departure from - Necessity for.
Civil Procedure - Pleadings - 0.18 of High Court Rules - Applicability.
Courts - Powers of - Extraneous considerations - Validity of under 0.18, High Court Rules.
Employment Termination - Unilateral nature of - Resignation.
Employment - Suspension - Contract of Employment - Effect on.

Headnote
The appellant was employed as Secretary by the respondent council before he was charged with and convicted of forgery of a local purchase order. Subsequently, he resigned giving three months notice. The respondent considered and declined to accept the resignation, recommending to the Eastern Province Local Government Service Board that the suspension should cease and the appellant be reinstated. The Board declined and purported to dismiss him, which dismissal was later declared null and void by the High Court. When the matter found by the respondent had stood by its decision, he removed its Chairman and his deputy and appointed new men to the posts. A fresh meeting of the Council was called at which it was resolved that the appellant be dismissed. The appellant sued the

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Council for wrongful dismissal. During the course of the trial, the court discovered that the appellant had resigned earlier and took this into consideration holding that it effectively terminated the employment contract, and all resolutions following were null and void.

Held:

(i) Although generally, the trial court should not radically depart from the case pleaded, in exceptional circumstances it would be incompatible with a judge's duty, to dispense justice on the merits of any given case, for him to allow evidence to be suppressed on the ground that a relevant issue was omitted from the pleadings; in this case, the learned trial judge could hardly have justified his discretions to grant the declaration sought on a fiction that the resignation did not take place and had not effected any fundamental change to the relationship between the parties.

(ii) An amendment under 0.18 is justified only where is results in mere recasting of the case in order to agree with the evidence, and without the introduction of any new cause of action or defence.

(iii) 0.18 of the High Court Rules, is not a directive to the courts spontaneously to raise further issues where the issues have already been clearly pleaded and joined by the parties, nor is it an open invitation to the parties to withhold issues and only attempt to raise them after a trial run on the evidence.

(iv) While in an exceptional case an employer in breach may have a declaration or other order made against, him which has the effect of forcing him to retain the employee in his service, no order may be made against an employee to remain in his employers employ; therefore resignation effectively terminated the contract of service.

(v) Suspension does not create any legal impediment which takes away the right of a person to continue to work or not to be forced to work as per the terms of the contract.

Cases cited:

(1) Byrne v Kanweka (1967) Z.R. 82.
(2) Mumba v Zambia Publishing Co. Ltd. (1982) Z.R. 53.
(3) Raine Engineering Co. Ltd. Baker (1972) Z.R. 156.
(4) Wallwork v Fielding [1922] All E.R. 298.
(5) Vine v National Dock Labour Board [1956] 1 All E.R. 1; 3 All E.R.
(6) Hill v C.A. Parsons and Co. Ltd [1971] 3 All E.R. 1345.
(7) Thomas Marshall (Exports) Ltd v Guinee [1978] 3 All E.R. 193.

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Legislation referred to:

Local Government (Officer's) Act, Cap. 477.
High Court Rules, Cap. 50, 0.18.

For the appellant: N. Kawanambulu, Shamwana and Co.
For the respondent: E.K. Mutal, Sondashi and Co.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The parties in this case were before this court in 1974 (*see* (1974) Z.R. 241), but, once again, it is necessary to set out briefly the facts of the case. These were that the appellant was the secretary of the respondent Council. On 23rd June, 1972, he was suspended from duty with effect from 22nd June, 1972, being the day when, the appellant appeared in subordinate court charged with the forgery and uttering of a local purchase order belonging to the respondent, whereby, he had altered the number of canopies to be obtained for the respondent Council from two to three. On 28th August, 1972, the appellant was convicted and received suspended sentence. Eventually, this court acquitted him on 22nd July, 1975, on the ground, basically, that there had been no intent to defraud since the third canopy was fact fitted to a Council Land - Rover. Meanwhile, shortly after his conviction in August, 1972, the appellant wrote letter of resignation giving three month's notice. The respondents duly considered this letter but declined to accept the resignation. The appellant was not notified of this development. The respondents' councillors considered the appellant's position a number of meetings. Under the then Local Government Officers Act (Cap. 477), the respondents could only dismiss the appellant if their recommendation to that effect was accepted by The Eastern Province Local Government Service Board (hereinafter called the "Board"). But they in fact did not want to dismiss the appellant.

They considered that, notwithstanding the conviction, the transaction had not been to the Council's

prejudice and that the appellant should be reinstated. Resolutions were passed to that effect and their purport communicated to the Board. The Board purported to dismiss the appellant by letter dated the 30th October, 1972, but, as the learned trial judge properly held, they had no inherent power to do so in the absence of a resolution from the respondents to that effect, and their action was therefore, of no effect whatsoever, subsequently, the responsible Minister and the Board wrote letters to the respondents indicating that only the appellants dismissal would be acceptable. The respondents maintained their position to the effect that the resolutions to reinstate the appellant would stand, and that, the Minister or the Board should dismiss the appellant themselves if they so wished. The Minister travelled to Chipata where he relieved the then respondents' Chairman and vice - Chairman of their posts and appointed new men to these posts. He addressed the respondents' councillors. The result of the Minister's address was that on 5th October, 1973, the respondents, under the new leadership, duly passed a resolution rescinding all the previous ones and dismissing the appellant from his post with effect from the date of his conviction. The appellant was duly notified by a letter dated 8th October, 1973. This dismissal was duly approved by the Board.

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By his writ, issued on 11th November, 1974, the appellant sought declaration that the respondents' resolution passed on 5th October, 1973, dismissing him from employment, was null and void and of no effect. As amended, the endorsement also included a claim debt, namely the payment of salary from 1st July, 1972, until judgment. The object of the claim for the declaration was, obviously, to obtain reinstatement. The statement of claim had set out number of grounds which, the learned trial judge was invited to find, rendered the resolution complained of a nullity. There was no mention either in the statement of claim or in the defence of the fact that the appellant had resigned. According to the pleadings the appellant was challenging the dismissal of 5th October, 1973, while the respondents were contending that it was a. valid dismissal. It was only during the course of the trial that it had transpired that the appellant had in fact previously resigned and, for this reason, the learned trial judge considered that, though the resignation was not pleaded, it was a material fact which had arisen in the evidence and which fell to be taken into consideration. He considered that such resignation had effectively terminated the contract of service on 30th November, 1972. That being the case, the learned trial judge considered that the subsequent resolutions and the dismissal in October, 1973, coming as they did long after the appellant had already validly terminated the contract, were all nullities. In these circumstances, the learned trial judge declined to grant the declaration sought, but made an award for the payment, of salary limited to the period of suspension up until 30th November, 1972.

On behalf of the appellant, Mr Kawanambulu has advanced three grounds of appeal which read:

"1. *Ground* 1

The learned trial judge misdirected himself in law in holding that the appellant's employment was terminated by his own resignation in that the respondent did not plead the issue of resignation nor were its pleadings amended subsequently to include the defence of resignation and accordingly the learned trial judge's decision founded on issues outside the pleadings was, in law, erroneous.

2. *Ground* 2

Further and in the alternative the learned trial judge misdirected himself in law in holding that the appellant's employment was terminated by his own letter of resignation that at the material time the letter of resignation is purported to have been tendered to the respondent, the appellants contract of employment was suspended by the respondent effected under the statute and consequently the resignation to terminate the suspended contract employment was null and void.

3. *Ground* 3

Even if the appellants' employment was not suspended the learned trial judge had also misdirected himself in law in holding that they

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appellant's letter of resignation effectively terminated the contract of service in. that the said resignation was not accepted by the respondent."

Mr Mutale, for the responded, supports the reasoning of the learned trial judge on all the issues complained of and invites us to uphold the court below. Mr Kawanambulu's argument under the first ground is that, the learned trial judge should not have decided the case on the basis of the resignation which had not been pleaded. It was pointed out that the respondent had not sought any amendment under Order 18 of the High Court Rules, and that, consequently, the learned trial judge was not entitled to base his decision on a matter which was clearly outside the pleadings. We were referred to *Byrne v Kanweka* (1). That case considered the circumstances when it would be proper and just for the High Court to amend pleadings of its own motion under what is now Order 18 of the High Court Rules. We respectfully agree with the observation made in that case by Doyle, J.A., (as he then was) to the effect that, Order 18 "is not directive to the judges spontaneously to raise further issues where the issues have already been clearly pleaded and joined by the parties, nor is it an open invitation to the parties to withhold issues and only attempt to raise them after, so to speak, trial run on the evidence." In our option the general rule is that an amendment under this order would be justified if it results the mere recasting of the case in order to agree with the evidence and without the introduction of any new cause of action or defence. We are mindful of the fact that the learned trial judge, in this case, did not actually amend the pleadings in fact. All that he appears to have done was to find that the evidence of resignation was admissible and relevant in connection with the exercise of his discretion to make a declaration. However, we must say that, though the question in this case was not one of amendment, nevertheless, a similar general rule applies.

In *Mumba v Zambia Publishing Co. Ltd* . (2), this general rule was expressed in the following terms:

"While it is open to a trial court and, indeed, it is the duty of such court to admit and if thought fit to decide a case on a variation, modification or development of what had been averred, never the less a radical departure from the case pleaded amounting to a separate and

distinct new case cannot entitle the party to succeed."

This general rule would apply, in the normal course, to every case, but, as with most general rules, exceptions are bound to arise from time to time. While, therefore, the parties are free to decline to raise certain issues, it would be, our opinion, incompatible with Judge's duty, to dispense justice on the merits of any given case, for judge to allow evidence to be suppressed on the ground that a relevant issue was omitted from the pleadings if, (and this is the essence of the exception), the result would be miscarriage of justice.

The learned trial judge noted that the appellant had attempted to suppress the fact that he had resigned. He considered the dicta of Doyle, C.J., and the late Hughes, J.A., in *Raine Engineering Co. Ltd v Baker* (3),

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to the effect that the parties to the appeal in that case were estopped from putting forward a date of termination which was contrary to their pleadings which contained a mutual mistake on the date. The learned trial judge further observed, and, in our view, quite fairly and properly so, that.

> "One must feel some sympathy for counsel for the defendant in conducting his brief, where the correspondence indicates a marked conflict between the councillors as opposed to the officers of the Council, the Board and the Ministry. I do not see that this action should be tried on a fiction. It is the court's duty to settle and try the real issues between the parties, and that duty is all the more pressing in the tangled web of relationships woven by the parties in this case."

We are in agreement with the learned trial judge. In our opinion, the circumstances of this case were such that, the remedy of declaration being wholly discretionary, the learned trial judge could hardly have justified the exercise of his discretion on a fiction that the resignation had not taken place and had not effected any fundamental change to the relationship between the parties. We find that this was a proper case for the application of the exception to the general rule to which we have already referred**.** We, therefore, reject the first ground of appeal.

The second ground of appeal is an alternative ground and is to the effect that, since the appellant was on suspension, he had no right to resign and that, his purported resignation was a nullity and should have been disregarded. It was argued in effect that the suspension of the appellant operated to suspend not only his entitlement to remuneration and work but also all his rights under the contract of service, including the right to terminate the contract by resignation. It was submitted that, if a suspended employee could resign, the employer would be deprived of the opportunity either to dismiss or to reinstate him. It was also argued that, in this case, the appellant could not lawfully deprive the respondent of the right to dismiss him, under the relevant section of the applicable Act, to back-date such dismissal to the date of the suspension. We were referred to *Wallwork v Fielding* (4), a case to which the learned trial judge had in fact made reference. That case is authority for the proposition that the suspension operates to suspend the whole operation of the contract for both parties. But, as the learned trial judge observed, the suspension cannot affect the question of termination. We do not see how the suspension of rights and obligations can be

construed, in a contract of personal service, as creating any supposed legal impediment which takes away the right of a person not to be forced to work or to continue to work for another.

The third ground of appeal is in a similar vein and is to the effect that the appellant's resignation could not effectively terminate the contract of service since it had not been accepted by the respondents.The learned trial judge had referred to resignation as "the unilateral free choice of an employee in a contract of personal service to terminate the contract at any stage either contractually or even in breach of contract."

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We hold similar view. We were referred to a number of cases which were to the effect that, in an exceptional case, the unilateral repudiation of the contract by the party in breach would be regarded as ineffectual if the innocent party has chosen not to accept such repudiation. The cases included *Vine v National Dock Labour Board* (5), where declaration was granted notwithstanding that the innocent plaintiff had in fact, elected to treat the contract as repudiated. Another case cited was *Hill v C.A. Parsons & Co. Ltd* (6), where an injunction was granted to restrain the employers from terminating the contract, the exceptional circumstances being that the employers had merely given in to pressures from trade union to force the plaintiff to join the union and, upon his refusal and to avoid problems with the union, notice of termination was served. In *Thomas Marshal (Exports) Ltd v Guinee* (7), the unilateral termination of a contract of service by a managing director who was in breach was not accepted and an injunction was granted to restrain him from diverting to himself business from the plaintiff's customers and suppliers. There were several other cases referred to. What emerges from these and in any other authorities is that while in an exceptional case an employer in breach may have a declaration or other order made against him which has the effect of forcing him to retain the employee in his service, not once has there ever been a case where an employee has had an order made against him forcing him to remain in his employer's service. Some of the cases which Mr Kawanambulu considered as support for his submission, that the resignation of an employee in breach is ineffective unless accepted, are in fact authorities for the proposition merely that certain covenants, rights and obligations survive and have effect notwithstanding termination of the relationship.

In the submissions under the second and third grounds of appeal it was suggested that, an employer can insist on the continuance of employment if only to retain the right to dismiss the employee in breach. As already stated, we do not believe that there is any law which confers right in effect to force an employee to remain in the employer's service. In our opinion, the appellant had every right to resign and, leaving doing so, such resignation effectively terminated the contract of service. As the learned trial judge observed, the respondents could have exercised their right to dismiss the appellant during the period of notice given by him. They did not do so and the appellant cannot now seek to invalidate a valid resignation on the untenable ground that it had deprived the respondents of the opportunity to dismiss him. It follows from the fore going that we reject the second and third grounds of appeal as well. In the result, we dismiss this appeal with costs to the respondents.

Appeal dismissed
