GODFREY MIYANDA v THE HIGH COURT (1984) Z.R. 62 (S.C.)

SUPREME COURT
NGULUBE, D.C.J.
4TH AND 18TH JUNE, 1984
(S.C.Z. JUDGMENT NO.5 OF 1984)

Flynote
Civil Procedure - Mandamus - Judges - Whether available against.
Jurisdiction - Supreme Court - Original jurisdiction - Whether available.

Headnote
A civil case in which the applicant was a plaintiff had been pending before a High Court judge for over eight months. Being dissatisfied with this delay, the applicant applied to the Supreme Court for leave to apply for an Order of Mandamus to compel the judge seized of the suit to determine else action and deliver a judgment.

Held:
(i) The Supreme Court of Zambia is basically an appellate Court. It has no jurisdiction to entertain an application for mandamus at first instance.
(ii) The remedy of mandamus is not available against the judges of the superior courts of Zambia in the event of an alleged failure to perform their judicial functions.

Cases cited:
(1) Codron v Macintyre and Shaw [1960] R.& N. 418.
(2) R.v Industrial Injuries Commissioners, Ex - Parte Amalgamated Engineering Union [1966] l All E.R. 97.
(3) The King v Electricity Commissioners. Ex Parte London Electricity Joint Committee Company [1920] Limited and Others; [1924] 1 K.B. 171.

Legislation referred to:
Constitution of Zambia, Cap. l, Arts. 20 (9), 107 (1), and 109 (5).
Constitution of the Federation of Rhodesia and Nyasaland, Art. 53 (c).
High Court Act of Zambia, Cap. 50, s. 4.
Rules of else Supreme Court of England, Whitebook, 1982 Edn., Ord. 53.
Supreme Court of Judicature (Consolidation) Act of England, 1925, s. 26.
Supreme Court of Zambia Act, Cap. 52, ss. 7 and 8.

Other works referred to:
Halsbury's Laws of England, (3rd Edn.), Vol. 9, para. 820.
Halsbury's lows of England, (4th Edn.), Vol. 10 para. 899.

For the applicant: In person.
For the respondent: Not represented.

p63

Judgment
NGULUBE, D.C.J.:

The applicant is a plaintiff litigant in a civil suit which is pending in the High Court in which, it is alleged, the reserved judgment has been pending for eight or more months. Being dissatisfied with the alleged delay or failure in the disposal of his action by the High Court, the applicant has applied to this court for leave to apply for an order of mandamus to compel the learned High Court judge seised of the suit to determine the action and deliver a judgment. Application has been made, ex parte, to a single judge for such leave, but, as a preliminary issue, I have raised with the applicant the question whether the Supreme Court of Zambia has any original jurisdiction to entertain an application for an order of mandamus directed against the High Court. For this purpose, my decision herein will not reflect upon the factual merits or otherwise of the proposed application but is confined to the narrow issues of law necessarily arising from this preliminary point.

At the outset, I must record my indebtedness to the applicant who, notwithstanding that he is but a layman, nevertheless cited a number of authorities, obviously the result of a great deal of diligent research and effort on his part. The applicant has argued that this court has jurisdiction to entertain this matter. His submission can be summarised as follows:

(a) The Supreme Court has an inherent jurisdiction to control or to supervise the High Court.
(b) That it is logical and proper that the Supreme Court should exercise a supervisory jurisdiction over the High Court when no other court would be appropriate to entertain a complaint against the High Court itself.
(c) That jurisdiction should be assumed on the footing that, should the High Court fail to perform its duties, parties ought to have recourse to a superior court which must be able to control the court below.

The argument on the first submission was to the effect that, since the High Court itself (by one of its judges) is proposed to be the respondent in this application, (which the applicant quite properly concedes is ordinarily made to the High Court), and since the High Court judges enjoy equal powers (vide Section 4 of the High Court Act, A 50), the Supreme Court should regard itself as possessing an inherent jurisdiction to supervise or to control the High Court. It was argued that no matter should be regarded as being beyond the jurisdiction of this court unless it is expressly stated to be so. In support of this proposition, the applicant referred me to paragraph 820 of Halsbury's Laws of England, Volume 9. With regard to the second submission it was contended that, the principle appearing under Order 53 of the 1982 White Book should be extended to the situation in hand so that the Supreme Court should be regarded as the most appropriate court to deal with a case of this nature where the intervention of a court superior to the High Court would be quite logical. Under the third submission, it was argued that since the High Court itself enjoys supervisory jurisdiction over the lower courts vide

p64

Article 109 (5)) of the Constitution), there must be assumed a corresponding jurisdiction in the Supreme Court to supervise the High Court since, otherwise, the parties would have no remedy if the High Court took several years without disposing of a case or delivering any judgment.

In the view that I have taken, the submission and the arguments to which I have referred in fact resolve themselves into a single assertion that this court has, or can assume, an original jurisdiction in mandamus and that the High Court would be amenable to such jurisdiction. The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated In the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both. Faced with a similar question of jurisdiction, two of their Lordships in *Codron v Macintyre and Shaw* (1), had this to say:

> Tredgold, CJ., cautioned, at page 420.
> "It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the later of adjective or procedural law."
> Briggs, F.J., said, at page 433:
> "Confusion may arise from two different meanings of the word "jurisdiction." On an application for mandamus in England the King's Bench division may, because of a certain fact proved say "There is no jurisdiction to grant mandamus in a case of this kind." That refers to an obstacle of substantive or procedural law which prevents the success of the application, but not to any limits on the general jurisdiction of the Court to hear and determine the application."

I think it is important to understand the various aspects of jurisdiction to which I have referred. The *Codron* case was drawn to my attention by the applicant in support of the general proposition that this court has jurisdiction in this matter. In that case, the Federal Supreme Court was faced with an original application for mandamus and declined jurisdiction because, on the facts, there was an obstacle of substantive law. The Federal Supreme Court had express original jurisdiction which was conferred by Article 53(c) of the Constitution of the Federation of Rhodesia and Nyasaland in the following terms:

> "53. The Federal Supreme Court shall, to the exclusion of any other court, have original jurisdiction -
> (a) (Not applicable).
> (b) (Not applicable).

p65

> (c) In any matter in which a writ or order of mandamus or prohibition or an injunction or interdict is sought against an officer or authority of the Federation as such."

Thus, it is seen that the statute constituting the Federal Supreme Court had specifically conferred an original jurisdiction in the circumstances which I have quoted. No similar provision exists for the

Supreme Court of Zambia and *Codron* can, therefore, not be relied upon this case. The relevant statutes in our case would seem to confirm that the Supreme Court of Zambia is basically an appellate court. Thus, Article 107(1) of the Constitution provides:

> "107 (1) There shall be a Supreme Court of Zambia which shall be the final court of appeal for the Republic."

Again in Section 7 of the Supreme Court of Zambia Act, Cap. 52, we read:

> "7. The Court shall have jurisdiction to hear and determine appeals in civil and criminal matters as provided in this Act and such other appellate or original jurisdiction as may be conferred upon it by or under the Constitution or any other law."

As far as I have been able to ascertain, no original jurisdiction has been conferred to entertain original actions of this nature. The applicant has urged that such original jurisdiction be assumed or be regarded as inherent in the court. Reference to "jurisdiction" in this context must necessarily be to adjective or procedural law. The authorities which I have consulted do not support the existence of an inherent original jurisdiction of the type contended for in this case. Section 8 of Cap. 52 provides to the effect that where our own laws are silent, the law and practice of the English Court of Appeal should be observed. Under the Supreme Court of Judicature (Consolidation) Act, 1925, the Supreme Court of Judicature in England consists of Her Majesty's High Court of Justice and Her Majesty's Court of Appeal (See Section 1). The jurisdiction of the English Court of Appeal is set out under Section 26 which it is unnecessary to reproduce here. However, the question did arise before the Court of Appeal in England in *R v Industrial Injuries a Commissioners, Ex parte Amalgamated Engineering Union* (2), as to whether a substantive notion for the prerogative order of certiorari could be moved in the Court of Appeal. It was there held that the court had jurisdiction to entertain the substantive motion, but this was in the exercise of the power which that court had (and which this court has) of doing that which the High Court could have done when the matter was before the latter court. The matter came to the Court of Appeal as an appeal and not as an original action. That was the position too, in *The King v Electricity Commissioners Ex parte London Electricity Joint Committee Company* (1920), *Limited, and Others* (3), which the applicant had cited but which I must mention, in fairness to him, he had intimated he was no longer relying upon. The original civil jurisdiction of the Supreme Court is very limited indeed, (of para 899 of Halsbury's Lows of England,

4th Edition Volume 10) and would appear to cover such matters the granting of injunctions pending appeal, the making of orders to extend time, or for leave to appeal, or as to costs, or security for the costs of appeals. The Supreme Court would also have original jurisdiction, like the Court of Appeal in England, to make orders requiring the fulfilment of an undertaking given to it and an inherent jurisdiction to strike out an incompetent appeal. I would go so far as to assert that the Supreme Court has an inherent jurisdiction to prevent abuses of process and to protect its authority and dignity. What emerges, however, is that this limited original jurisdiction arises either in connection with some matter pending in the courts below or some matter preliminary to, or during, incidental to, some proceedings before the court.

It follows from what I have been saying that, in so far as the question of procedural law is concerned, I am convinced that the Supreme Court cannot entertain an application for mandamus at first instance. On this basis alone, I hate no hesitation in coming to the conclusion on the preliminary point, that this court has no jurisdiction, and must decline to assume jurisdiction, to entertain an original application for mandamus.

I further feel, in the circumstances, that no useful purpose will be served in discussing the applicant's additional obstacle posed by the substantive law which makes it clear that, it is the High Court which can issue a mandamus against inferior courts and tribunals and that, the order does not issue against the High Court itself. The applicant asked what should happen if a High Court judge refuses or fails to perform his job within a reasonable time (as enjoined by Article 20(9) of the Constitution) or at all. It is unnecessary from me to answer this question but I have no doubt in my mind that the remedy of mandamus is not available against the judges of the superior courts of this country in the event of an alleged failure to perform their judicial functions.

As there has been no other party to these proceedings at this stage I make no order as to costs. Of course, should the applicant be dissatisfied with my determination, there is liberty to refer the application to the full court.

Application dismissed
