

CHRISTOPHER LUBASI MUNDIA v ATTORNEY-GENERAL (1986) Z.R. 37  
(S.C.)

SUPREME COURT  
SILUNGWE, C.J., GARDNER, AG. D.C.J., AND MUWO, J.S.  
5TH AND 6TH MARCH, 1986  
(S.C.Z. JUDGMENT NO 16 OF 1986)

**Flynote**

Civil Procedure - Inquiries Act - Interpretation thereof

Evidence - Administrative inquiry - Whether legal representation with a right to cross-examination exists.

**Headnote**

The appellant was an advocate of the High Court and Board Secretary to the Zambia National Provident Fund (ZNPF). Following a series of wildcat strikes at ZNPF, the President established a Commission of Inquiry under the Inquiries Act, Cap. 181 to look into inter alia, the call for the removal of the appellant from office. When the Commission started to gather evidence, the appellant sought legal representation with a right to cross-examine witnesses, but this was refused. He then moved the High Court for an order of mandamus, prohibition or certiorari which was denied on the basis that this was an administrative inquiry and the Commission was not bound by the rules of evidence and procedure.

**Held:**

- (i) Under the Inquiries Act, a person whose conduct is the subject of the inquiry has a mandatory right to representation while one who is in any way implicated or concerned may be permitted to have legal representation.
- (ii) Representation means the right of appearance of legal practitioners and other persons.
- (iii) In a public inquiry under the Inquiries Act, in order for it to be meaningful, legal representation carries with it the right to cross-examination of witnesses.

**Cases referred to:**

- (1) In Re Pergamon Press Limited [1971] Ch. 388
- (2) O'Connor v Waldron [1975] A.C. 76

**Legislation referred to:**

Inquiries Act, Cap. 181, S.12(1), 13, 14 (3)  
Statutory Instrument No. 121 of 1984

For the appellant: M. Mwisiya, Mwisiya and Co.

For the respondent: B.L. Goel, Senior Statte Advocate, (amicus curiae)

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**Judgment**

**SILUNGWE, C.J.:** delivered the judgment of the court.

This is an appeal against the refusal by a judge of the High Court to grant the appellant the prerogative writ of mandamus.

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The appellant is an advocate of the High Court and a Board Secretary to the Zambia National Provident Fund (hereinafter referred to as the Z.N.P.F.), a parastatal body. We take judicial notice of the fact that, during the periods May 3 to 8 and October 3 to 8, 1984, many employees of the Z.N.P.F. went on wildcat strikes, principally demanding the removal of the appellant from office, on allegations of tribalism and nepotism. In consequence of the strike action, the President of the Republic of Zambia established a Commission of Inquiry (hereinafter called the Commission) in terms of the Inquiries Act, Cap. 181, on October 19, 1984. The Commission comprised three members, including a judge of the High Court as its Chairman, and was published in Statutory Instrument No. 121 of 1984. The Commission was enjoined to:

- "1. Inquire into the events and circumstances leading to the strikes by the Zambia National Provident Fund workers during the periods 3rd to 8th May, 1984, and 3rd to 8th October, 1984.
2. Establish the facts of and surrounding the said strikes.
3. Identify and establish the cause or causes of the said strikes.
4. Inquire into any other matters which appear to the Commission or relate to the foregoing and which in the opinion of the Commission might, in the public interest, be inquired into.
5. Make such recommendations with regard to the foregoing matters as the Commission may, in the light of its findings, deem appropriate."

The terms of reference included a requirement that the "Inquiry shall be held in public."

When the Commission started to gather evidence, the appellant sought legal representation with a right to cross-examine witnesses, but this was refused. The appellant then moved the High Court on an ex parte application for an order of mandamus, prohibition or certiorari. However, the High Court, on its own motion, decided to hear the matter inter partes; hence, the Attorney-General was directed to intervene. The hearing took the form of affidavit evidence and submissions.

In his ruling, the learned trial judge relied on the judgment of Lord Denning, M.R. *In Re Pergamon Press Limited* (1). That was a case in which the Board of Trade had appointed inspectors under section 165 of the Companies Act, 1948, as amended by section 38 of the Companies Act, 1967, section 38, to investigate the affairs of a company. The Directors were required to decide or determine nothing but merely to investigate and to report its findings to the Board of Trade. The Director of the company wanted to see the transcripts of the witnesses who had spoken adversely of them and to see any documents which might be used against them. They, or some of them, even claimed to cross-examine witnesses. In his judgment, Lord Denning said at page 400 under letter B:

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"In all this the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind. Witnesses should be encouraged to come forward and not hold back. Remember, this not being a judicial proceeding, the witnesses are not protected by an absolute privilege, but only by a qualified privilege: see *O'Connor v Waldron* (2)"

Later on the same page, he said this under letter F:

"It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticism of someone, they should draft the proposed passage of their report and put it before the party for his comments before including it. But I think this also is going too far. This sort of thing should be left to the discretion of the inspectors. They must be masters of their own procedure. They should be subject to no rules save this: they must be fair."

The trial judge ruled that, in an administrative inquiry, such as this one, "one cannot claim a right to cross-examine a witness", adding that there were good reasons for that, one of which being that, under section 13 of the Inquiries Act (Cap. 181) a commission of inquiry is not bound by the rules of evidence and procedure. In the light of this, and, regard being had to the fact that the remedies sought were discretionary, the trial judge held that none of the remedies sought was available to the appellant. The appellant's application was accordingly dismissed.

The issue for determination is not just whether the appellant is entitled to legal representation, but also whether his legal representative has a right to cross-examine witnesses.

Sector 12(1) of the Inquiries Act provides that:

"12.(1) Any person whose conduct is the subject of inquiry under the Act or who is in any way implicated or connected in the matter under inquiry, shall be entitled to be represented at the inquiry and any other person who may consider it desirable that he should be so represented may, by leave of the commissioners, be so represented."

There are here two categories of persons. The first category consists of two types of persons, namely (a) one whose conduct is the subject of the inquiry under the Act; or (b) one who is in any way implicated or concerned in the matter under inquiry. The second category relates to any person who may consider it desirable that he should be so represented. Clearly, representation under the first category is mandatory; whereas representation under the second category is permissive. There is no doubt that the appellant was implicated and concerned in the matter under inquiry and so he was entitled to be represented.

The question arises as to the meaning of representation, under the section. Mr Goel has argued that the term means self-representation. We disagree with Mr Goel's interpretation and accept Mr Mwisya's which is

that the only meaning attributable to the term is representation by another person. Indeed Wharton's Law Lexicon, 14th edition, defines representation as "standing in the place of another for certain purposes ..."

It is noted that section 12(1) of the Act does not speak of legal representation. It simply speaks of representation which means representation by any person who may include an advocate. In our view the marginal notes which read:

"Appearance of legal practitioners and other persons" accurately conveys the meaning of the term.

A crucial issue is whether the term representation under section 12(1) of the Act includes a right to cross-examination. We have no difficulty in resolving the issue for, in our opinion, representation can only be meaningful if it carried with it the right to cross-examination, even in situations where commissioners choose to receive evidence not on oath, since, under section 13(1) of the Act, they are not bound by the rules of evidence or by the rules of procedure of any court or tribunal and "may conduct their proceedings in such manner as they think proper".

This case is distinguishable from *In re Pergamon Press Ltd* (1) in that there, the inquiry was heard in private and the witnesses merely enjoyed qualified privilege; whereas here, proceedings have been, and continue to be, held in public and witnesses are entitled to absolute privilege, in terms of section 14(3) of the Act, the relevant part of which reads:

"14 (3) ... every person shall, in respect of evidence given by him before the Commissioners, be entitled to the same privilege so which he would be entitled if giving evidence before the High Court."

What then is the effect of our decision? Mr. Mwisya has indicated to us during argument that he would be content with an order entitling him to receive copies of the record of proceedings (presumably two: one for himself and the other for his clients to enable him to peruse the record and to recall such witnesses as he may deem necessary for the purpose of cross-examination. We accept Mr Mwisya's submission in part and direct that he be entitled to a copy of the record of proceedings to the extent and to a right to cross-examination.

The appeal is allowed. As the inquiry has already taken more than one year to gather evidence, we trust that efforts will be made by all concerned to expedite the remainder of the proceedings in order to facilitate an early conclusion.

In view of the fact that the Attorney-General was brought into the proceedings, ostensibly as an amicus curia there will be no order as to costs.

Appeal allowed.

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