LUCIANO MUTALE AND JACKSON CHOMBA v NEWSTEAD ZIMBA (1988 - 1989) Z.R. 64 (S.C.)

SUPREME COURT
NNGULUBE, AG. C.J., GARDNER, AG. D.C.J., AND CHAILA, AG. J.S.
13TH SEPTEMBER, 6TH DECEMBER, 1988
(S.C.Z. JUDGMENT NO. 12 OF 1988)

Flynote

Trade union - Right of Congress to discipline members of union must be express - Not implied in power to settle disputes etc.

Headnote

In this case the General Council of the Building, Engineering and General Workers Union suspended its chairman as a disciplinary measure. In response to the suspension the Congress of Trade Unions, to which the union was affiliated, *inter alia*, suspended the whole of the Executive Committee of the union pending an investigation by Congress into the activities of some members of the union. The appellant objected to the Congress' intervention and sought declaratory relief from the High Court, *inter alia*, that the Congress acted *ultra vires* its constitution in suspending or dismissing the executive committee of the union. The High Court found for the respondent and the appellant appealed. The respondent argued on behalf of the Congress that because the union was affiliated to Congress (which affiliation is mandatory under the Industrial Relations Act, Cap. 517) the rights, privileges, duties and obligations of trade unions in terms of the Act are those specified in the Constitution of Congress.

Held:
The power to expel must be found in the rules and does not exist apart from them. It is not enough for a rule to confer power to deal with disputes between members. Unless power to take the measures complained of is explicitly stipulated or it exists by necessary implication then the measures taken in the absence of such power would be regarded as *ultra vires*, null and void if not altogether illegal.

Cases referred to:
(1) Parr v Lancashire and Cheshire Miners Federation [1913] 1 Ch. 366
(2) Luby v Warwickshire Miners Association [1912] 2 Ch. 371
(3) Maclean v The Workers Union [1929] 1 Ch. 602
(4) Evans v National Union of Printing, Bookbinding and Paper Workers [1938] 4 All E.R. 51
(5) Spring v National Amalgamated Stevedores and Dockers Society [1956] 2 All E.R. 221
(6) Wolstenholme v Amalgamated Musicians' Union [1920] 2 Ch. 388

Legislation referred to:
Industrial Relations Act, Cap. 517, s. 27(1)(i)

Works referred to:
Vester and Gardner Trade Union Law and Practice

Citrine Trade Union Law 2nd ed
Grunfeld Modern Trade Union Law.

For the appellants: R.M. Chongwe, S.C., instructed by B.B. Kaweche, Kaweche & Company.
For the respondent: L.P. Mwanawasa, Mwanawasa and Company.

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Judgment

NGULUBE, AG. C.J.: delivered the judgment of the Court.

For convenience we will refer to the appellants as the plaintiffs and the respondent as the defendant which is what they were in the action. We will also refer to Zambia Congress of Trade Unions as the Congress and the National Union of Building Engineering and General Workers' as the union. The brief facts of the case so far as it is necessary to refer to them were these: the Union's General Council passed a resolution on 12th September 1987 in which, among other things, it was decided to suspend the Union Chairman for a period of three months as a disciplinary measure. We should make it clear here that we are not concerned with the legality, propriety, the merits or otherwise of those proceedings of the union which we understand are the subject of other proceedings in the High Court. As will become apparent later, that issue did not and does not arise for our consideration. However, to continue with the brief history of the matter, the congress (whose chairman also happened to be the suspended chairman of the Union) convened its own General Council which decided to intervene in the matter by, *inter alia*, suspending the whole of the Executive Committee of the Union and possibly - though there was a dispute on this - some full-time - employees of the union as well, pending investigations into the affairs of the union and, in particular, the activities of a self-styled caucus within the union calling itself the Enlightened Progressive Leadership (E.P.L.). The Congress suspected that the E.P.L. group - most of whom were members of the Unions' Executive Committee - had set itself up with a view to undermine the legitimate interests of the labour movement as a whole and, in order to protect unionism from subversion, the Congress decided to intervene directly in the affairs of the union. The plaintiffs objected to the Congress intervening in the union's internal affairs in this manner and commenced proceedings for declaratory relief and necessary orders on the following three major prayers:

"1. That the Zambia Congress of Trade Unions acted *ultra vires* its constitution in suspending or dismissing the Executive Committee and full-time employees of the National Union of Building, Engineering and General Workers on 10/10/87 and the decision made by the Zambia Congress of Trade Unions on or about 10/10/87 be declared null and void as it is unconstitutional.
2. That the National Union of Building, Engineering and General Workers is separate from the Zambia Congress of Trade Unions and its constitution does not provide for the dismissal of its Executive Committee or any of its employees by the Zambia Congress of Trade Unions.
3. That since there was no complaint lodged before it by the suspended Chairman of the National Union of Building, Engineering and General Workers, one named Fredrick Chiluba, the Zambia Congress of Trade Unions had no *locus standi* in the hearing of the disciplinary action taken against one named Fredrick Chiluba."

The learned trial commissioner found against the plaintiff and, in a subsequent ruling delivered on

the occasion of an application (which was refused) for a stay of execution pending appeal, directed that the Congress proceed to enforce the decisions and measures which the plaintiffs had complained of in the action. It is against the main judgment and the later ruling that the plaintiffs now appeal to this Court.

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For completeness, we should perhaps mention that the Congress is established and exists by statute now under the provisions of section 26 of the Industrial Relations Act, Cap. 517 (hereinafter called the Act). The Union is one of many such trade unions registered under part II of the Act and required, by section 15 of the Act, to be affiliated to the Congress. It was not in dispute that each registered trade union is required to have its own constitution which must contain, among other things, the matters set out in section 8 of the Act, some of which are clearly concerned with a union's own internal governance as a separate, distinct, and autonomous legal entity. By the same token under Part III of the Act, the Congress must have its own constitution which 'shall include' the matters specified in section 27 of the Act. Some of the matters specified are concerned with the Congress' own internal governance while others pertain to its overall position as an apex organisation embracing many unions and as the ultimate and authoritative organ of the labour movement as a whole. While previously affiliation was voluntary, it is now obligatory under section 15 and in this regard section 27(1)(i) requires the Constitution of the Congress to spell out:

"(i) The rights, privileges, duties and obligations conferred or imposed upon trade unions by virtue of their affiliation to the Congress."

It was argued on behalf of the plaintiffs that there was nothing in the Act to suggest that trade unions would be subordinate to the Congress or could be treated as branches of the Congress or that the Congress could intervene in the purely internal affairs of a trade union. In this regard, Dr *Chongwe* repeated the contentions which were unsuccessful below and which in essence assert that the Congress had neither the power nor the right to intervene in the manner complained of and to suspend the Union's Executive Committee. In answer to these submissions, counsel for the defendant argued to the effect that, in consequence of the affiliation which is now mandatory, the rights, privileges, duties and obligations of trade unions in terms of section 27(1)(i) are those specified in the constitution of the Congress. According to Mr *Mwanawasa*, the right to intervene and the power to take measures complained of are provided for in the rules of the Congress. Specific rules have been relied upon and we shall revert to them in a moment.

At this juncture, it may be useful first to discuss the general principles which we consider to be applicable to a case of this nature. The question to be answered does not concern, in our considered opinion, issues of superiority or autonomy but one simply of *vires*. Just as individual membership of a trade union is governed by the contract set out in the Constitution or the rules of the union, so too will the relationship between the trade union and its apex body to which it affiliates be governed by the terms of the contract stipulated in the Constitution or the rules of the mother body. To some extent, the Act may be said to contain some of the terms of this relationship; but it is also obvious that the Act, especially in section 27(1)(i), has largely left it to the Congress and its affiliates to settle their own terms of the relationship between themselves. There is also no dispute about the

right of a person who claims to have been wrongly expelled or suspended from membership of, or honorary office in, a trade

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union to bring an action for a declaration that the expulsion or suspension is invalid and for an injunction, if necessary, to restrain its operation. However, as Vester and Gardner caution at page 173 of their book *Trade Union Law and Practice*, basing their statements on a number of English authorities:

> " The court does not sit as a court of appeal from the decision of a domestic tribunal to review its proceedings or to inquire whether the decision is fair or just or reasonable. The jurisdiction is limited to the question of whether the court has power to intervene; that is to say, is limited to the questions of (1) whether the union has valid disciplinary powers and (2) if so, whether such powers have been validly exercised."

We wish to respectfully concur with the learned authors and to state that, that should have been the approach below and will be our approach here. The first question in the quotation arises in this appeal and the second question may only arise if the first be answered in the affirmative. We are here concerned with the right and the power which the Congress claims to have, *inter alia*, to suspend the Executive Committee of the union. Citrine asserts at page 221 of his *Trade Union Law*, 2nd ed:

> "There is no inherent common law right to expel or suspend from membership of, or honorary office in, a trade union. Any such right must be found in the rules or constitution, either by express mention or by necessary and clear implication."

We respectfully agree with this assertion which is supported by common sense, principle, and a long line of English decisions which we have found to be of a high persuasive value. For instance, there are cases like *Parr v Lancashire and Cheshire Miners' Federation* (1) and *Luby v Warwickshire Miners' Association* (2) in which Neville, J. found that expulsions in the absence of any enabling provision in the rules were *ultra vires*, null and void. Other cases include *Maclean v The Workers Union* (3), *Evans v National Union of Printing, Bookbinding and Paper Workers* (4), *Spring v National Amalgamated Stevedores and Dockers Society* (5) and a host of other cases. We further wish to respectfully agree with Eve, J. when he asserted in *Wolstenholme v Amalgamated Musicians' Union* (6) at page 394: 'that the power to expel must be found in the rules, and does not exist apart from them'. Grunfeld in his *Modern Trade Union Law* asserts at pages 176 and 177: 'The expulsion power must be explicitly reserved in the rule book', adding in a marginal note that, in this regard, it is not enough for the rule book to confer power to 'deal with disputes between members'. The authority cited for this is the *Luby* case already mentioned. What emerges from the cases, including the many which we have not mentioned in this case but we have considered, is that, unless a power to take the measures complained of is explicitly stipulated or it exists by necessary implication, then the measures taken in the absence of such power would be regarded as *ultra vires*, null and void, if not altogether illegal. We have taken the liberty to adopt the reasoning in the English cases, even though some of them concerned expulsions, because the principles governing the expulsion cases govern also, *mutatis mutandis*, the other kinds of disciplinary measures, such as

suspensions: see Grunfeld *Modern Trade Union Law* at page 176. In our considered view, these principles apply equally to this

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rather novel situation where the Congress has taken disciplinary measures not against the affiliated union but against individual members of the union who comprise its Executive Committee and possibly some employees as well.

This brings us to a scrutiny of the terms of the relationship between the Congress and the union as set out in the Constitution and the rules of the Congress. *Mr Mwanawasa* argued that Rule 2(c) conferred such power. The rule in question is found in the objects clause and is to the effect that one of the objects of the Congress is 'to settle disputes between and within unions and in particular disputes concerning representation and demarcation'. It was argued that reference to settlement of disputes 'within unions' meant that the Congress had the right to intervene in the manner complained of by the plaintiffs. Quite plainly, the rule bears no such meaning and it does not stipulate any power of suspension. The other rule relied upon is Rule 3(e) under the heading 'Membership and Obligations of Unions'. This reads:

" (e) Every union shall be subject to the specific and general directions of the Congress in all matters affecting the jurisdiction of unions."

Mr Mwanawasa wishes us to read into this rule the right and power, *inter alia,* to suspend the Executive Committee of a union. There is clearly no such power in the rule and the jurisdiction of the unions referred to therein - which may cover such things as questions of representation and spheres of coverage by any given union - does not refer to any jurisdiction of the Congress to do the things complained of in the action. Rule 7(d) was also relied upon and covers the same subject matter as Rule 2(c). What we have said about the former rule applies equally to the latter rule. Rule 2(n), another of the object clauses, was also cited as giving the right to suspend and it read:

> (n) To maintain and safeguard the democratic character of the labour movement and to protect it from hostile forces and from infiltration or penetration by subversive elements within or outside the Republic of Zambia who are opposed to free and democratic unionism.

This, and other rules cited in Mr *Mwanawasa*'s heads of argument such as Rule 2(r), which is a general provision enabling all incidental objects - and which other rules it would be pointless to set out here - did not confer the power or the right to do what was done in this case. Only Rule 7(g) appears to give disciplinary power to the Congress to fine a union and it is inapplicable here. Mr *Mwanawasa* ultimately did not seek to demonstrate that any explicit power existed. His argument was that such a right and power must be implied if the Congress is to have any teeth to settle internal union disputes or to protect the labour movement from the activities of subversive elements, such as the E.P.L. In our considered view, it would be against all known canons of interpretation to read into the terms of the relationship between the Congress and the unions penal powers and rights of discipline and intervention which are in fact not there. It was entirely up to the Congress to include such provisions and it is not too late for necessary amendments to be proposed for inclusion in their rules for the future and as a result of the lessons learnt from this case.

From the foregoing discussion we come to the conclusion that the absence of any right or power in the rules rendered the decisions and measures of the Congress in this matter to be invalid, null and void for being *ultra vires*. It follows that the appeal is allowed, the decision below reversed and a declaration made only on the first prayer in the originating summons. We must make it clear that a declaratory judgment is always in the discretion of the Court and, having interpreted the rules for the guidance of both parties, we find no need at this stage to deal with the other prayers in the originating summons or to consider any other orders or reliefs. The costs both here and below follow the event and are to be taxed in default of agreement.

Appeal allowed.

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