

NDOLA CITY COUNCIL v CHARLES MWANSA (1994) S.J. 78 (S.C.)

SUPREME COURT
CHAILA, CHIREA AND MUZYAMBA, JJ.S.
11TH OCTOBER AND 8TH DECEMBER 1994
S.C.Z. JUDGMENT NO. 15 OF 1994
APPEAL NO. 41 OF 1994

Flynote

Reinstatement - Against ruling of the Local Government Service Commission - Whether High Court can order reinstatement - Whether appeal operates as a stay of execution

Headnote

The respondent was an employee of the appellant. The appellant took disciplinary action against the respondent which resulted in the respondent being discharged from the employment. The respondent appealed to the Local Government Service Commission against being discharged. The Local Government Service Commission upheld the appeal and directed that the respondent be reinstated in his position as director of Water and Sewerage with full benefits. The appellant dissatisfied with this decision appealed to the High Court but later abandoned the action. The High Court later ordered that the respondent be reinstated and the appellant appealed.

Held:

- (i) An appeal does not operate as stay of execution, it must be applied for and the decision is discretionary

Cases referred to:

1. Mutale v Attorney General 1976 Z.R. 139
2. Midlands Ry v Robinson (1889) 15 App. Cas. 19, at p. 34
3. R. v Peters (1886) 16 Q. B.D. 636 p. 641
4. Camden (Marquis) v I.R.C. (1914) 1 K.B. 641 at p. 647
5. Sinkamba v Doyle 1974 Z.R. 1 at p. 4
6. The People v Jefferson 1965 Z.R. 123 at p. 124

For the appellant: Mr G Kunda of Kunda & Co.

For the respondent: Mr I C T Chali of Chali, Chama & Co.

Judgement

CHAILA, J.S.: delivered the judgement of the court.

This is an appeal against the High Court's decision rejecting the appellant's application to set aside its decision to enforce Local Government Service Commission and the stay of High Court decision. The respondent was an employee of the appellant. The appellant took disciplinary action against the respondent which resulted in the respondent being discharged from the employment. The respondent appealed to the Local Government Service Commission against being discharged. The Local Government Service Commission upheld the appeal and directed that the respondent be reinstated in his position as director of Water and Sewerage with full

benefits. The appellant dissatisfied with this decision appealed to the High Court. Meanwhile the respondent was not reinstated in his position. The appellant took up summons in the High Court to have the decision of the Local Government Service Commission stayed pending appeal to the High Court. Later the cause of action was abandoned by the appellant. The respondent took up summons to order the appellant to reinstate him. The High Court ruled in his favour and ordered that he be reinstated as directed by Local Government Service Commission despite the appeal pending in the High Court.

Mr Kunda has advanced the following grounds:

“The learned judge erred in holding that the decision of the Local

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Government Service Commission is binding on the appellant notwithstanding the appeal filed by the appellant to the High Court against the said decision. The learned judge further erred in ordering the enforcement of the decision of the Local Government Service Commission before the hearing of the said appeal filed by the appellant against the said decision.”

Mr Kunda has argued that the learned trial judge misinterpreted the provisions of section 100 (3) of the Local Government Act No. 22 of the section which reads as follows:

“The decision of the Commission shall be binding upon the council and the officer or employee, subject to an appeal to a Court of competent jurisdiction.”

The words “subject to,” mean conditionally upon. He has kindly referred us to Oxford Advanced Learner’s Dictionary of Current English, by A S Horby. He has argued that in every day usage, the words “subject to” are used to refer to a condition precedent which must first be satisfied, before a set of circumstances can take effect. He has referred the court to the following authorities:

1. Regulation 34 of the Local government Service Regulations 1993, S. I. No. 31 of 1993
2. Mutale v Attorney General (1)
3. Midland Ry v Robinson (2)
4. R. v Peters (3)
5. Sinkamba v Doyle (5)
6. The People v Jefferson (6)
7. Cameden (marguis) v T.R.C. (4)

Mr Kunda attacked the learned judge’s interpretation of section 100 of the act referred to above. He argued that the learned judge fell into error in not restricting himself to the interpretation of the section liberally and extended his ruling into the realm of conjecture and introduced and implied into the Local Government Act provisions which are not there. He argued that the learned 30 judge erred in reading into the Act a provision to the Act a provision to the effect that an appeal does not operate as a stay of execution, on the same lines as appeals from the Subordinate Court to the High Court and from the High Court to the Supreme Court. He further argued that the learned judge failed to take into account the fact that in cases of appeal from the Subordinate Courts to the High Court there is specifically Order XLVII Rule 5 of the High Court Rules which specifically provides that an appeal shall not operate as a Stay of Execution. There is further provision in Rule 51 of the Supreme Court Rules Cap. 52 of the Laws of Zambia. Mr Kunda argued that there is no provision in the Local Government

Act stating that an appeal to the High Court shall not operate as a Stay of the decision of the %Local Government Service Commission.

Mr Chali Counsel for the respondent maintains that the learned judge did not err in holding that the decision of the Local Government Service Commission is binding on the appellant notwithstanding the appeal to the High Court.

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According to Mr Chali, the wording “subject to” referred to in the Act means that the decision once made by the Commission one way or the other must be obeyed or implemented until it is set aside on appeal.

He argued that the words do not construct the effectiveness of the Commission’s decision pending appeal. In his argument Mr Chali has posed the following question “What would happen if the Local Government Service Commission decided against the respondent, would the respondent on mere lodging of the appeal enjoy stay of execution of the judgement of the Local Government Service Commission and report for work?” To him the result would be absurd. It would require specific application to the High Court to have the judgement stayed pending appeal.

We have considered the arguments and authorities by both counsel in the matter. During the argument none of the counsel referred us to Statutory Instrument No. 6 of 1984. This Statutory Instrument laid rules concerning appeals from tribunals to the High Court. According to these rules the local Government Service Commission comes within the definition of tribunal and appeals against its decisions will be governed by High Court (Appeals) general rules of 1984 contained in the Statutory Instrument referred to above.

Mr Kunda has contended that the wording of Section 100 of the Local Government Service Act calls for a construction which calls literal meaning which brings out sense in which the words are used in popular sense. It is trite law that an appeal per se from the Subordinate Court’s decisions to the High Court do not operate as stay of execution. This is specifically provided for in the High Court Act. The appellant must apply for stay to the High Court and the matter becomes discretionary. The same situation applies to the appeals to the Supreme Court. There is a specific provision to the effect that the appeal does not operate as stay of execution, it must be applied for and the decision is discretionary. We have considered the wording of Section 100 of the Local Government Act. We are of the view that if the appeal against the decision of the Local Government Service Commission would per se operate as stay of execution then it will produce absurdity. If the decision were made against the employee and the employee decided to appeal against the decision and the appeal has an effect of staying the decision then he would go back to his office and continue working until the appeal is determined. This in our view would produce absurdity. It is obvious that at the hearing before the trial judge, the appellant did not wish the respondent to be reinstated pending the appeal; although he argued that the law prevented reinstatement at that stage, he was wrong. That however, does not prevent the fact that the appellant does not wish the respondent to be reinstated at this stage and it is proper to deal with this as an application for stay of the Order for reinstatement pending the appeal. Having regard to the limited power of the High Court in cases of employment contracts, it is apparent to us that stay should be granted pending the appeal. The appeal is dismissed on original arguments, but a stay of the order of reinstatement is granted. This is the most appropriate case where each party must bear his own costs.

Appeal dismissed
Stay of the order granted

