WYNTER M KABIMBA v THE ATTORNEY GENERAL AND LUSAKA CITY COUNCIL (1996) S.J. (S.C.)

SUPREME COURT
GARDNER, A.C.J., SAKALA A.D.CJ., AND CHAILA, J.S.
31ST MAY, 1995, 14TH JUNE, 1995 AND 22ND JUNE 1995.
S.C.Z. JUDGMENT NO. 13 OF 1996

Flynote

Practice - Stay of proceedings - Court's jurisdiction where State Proceedings Act cap 92 precludes granting of injunctions against State - Where proceedings are by way of judicial review.

Headnote

In an application for the stay of an order made by a High Court judge discharging an injunction against the second respondent and lifting a stay of proceedings granted against the first respondent the Court was required to consider whether it had jurisdiction to order a stay of proceedings where the State Proceedings Act cap.92 precluded the granting of injunctions against the state.

Held:

That what was sought in the instant case was just as much a stay as it would be in relation to a decision or judgment of an inferior court: it was not properly described as an injunction which was an order directed at a party to litigation. The Court held accordingly that it was empowered to order the stay.

Appeal allowed.

Cases referred to:

1. R v Secretary of State for Education and Science Councty Council (1991) 1 All E.R. 282
2. Pactortame Limited v Secretary of State for Transport (1989) 2 All ER 692
3. Zambia National Holdings Company Limited and United National Independence Party v The Attorney General S.C.Z. Judgement No. 3 of 1994

For the appellant: R M Simeza of Sangwa and Associates
For the respondents: A G Kinariwala Principal State Advocate
L.Mwanawasa of Mwanawasa and Company

Judgment

GARDNER, AC.J .: delivered the Judgment of the court.

This is an application for the stay of an order made by a High Court judge discharging an injunction against the second respondent and lifting a stay of proceedings against the first respondent.

The facts of the case are that the applicant is employed as Town Clerk by the second respondent, and on the 17th February, 1995, the Minister of Local Government and Housing

wrote to the applicant informing him that in exercise of powers vested in the Minister under Regulation 21 Proviso (ii) of the Local Government Regulation 1993, the applicant was thereby transferred to Kitwe city Council with immediate effect. The applicant wrote to the Minister appealing against that decision but the appeal was refused.

The applicant instituted proceedings in the Industrial Relations Court but discontinued proceedings for judicial review in the High Court. The High Court granted leave to issue the application for judicial review in at the came time the applicant was granted a stay of the order of the transfer pending the hearing. The applicant also applied for and was granted, ex parte, an injunction against the second respondent preventing the second respondent from transferring the applicant and ordering that the second respondent should not interfere with the applicant's performance of his duties as Town Clerk for Lusaka City Council.

The respondents applied for the discharge of the injunction and the lifting of the stay of the order of transfer, and the learned trial judge granted these orders as requested. The applicant has appealed to the Supreme Court against the orders and has applied to this court for a stay of the orders pending the hearing of the appeal. The application has been referred to this court by a single judge.

The court was informed that the respondents intended to cross appeal against some of the findings made by the learned High Court judge, but we indicated that, at this stage of the proceedings, we were concerned solely with the application for a stay of the judge's order pending the appeal.

Mr Mwanawasa on behalf of the second respondent argued a number of points which may still be the subject of the judgement of the lower court. In particular in dealing with the joining of the second respondent in an application for judicial review when the only claim against the respondent is for an injunction I assume that the learned trial judge treated that application as having been begun by writ in terms of Order 53 Rule 3(10) (b); or otherwise but this was a matter for the court below and some other course may have been taken or presumed to have been taken in order to regularise the second respondent's joining in the action. In dealing with the application before this court I will endeavour to avoid pre empting any decision which may be made by the learned trial judge. However, there is one issue which has already been disposed of by the court below and that concerns the court's juridiction to order stays of proceedings in cases such as this where the state proceedings Act Cap. 92 procludes the granting of injunctions against the state. Section 16 of the Act reads as follows:

> "16 (1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have the power to make all such orders as it has power to make in proceedings between subject, and otherwise to give such appropriate relief as the case may require: provided that:
>
> > (i) where in any proceedings against the state any such relief is sought as might in proceedings between subjects the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the parties;
> > (ii) .....
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State."

The practice in the United Kingdom with regard to the staying of orders pending judicial review

is set out in Order 53 of the Rules of the Supreme Court (the White Book) 1995 edition.

Order No. 53 Rule 3 (10) reads as follows:

"(10) leave to apply for judicial review is granted, then

(a) if the relief sought is an order prohibiting certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

It has been held in the United Kingdom in the case of Rv Secretary of state for Education and science Exparte Avon County Council (1) that a stay of proceedings under Order 53 is not in the nature of an injuction and courts are not precluded by Section 21(2) of the Crown Proceedings Act 1947 from granting astay against a minister or officer of the Crown. Section 21(2) of the proceedings Act is identical to section 16(2) of the state Proceedings Act in Zambia.

Mr Kinariwala on behalf of the Attorney General argued that in view of the fact that the order for transfer had already been made, it was not possible now to order that it be stayed. Icannot agree with this, Iam satisfied that where the purpose of an order has not yet been carried out, it can be stayed as "proceedings" within the meaning of Order 63 . Mr Kinariwala further argued that, although the procedure for applying for judicial review under Order 53 applies to Zambia, no stay of proceedings could be applied for in Zambia because a stay is the same as an injunction which is prohibited by section 16(2) of the Zambian Act.

Mr Mwanawasa accepted that Order 53 applies to Zambia but argued that the state Proceedings Act did not apply where applications were made for judicial review. Consequently, he argued, the present action was commenced in wrong form and the Minister should have been named as the defendant. He argued that it was too late to name the title of the action at this stage without injustice to the Minister.

Mr Mwanawasa further argued that, as any loss caused to the applicant by transferring to Kitwe and back again could be compensated for by monetory damages, this was not the type of case where an injunction would be appropriate and in the same way, a stay should not be granted. He argued that the injunction against the second respondent was wrong because the second respondent was not in the party who ordered this transfer and further that an injunction was unnecessary in the circumstances.

Mr Kinariwala did not support Mr Mwanawasa's argument that the action was wrongly commenced.

Mr simeza on behalf of the applicant did not accept that the action was wrongly commenced but said that if the court held against him he would apply for amendment in accordance with any findings of the court. On the merits of the case he argued that the English procedure applied and that a stay was available and should be granted. He argued that loss of prestige in being transferred to Kitwe could not be compensated for in money.

In the case of Zambia National Holdings Company Limited v United National Independence Party and Anor, this court commented, albeit obiter, "In the next place we wish to acknowledge that there is a growing school of thought against continued existence of state immunity against injunctive relief and other coercive orders: see for example, de Smith's Judicial Review of

Administrative Action, 4th Edition, from page 445. However, the underlying rationale, particularly the difficulties of enforcement by compulsory process of orders and judgements against the State make it unrealistic to accept that the State can be proceeded against in all respects as for a subject. Simon Brown, J, delivered a most useful review of this problem in M v Office (5) where, on appeal to the Court of Appeal, one of their Lordships suggested on ingenious way round the problem by finding, that as Minsters and civil servants are accountable to the law and to the courts for their personal actions, they can be proceeded against for contempt of court if they disobey or frustrate an order of the court. For our part, what is certain is that it was not true (and Mr Sakala properly so conceded) that, in the absence of an order of interlocutory injunction, no other useful orders could have been made against the State in order to effect a suspension of the compulsory acquisition pending trial and, in case of breach, to exact compliance. If, for example, compliance with fairly coercive prerogative orders like mandamus and others can be exacted, so can other suitable orders (not amounting to prohibited reliefs) envisaged by Article 26(i)."

So far as Mr Kinariwala's argument is concerned the only difference between the English legislation and the provisions of the Zambian law is that the English Crown Proceedings Act 1947 contains in section 38 the following definition: "Civil Proceedings" includes proceedings in the High Court or County Court for the recovery of fines or penalties but does not include proceedings on the Crown side of the King's bench Divison." In the case of the Factortame Limited v Secretary of State for Transport, the majority of the Law Lords, who were of the view that there could be a stay of proceedings despite the provisions that no injunction could be granted, said that one of the reasons for their so finding was that proceedings on the Crown side were specifically excluded from "Civil Proceedings" in the definition section. This definition section does not appear in the Zambian legislation, but, as pointed out by Glidewell, L.J., in the Secretary of State for Education, ex parte Avon County case" in my view, this question comes back to the issue whether the phrase' a stay of the proceedings' is apt to include decisions by the Secretary of State, and the process by which he reached such decisions. I am correct in my view that the phrase is wide enough to embrace such decision, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgement of an inferior court.

It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision making body. Of course, in some respects an application for judicial review appears to have similarities to civil proceedings betwen two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analysed, however, the apparent similarity disappears. Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari, is a challenge to the way in which a decision has been arrived at. The decision maker may appear to argue that his or its, decision was reached by an appropriate procedure. But the decision maker is not in any true sense an opposing party, any more than an inferior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay.

For these reasons I am of the opinion that an officer or Minister of the Crown, in principle, may be stayed by an order of the Court".

I respectifully agree that following these arguments, applications for judicial review are not civil proceedings within the meaning, of the State Proceedings Act. I further agree that a stay in these circumstances is not an injunction. I am aware that, regretably, personalities are involved in this case, but that does not after the fact that the proceedings is an eqnuiry into a

discretionary ministerial decision, not a civil proceeding.

Consequently I would find that a stay of the order of transfer of the applicant to Kitwe can be made in this jurisdiction.

A perusal of the facts of R v Secretary of State of Education Ex parte Avon County Council indicates that the court there was not concerned with whether or not damages in the form of a financial award could compensate the applicant for any less suffered. It was accepted that a proposal to reorganise secondary education was a proceeding being stayed and, therefore, ought to be the fact that a decision in the main action was imminent. In this case I agree with counsel for the respondents that monetory could compensate the applicant for most of the results of having to transfer to Kitwe but for the purpose of deciding what is an appropriate order to make in this case, I acknowledge that there would be considerable physical inconvenience if the applicant were to be made to move to Kitwe and thereafter to move back again to Lusaka if his action in the court below are mindful of Mr Mwanawasa's argument that it is an desirable for there to be interference in the internal discipline for an organisation but he fairly acknowledges that in some cases such interference may be necessary. This is a case which concerns a discretionary exercise of a power. The court below by granting leave, deemed it fit for judicial review. In those circumstances it is quite possible that it is desirable to stay the implementation of the decision.

It would not be improper for the court below to make an order in favour of the applicant in the main action, provided of course such an order is merited by the evidence, and we must therefore take into account the possibility of such an order being made. From the wording of the order by the learned trial judge it appears that he did not think it necessary to make an order for stay of proceedings because he expected to be able to decide the main case very shortly. In the event the case has taken longer than anticipated, and for the reasons I have given I find it necessary for the order that there be a stay of the transfer of the applicant from Lusaka to Kitwe to continue pending the outcome of the appeal.

I now turn to the application for an injunction against the second respondent. In the case of Factorfame Ltd v Minister of State for Transport (2) at p. 705 Lord Bridges said:

> "Injunctions were never available in proceedings on the Crown side involving the ancient jurisdiction to issue the ancient prerogative writs of mandamus, prohibition and certiorari....."

Under the provisions of Order 53 rule 3(10) (b) the remedy of injunction is now available in applications for judicial review and as I said earlier, may be made against the second respondent by treating the application against that respondent as if it had been begun by writ or any other way, possibly by way of amendment, ordered or presumed in the court below.

In considering whether the injunction should continue, I do not accept the argument that because the second respondent did not order the transfer of the appellant there is no need for any order against it. In the circumstances of this case the applicant is entitled to protection from interference with his present position as Town Clerk in Lusaka, and for this reason the injunction is necessary. I would order that the original injunction against the second respondent be restored pending the outcome of the appeal.

Sakala, J. S: I concur.

Chaila, J. S:.....

Gardner, J. S: In view of the majority decision it is ordered that the stay of the order of transfer and the injunction against the second respondent be restored pending the outcome of the appeal.

Costs to the applicant
Appeal allowed

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