ANZ GRINDLEYS BANK (ZAMBIA) LIMITED v CHRISPIN KAONA (1995) S.J.

SUPREME COURT
GARDNER, SAKALA, AND CHAILA , .JJ.S.
(S.C.Z. JUDGMENT NO. 12 OF 1995)

Flynote
Improper dismissal - Reinstatement - Circumstances when it can be ordered

Headnote
The respondent employed by the appellant. There was a strong possibility that there was going to be strike action by the respondent's union. The respondent obtained permission from the appellant to attend a union meeting. He and others went for the meeting and found that it had been cancelled. When they returned to their work place, they found that they had been locked out of their offices and treated as though they had been on strike. They left for the weekend but on going to work on Monday were informed that they had been dismissed. The union brought proceedings in the Industrial Relations court where it was found that the employees had been unfairly dismissed but the court could not order reinstatement. Consequently, the respondent brought another action in his personal capacity stating that he had been discriminated against and should be reinstated. The court ordered inter alia that he be reinstated. The appellant appealed.

Held:

(i) In order for a defence of re-judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.

(ii) Where a dismissal is declared null and void, the courts have a discretion to order reinstatement or damages if appropriate

(iii) This is not an appropriate case for the order of reinstatement but one for damages only.

Cases referred to:-

(1) Posts and Telecommunications Corporation Limited and Phiri S.C.Z. Judgment No. 7 of 1995
(2) Ngwira vs Zambia National Insurance Brokers S.C.Z. Judgment No. 9 of 1994
(3) Francis and Municipal Commissioners of Kuala Lumpar (1962) 3 All E.R. 633.

For the appellant: K.M. Maketo of Christopher Russel Cook and Co.
For the respondent: H. Chama of M/s. Mwanawasa and Company

Judgment

GARDNER, J.S.: read the judgment of the court.

This is an appeal from a judgment of the Industrial Relations Court, holding that the respondent was improperly dismissed, and ordering that he be reinstated and paid arrears of salary and allowances plus interest.

The facts of the case were that the respondent was employed the the appellant, and, prior to the 27th of June, 1992, there was a very strong probability that members of the respondent's

Union intended to go on unofficial strike. There was evidence from the respondent that he reported for duty at eight hours at his place of work and obtained permission from the Branch Manageress to absent himself from his place of work in order to attend a Union meeting that morning. He and others went for a meeting and found that it had been cancelled, so they reported back to their place of work. On their return they found that they had been locked out and treated as having been on strike. They then left for the weekend and returned on the following Monday morning when they applied for reinstatement. Some of those was applied were taken on again by the bank but others were told that as they had withdrawn their labour they could not be re-employed. The respondent was among those who were not re-employed. The respondent gave evidence that he was under the impression that he had been discriminated against because of the period he had worked for the appellant as compared with others who were re-employed.

On the 16th day of April, 1993 the Industrial Relations Court delivered a judgment in connection with applications by the respondent's union, the Zambia Union of Financial Institutes and Allied Workers to which the Zambia Bankers Employers Association and six Commercial Banks were respondents. The appellant was the sixth respondent. The application concerned alleged strikes, including one on the 27th June 1992, and asked for an order that the union members should not have been dismissed but should have been punished in accordance with the dismissal code for unlawful absence from work The application included an application for the court to find that there had been discrimination in the treatment of the alleged offenders. In the said judgment the Industrial Relations Court held that there had been unlawful strikes and, inter alia, "the applicant members who were dismissed were those who returned for work on the 27th of June 1992 and inter withdrew their labour." The court found that there hasn't been a mere unlawful absenting from labour and indicated that in the court's view there should not have been discrimination by re-employing some persons but not others. In this respect the court said that in the proceedings before it which were complaints by individuals the court was unable to order reinstatement as it would have wished. The respondent then issued a fresh complaint claiming reinstatement on the grounds that he had been discriminated against because he said:

> "I have worked for the bank for more than 20 years and wad dismissed in a discriminatory manner and had not been reinstated."

In answer to the complaint the appellant stated that having dismissed all the striking workers the appellant was entitled to re-employ which ever workers chose. They re-employed the first eleven persons who applied for employment regardless of the number of years service they had worked. At the hearing of the case by the Industrial Relations Court the respondent gave evidence that he had obtained permission from his branch manageress to attend a Union meeting together with other employees. That meeting did not in fact take place, but on his return to the bank to report back for duty, he learned that all employees have been treated as having gone on illegal strike. After the weekend when he returned for duty he was not re-employed although a number of all his fellow workers were. The appellant called no evidence to contradict the allegations that the Branch Manageress had specifically given permission for the respondent and others to attend a Union meeting and the court held, therefore, that they were wrongly dismissed. In its judgment the court, having discussed the method by which the persons for re-employment were chosen said:- "In our view it was by design that the eleven who were picked happened to have been those who served for seven years and below. Since no reasonable justification was given by the respondent for their action, it is our view that there was discrimination." The court then went on to say: "The facts of the case in our view fall within section 108(2):- "Any prospective employee who had reasonable cause to believe that he ahs been discriminated against....." The court did not complete the question which should read as follows:- section 108(1) "No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital

status, religion, political opinion or affiliation, tribal extraction or social status of the employee." There was no indication by the court as to which form of discrimination it was considered that the respondent had suffered. However, the court went on to say that the respondent had not been given a proper hearing so his dismissal was not in accordance with natural justice and therefore the action taken against the complainant/respondent was nullified. Mr Maketo in support of the appeal argued that the question of whether or not the respondent has been on illegal strike was res judicata because the industrial Relations Court, in its judgment dated the 16th April, 1993 in a hearing between the same parties at which the same respondent gave evidence had found that the strike was illegal and that even those workers who had returned for work on the 27th June, 1992 had withdrawn their labour In this respect we note that the court in that instance was justified in arriving the evidence of applicant's witness 9 who admitted that the normal procedure of getting permission from the bank before holding a meeting was not followed and that as a result no permission was given the members to attend the meeting on the morning of 27th June, 1992. In order for a defence of *re-judicata* to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second. (see Halsbury's Laws of England (Third Edition) Volume 15 paragrah 358). This point was dealt with by the Industrial Relations Court at the commencement of hearing of the court below when counsel for the appellant first argued that those proceedings should not continue. We agree with that court that the action then before the court was application on behalf of the Trade Union, and did not allow for the making of an order of reinstatement, which could only be made after a complaint in accordance with the provisions of the Act. The proceedings in the first case, even if they might be said to be between the same parties did not give the respondent an opportunity to obtain an order of reinstatement as claimed in the second proceedings. This ground of appeal therefore cannot succeed. With regard to the ground of appeal that the question of reinstatement was irrelevant because name of the reasons for discrimination as set out in section 108 apply, we agree, as we said in the cases of *Post and Telecommunications Corporation Limited and Phiri* (1) and *Ngwira v Zambia national Insurance Brokers* (2), that discrimination must come within the subject matter of section 108(2), and a person's position in the hierarchy of an association is not the same as social status. Following those earlier decisions their could be no question of discrimination in this case and consequently no question of reinstatement under the provisions of section108(2).As the appeal cannot succeed on the question of resjudicata, there is no ground upon which the presumed finding of wrongful dismissal can questioned. In this regard the court below found that the respondent had been granted permission to attend a Union meeting on the 27th of June, 1992, and it follows that his attendance at the Union meeting,could not have been illegal strike action. The court below did not say so, but it follows that the dismissal of the respondent on those ground and the treatment of him as a person who had illegally withdrawn his labour amounted to wrogful dismissal. The Industrial Relations Court immediately thereafter set out the law relating to the rights of an employee to attend Union meetings, and said that , since section 5(2)(a) of the Industrial Relations Act provides that no employer should dismiss any person for exercising his right to attenda Union meeting, the dismissal in this case was null and void. In Francis and the Principal Commissioners of Kuala Lumpar (3) the Privy Council indicated that even if a dismissal is declared null and void the fact of the dismissal that is that the employee is no longer working as before, cannot be ignored, and in all such cases courts have a descretion to order reinstatement or damages if appropriate. WE are of course mindful, as we have said so often, of the admonition that orders for reinstatement in such cases are only made in exceptional cases, and, even then are very rarely made. In the present case the evidence having indicate that the respondent was wrongly dismissed, there is nothing to suggest that this is one of those rere cases where reinstatement should be ordered. The appeal is allowed. The order for reinstatement, arears of pay, allowances and interest is set aside; in its place we order that the appellant pay to the respondent damages for wrongflul dismissal consisting of the number of months salary that no is entitle to in lieu of notice under the terms of his contract. The respondent should also be paid all terminal benefits and other allowances. Both parties having failed in same arguments

and succeeds in others, this is an appropriate case, and we so order that each party shall bear its own cost.

Order for reinstatement set aside.
