ZAMBIA OXYGEN LIMITED AND ZAMBIA PRIVATISATION AGENCY v PAUL CHISAKULA , FRANCIS PHIRI YESANI CHIMWALA, RUMBANI MWANDIRA AND RICHARD SOMANJE

Supreme Court.
Ngulube, CJ, Muzyamba and Chibesakunda, JJS
2nd November, 1999 and 9th February, 2000
(SCZ Judgment No. 4 of 2000.)

Flynote

Privatization Act – Proceeds of Privatisation – to support redundancies or retrenchments. Employment – Employers – Unilateral variation – basic conditions of service – Effect thereof.

Headnote

The respondents sued the appellants to recover moneys claimed as the balance of terminal or retrenchment benefits and repatriation allowances to which they claimed to have been entitled by virtue of conditions of service approved by the Board of Directors of the first respondent and to take effect from 1st April 1996. Such conditions of service resulted in the employees who were all non-unionised receiving increased salaries which were actually implemented as well as a retirement package.

The appellant's position in the action was that the conditions of service approved from 1st April 1996, were bloated and extravagant so that the affected employees should be paid packages worked out on a formula which was never stated in evidence but which would generally reflect the position before 1st April 1996, coupled with the payment of gratuity according to the number of years served.

The first appellant caused such packages to be worked out which were then paid by the second appellant. The respondents felt short-changed and launched proceedings in court to recover the balances based on the packages contained in the conditions approved with effect from 1st April 1996. The learned trial judge found for the respondents. The appellants appealed.

Held:

(i) The Privatisation Act stipulates that the proceeds of privatisation are to be available to support redundancies or retrenchments.

(ii) Conditions of service already being enjoyed by the employees cannot be altered to their disadvantage without their consent.

Legislation referred to:

Privatisation Act Cap 386 Section 39.

Cases referred to:

1. *Dunlop Pneumatic Tyre Company Limited* v *Selfrigdge and Company Limited* [1915] AC 847.
2. *Ng'andwe and Others* v *Zamox Limited and Another*, SCZ Judgment No. 13 of 1999.
3. *Kabwe* v *BP Zambia Limited* (1995-1997) Z.R 218.

C. Kunda (Ms) of Corpus Globe for the first appellant.
M Z Mwandenga Legal Counsel, Zambia Privatisation Agency for the second appellant.
K Msoni of JB Sakala and Company for the respondents.

Judgment

NGULUBE, CJ., delivered the judgment of the court.

For convenience we shall refer to the respondents who were former employees of the first appellant as plaintiffs and the appellants as defendants which is what they were in the action. The plaintiffs sued the defendants to recover moneys claimed as the balance of terminal or retrenchment benefits and repatriation allowances to which they claimed to have been entitled by virtue of conditions of service approved by the Board of Directors of the first defendant and to take effect from 1st April 1996. Such conditions of service resulted in the employees who were all non-unionized- receiving increased salaries which were actually implemented as well as a retirement package worked out in accordance with clause 35 of the conditions of service for non-represented employees approved by the Board from 1st April 1996, as already stated.

The Board which approved those conditions sat on 23rd July 1996, and was chaired by PW3 Mr Kunkuta who also happened to be the Registrar of Companies for the Republic. Under clause 35, approved by the Board with effect from 1st April the employees being separated due to retirement or retrenchment or redundancy were to receive twenty-four months' pay and a month's pay for every year completed in service, together with repatriation allowances.

The defendant's position in the case was that the conditions approved from 1st April, 1996, were bloated and extravagant so that the affected employees should be paid packages worked out on a formula which was never stated in evidence but which would generally reflect the position before 1st April 1996, coupled with the payment of gratuity according to the number of years served. The first defendant caused such packages to be worked out which were then paid by the second defendant. As already stated, the plaintiffs felt short-changed and launched proceedings in court to recover the balances based on the packages contained in the conditions approved with effect from 1st April 1996. The learned trial Judge found for the plaintiffs. He rejected the contention by the defendants that the retrenchment benefits payable to the plaintiffs should be those before 1st April 1996. The learned trial Judge rejected the argument that the first defendant's board had validly varied the retrenchment packages at a board meeting which was held on 6th December 1996, and which passed a resolution that these should be paid in accordance with the conditions enjoyed prior to 1st April 1996. The learned trial Judge noted that the defendants had failed to state or to specify which conditions of service prior to 1st April 1996, were to be used to compute the benefits. He further noted that the defendants had failed to exhibit any evidence of the conditions on which they were relying. In the circumstances, the court was

of the opinion that conditions of service could not be plucked from the air and foisted upon the plaintiffs. In the premises, the court also followed previous decisions of this court where the second defendant had tried to resist the payment of terminal benefits based on improved salaries and conditions of service. In the premises, it was adjudged that both defendants were jointly liable to pay the plaintiffs the unpaid part of their retrenchment benefits. Such benefits had been calculated by the plaintiffs who were the senior-most and non-unionized employees of the first defendant. The amounts altogether totalled a sum of just over K148 million, with the fifth plaintiff Richard Somanje claiming the largest share.

On behalf of the defendants, learned counsel advanced a number of grounds of appeal and arguments. One argument and ground of appeal which was advanced on behalf of the second defendant and which we feel should be disposed of first was that it was wrong for the court below to have entered judgment against the second defendant as well when there was no privity of contract between the employees and the second defendant who admittedly have their own arrangement or agreement with the first defendant for the payment of terminal benefits to the employees. The argument in this regard is based on the typical formulation of the doctrine of privity of contract so that a contract, as a general rule, cannot confer rights or impose obligations arising under it on any person except the parties to it. In this regard, counsel relied on the well known text books and reference books including Chitty on Contracts General Principles 25th edition, at page 662 and the following pages, together with Davies on Contract, 7th edition, at pages 171 to 172. Learned counsel took us on a journey to revisit *Dunlop Pneumatic Tyre Company Limited* v *Selfridge And Company Limited (1)* where the rule on privity of contract was restated by Lord Haldane who said and we quote:-

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

The general submission by counsel for the defendants was that the plaintiffs, the employees of the first defendant were not privy to the agreement between the appellants under which the two defendants had an arrangement whereby the second defendant was to provide funds to the first defendant for the payment of benefits to the employees. The point was that the employees were not party to the arrangements. In answer to the court, counsel submitted that Section 39(2)(h) of the Privatisation Act, Cap 386, does not suggest that the employees should join the Zambia Privatisation Agency as a party to an action nor that they can be able to sue the second defendant directly so as to enable a court to say that the Agency and any employer could be jointly liable on a judgment debt for the payment of terminal benefits. Mr Msoni on behalf of the plaintiffs drew our attention to the fact that it was the second defendant who was paying on behalf of the first defendant. Even the retrenchment letters which were written specifically stated that it was the second appellant who was to pay. Mr Msoni further pointed out that even the witness who gave evidence for the second defendant confirmed that the second defendant was the one to pay so that the obligation of the second defendant arose from the statute since the benefits were to come from the purchase money.

We have addressed our mind to the submissions on the question of privity and while we have no quarrel with the doctrine under the general law of contract, we do have to say in agreeing with Mr Msoni that the doctrine was wrongly invoked in these proceedings. Section 39(1) and (2)(h) of the Privatisation Act, Cap 386, reads *"39. (1) Any proceeds from completed sales of shares and assets shall be paid into a Privatisation Revenue Account established by the Minister responsible for finance and held at the Bank of Zambia. (2) With*

the prior approval of the Minister responsible for Finance the proceeds of sale referred to in subsection (1) may be used for:- (h) supporting redundancy payment schemes in consultation with the ministry responsible for labour."

With respect, therefore, it was wholly untenable to ignore the statutory obligations and responsibilities which have been placed upon the second defendant for the sake of arguing on the general law of privity. There is in fact in the arrangement which the defendants claimed to be between the two of them as a private contract, no charity or mere kindness involved. The law expected the proceeds of privatisation to be available, inter alia, to support redundancies or retrenchments such as those in this case. The second defendant therefore, was under a statutory obligation and statutory duty and quite clearly the employees are entitled to sue both the employer and the agency which has such statutory obligations. The whole of the argument based on privity of contract was, we consider, misconceived and should not even have arisen.

We now turn to the other grounds of appeal which were argued on behalf of the defendants. One of them was that the learned trial Judge erred in holding that there was no variation of the conditions of service enjoyed by the employees. It was submitted that there was ample evidence on the record and before the trial court that at a board meeting on 6th December 1996, a resolution was passed which was recorded in the minutes under which the separation packages were reviewed. The submission and the argument was that it was for the plaintiffs to show that the conditions had not been revised. The submission that the plaintiff should negative the case which the defendant was putting up was a curious one and cannot be supported. The learned trial Judge heard the evidence in this matter and was alive to the contention by the defendants that the terms of 1st April 1996, should not be used so that instead some terms which were not explained to the court but which were said to predate 1st April 1996, were to be called in aid. The learned trial Judge in effect disallowed an attempt by the employer to unilaterally alter the conditions of the employees without any notice to them and quite unilaterally for worse and to the disadvantage of the employees. This kind of scenario arose in a case involving the same defendants with other employees. We refer here to the case of *Ng'andwe and Others* v *Zamox Limited (2)* 1st respondent, *Zambia Privatisation Agency,* 2nd respondent, (2) the decision which was rendered by this court only on 2nd June, 1999. Apart from those plaintiffs having a different counsel, Miss Kunda and Mr Mwandenga represented the same parties as in this case. The principle in that case and which is applicable in this case also, despite submissions by counsel for the defendants to the contrary, was that conditions of service already being enjoyed by the employees cannot be altered to their disadvantage without their consent. That case applied an earlier decision of this court in the case of *Kabwe* v *BP Zambia Limited* (3) We are aware, of course, of counsel's spirited submissions in this appeal that the *Ng'andwe* case, as well as the *Kabwe* case, covered different situations and were, therefore, distinguishable. It was submitted that in the *Ng'andwe* case, the employees were serving employees while in this case, the employees were retrenchees. With respect, the principle enunciated and supported in the earlier cases cannot depend on whether the employees are continuing in employment or they have been separated. The principles for the safeguarding of the terms of a contract already being enjoyed cannot vary in the manner proposed. We find that there is in fact no basis in principle for not applying the decision in the *Ng'andwe* Case. That being the case, the defendants cannot be heard to complain that the learned trial judge declined to enforce variations unilaterally introduced by them to the disadvantage of the employees. All the arguments and submissions to this effect are unsuccessful.

The other ground of appeal and submissions related to the award which was given to the fifth plaintiff. It was argued that he had not given any evidence and had, therefore, not established the amount to which he was entitled. Mr Msoni's submission was that the conditions of service of 1st April 1996, were quite clear and that, therefore, all that the learned trial judge had to determine was the basis upon which the computations had to be

made between the conditions contended for by the plaintiffs and the unspecified conditions contended for by the defendants. There was in fact much merit in the argument by Mr Msoni. The truth of the matter is that the defendants had the opportunity at the trial to question the calculations which were exhibited by the plaintiffs in their affidavits and which could have been discussed at the trial if the need was there. Instead, what was there was simply that each side contended for its own conditions to be applicable and the learned trial judge came down in favour of the contention by the employees. In doing so, the learned trial judge did not misdirect himself. It follows that at the end of the day the appeal cannot possibly succeed; it has no merit and it is dismissed. Costs both here and below are for the plaintiffs, the employees.

Appeal dismissed.