Hon PC

File

SCZ NO. 21 OF 2004
APPEAL NO. 106/2003

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(CIVIL JURISDICTION)

BETWEEN:

ZAMBIA CONSOLIDATED COPPER MINES — APPELLANT

AND

JACKSON MUNYIKA SIAME AND 33 OTHERS — RESPONDENT

Coram: Chirwa, Chibesakunda and Chitengi, JJS
on 3rd September 2003 and 1st July 2004

For the Appellant:: Mr. P M Chamutangi, Senior Legal Officer
Mrs. I Kunda of Messrs. George Kunda and Company
For the Respondents: Mr. M Chitabo of Messrs Mwila Chitabo and Company

JUDGMENT

Chibesakunda, JS, delivered the Judgment in Court

Cases referred to:

1. Zambia Consolidated Copper Mines vs. Moses Phiri and Others Appeal No. 119/1997 (unreported)
2. Paul Gwese vs. Zambia Consolidated Copper Mines Limited SCZ Appeal No. 38/1993

Laws referred to:

3. Sections 69(3) and 85 (3) & (6) of the Industrial and Labour Relations (Amendment) Act Cap 269
4. Halsburys Laws of the England 3rd Edition Vol. 24 paragraph 3278
5. Halsburys Laws of the England 4th Edition Vol. 44(1) paragraph 287
6. Maxwell on Interpretation of Statutes, Eleventh Edition 205

For convenience sake, in this appeal we will be referring to the Appellants as the Respondents and the Respondents as the Applicants, which they were in the Industrial Relations Court.

This is an appeal against the Industrial Relations Court's ruling in which the full bench upheld the learned Deputy Chairman's ruling that the provisions of Act No. 30 of the Industrial and Labour Relations (Amendment) Act of 1997 did not apply to the Applicants whose rights accrued long before Cap 269 was amended.

To that effect the Industrial Relations Court held that the Applicants had a right to lodge their complaint without seeking leave of the court.

The brief facts before the Industrial Relations Court were that the Applicants who were employed by the Respondents in various capacities had their services terminated at the same time and in the same manner as another group (who were applicants in Zambia Consolidated Copper Mines v. Moses Phiri and Others and whom we will be referring to in our Judgment as the former group). This former group of employees had taken the matter to the High Court and had successfully litigated against the Respondents in the case of Zambia Consolidated Copper Mines vs Moses Phiri and Others (1). The Applicants who were not part to these proceedings, when they realized that their colleagues, former group, had successfully litigated and had been awarded redundancy packages, lodged complaints before the Industrial Relations Court and sought the following reliefs:-

1) That the purported early retiring or declaring of the Applicants redundant when they had reached the ages of 50 years, but not over 55 years be declared null and void;
2) An Order that the Applicants be deemed to have continued in employment until the attainment of 55 years;
3) The Applicants be paid arrears of salary and allowances and such entitlements that they may have continued to enjoy until reaching their respective retiring ages of 55 years with interest on awards at bank lending rates from date of separation; and
4) That the Respondent be condemned to pay costs to be taxed in default of agreement.

This complaint was lodged more or less seven years after the services were terminated. The initial complaint was filed on 9th July 1999 without seeking leave of the court..

The Respondents raised a preliminary point before the learned Deputy Registrar of the Industrial Relations court challenging the lodgment of this complaint as they argued that that action was statute barred as provided in Section 69(3) of the Industrial and Labour Relations (Amendment) Act (3). The learned Deputy Registrar of the Industrial Relations Court refused to grant the application for extension of time in which to lodge the complaint, as the delay was inordinate. He refused to accept the argument that the Industrial Relations Court being a court of substantial justice was not bound by statutory limitation. The Applicants appealed then to the learned Deputy Chairman of the Industrial Relations Court who treated their application as application for leave to file the complaint out of time. He ruled on 6th January 2002 that the provision of Act No. 30 of 1997 did not apply to the case before him because the Applicants' rights had accrued long before the amendment and as such the Applicants had accrued rights and therefore they were at liberty to lodge their complaint without seeking leave of the court. It is this ruling which was appealed against to the full bench of the Industrial Relations Court. The full bench ruled on 11th October 2002 upheld the ruling of the learned Deputy Chairman holding that the provisions of Act No. 30 1997 did not apply to the rights of the Applicants as those rights accrued long before the amendments enacted in Act No. 30 1997. It is this ruling being appealed against before us.

Before us the memorandum of appeal had two ground of appeal:-

1) The court below erred in law and in fact in holding that Section 85 (3) of the Industrial and Labour Relations Act did not bar the respondents from filing complaint and holding that the Respondents could file their complaint without the leave of the court.

2) The court below erred in law and in fact in holding that the Limitation Act did not apply in the particular circumstances of this case.

The main argument before us was raised by the court. The appeal was scheduled to have been on 2nd September 2003 when the court asked Mr. Chamutangi, learned counsel for the Respondents (Appellants), to address the court on the applicability of Section 85 (6) of the Industrial and Labour Relations (Amendment) Act (3), which says:-

> *"(6) An award, declaration, decision or judgement of the Court on any matter referred to it for its decision or on any matter falling within its exclusive jurisdiction shall, subject to section ninety-seven, be binding on the parties to the matter and on any parties affected.*

In response to that argument, Mr. Chamutangi both in his written arguments and his oral arguments submitted that Section 85(6) of the Industrial and Labour Relations (Amendment) Act did not apply to the case before us, as, according to him, the Moses Phiri case, which was on all fours with this case before us did not originate from the Industrial Relations Court. He pointed out that the Moses Phiri case was a High Court case and that Section 85(6) referred to cases which originate from Industrial Relations Court. He argued that the definition of the 'Court' in this Act solely refers to the Industrial Relations Court and not the High Court. He explained that according to Section 85(6) only awards, declaration, decisions or judgments of the Industrial Relations Court were binding to parties to the matter and any party affected. So he consequently argued that the decision in Moses Phiri case was not binding.

In response to the argument, by Mr. Chitabo that the Industrial Relations Court's judgments ended in the Supreme Court and that that should necessarily mean, that the judgments of the Supreme Court must fall within the ambit of sub Section 6 of Section 85, he argued that this special provision only applied to decisions emanating from the Industrial Relations Court and not the High Court. In conclusion therefore he argued that Section 85(6) of the Industrial and Labour Relations Act (3) was only applicable to the decision of the Industrial Relations Court.

Mr. Chitabo, in response to that, counter argued that Section 85(6) of the Industrial and Labour Relations (Amendment) Act (3) has to apply to all cases regardless as to whether or not the award or declaration or decision emanated from the Industrial Relations Court or the High Court. He argued that the judgments in Paul Gwese vs. Zambia Consolidated Copper Mines Limited (2) and Zambia Consolidated Copper Mines Limited vs. Moses Phiri and Others (1), although they originated from the High Court ended at the Supreme Court and so the judgments which have to be binding on the parties to the matter or any other affected party, must include judgments of the Supreme Court. He accepted the augment that Section 85(6) did not apply to the High Court judgments.

As we regard this as the main argument before us, we want to address our minds to it before dealing with any other ground of appeal. It is common ground that the Applicants' services were terminated at the same time and in the same manner as the former group. It is also common ground that the Moses Phiri case was handled in the High Court. The decision that was confirmed by the Supreme Court was a High Court judgment. It has been argued that the Moses Phiri case cannot apply to the Applicants before us because the Moses Phiri case was handled in the High Court and therefore Section 85(6) of the Industrial and Labour Relations (Amendment) Act (3) does not apply. Section 3 of that Act defines the court as:-

> *"The Industrial Relations Court established by section sixty-four of the Industrial Relations Act, 1990, is hereby continued as if established under this Act."*

Although we totally agree with Mr. Chatabo's argument on the role of the Industrial Relations Court which is established to administer substantial justice, it is, clear, however, from the wording in both Sections 3 and 85(6) of the Industrial and Labour Relations (Amendment) Act that "only orders made by the Industrial Relations Court can have that binding effect on the parties to the action and any other party who is affected by that order." Therefore, we are inclined to agree with Mr. Chamutangi that the Moses Phiri case decision cannot be applied to the Applicants in this matter.

We totally accept that the Industrial Relations Court was established to do substantial justice and that both the High Court's Judgments and the Industrial Relations Court's judgments end up in the Supreme Court and that the Supreme Court's decision are binding on both the Industrial Relations Court and the High Court as the court of last instance. Although we sympathise with the arguments by Mr. Chitabo that the judgments of the Supreme Court should fall within the ambit of Section 85(6) of the Industrial and Labour Relations (amendment) Act (3), regrettably, because of the definition of the word, "court" in Section 3, we have to agree with Mr. Chamutangi that Section 85(6) was meant to apply to decisions only emanating from the Industrial Relations Court.

Coming to the other two grounds of appeal, it was argued by Mr. Chamutangi both in his written arguments and oral arguments before us that before the amendment to section 85 of the Industrial and Labour Relations Act of 1993 there was no provision which stipulated time in which to lodge complaints before the Industrial Relations Court, but after the amendment of Act No. 30 of 1997 time limit was introduced by Section 69. It was argued that the Applicants sat on their rights and took seven years to lodge their complaint in 1999 after being dismissed in August 1992.

Mr. Chamutangi referring to Section 36 of the English interpretation of Statutes Act 1889, which applies to Zambia by virtue of Section 10 of the High Court, argued that all statutes enacted which are not procedural, should be construed to have prospective application. He argued that such statute could only be construed to have retrospective application only where "such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication," Maxwell on Interpretation of Statutes (6). He further argued that it is a fundamental rule of law that statutes relating to procedure and practice of the court have a retrospective application. He, however, contended that it is a well-established principle of law that it matters not that the effect of a procedural alteration is to make a prosecution under a penal act possible even

where formerly it was not possible, or even where the alteration of the procedure would bring a disadvantage to one or two parties.

Citing the Halsbury's Laws of England (4) which says:-

> *"The general presumption against retrospection does not apply to legislation concerned with matter of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament. For this purpose, procedure includes matters relating to remedies, defence, penalties, evidence ....."*

his arguments therefore was that the amendments introduced by Section 69 and that of Section 85 of the Industrial and Labour Relations (amendment) Act (3) were procedural and as such had retrospective application. He went on to argue that the lower court misdirected itself in holding that the Applicants had accrued rights and as such the amendments were not applicable to them.

Mrs. Kunda, 2nd learned counsel for the Appellant, concurred with Mr. chamutangi's arguments.

The Applicants' learned counsel, Mr. Chitabo, counter argued on both grounds of appeal that the Industrial Relations Court is a court which is a court moderated to do substantial justice and as such administers substantial justice which should not be encumbered by rules of procedure that would drive litigants from the seat of justice. He argued that the lower court was right when it held that the amendments were not mere procedural rules. He supported the lower court's conclusion that those amendments were substantive, and that legislature did not come out clearly to indicate that these amendments had retrospective application.

He referred to Halsbury's Laws of England (3rd Edition) (4) which says:-

> *"The limitation Act 1939 came into operation on 1st July 1940, and applies, subject to certain exceptions, to all actions sought to be begun within the jurisdiction of English Courts, ..., on or after that date. In a case where the period had expired before the Act came into operation, the effect of the Act was to prevent the proceedings from being brought after the act had come into operation, even though there had been no period of limitation applicable to the proceedings under the enactments replaced by the Act."*

We have considered the arguments and the record before us. We entirely agree that the amendments brought in by Section 85 are procedural. Section 85(3) says:-

> *"(3) The Court shall not consider a complaint or application unless it is presented to it within thirty days of the occurrence of the even which gave rise to the complaint or application. Provided that upon application by the complainant or applicant the Court may extend the thirty day period for a further period of three months after the date on which the complainant or applicant has exhausted the administrative channels available to that person."*

We accept that it is a well-settled principle of law that there is always a presumption that any legislation is not intended to operate retrospectively but prospectively and this is more also where the enactment would have prejudicial effect on vested rights. According to the learned authors of Maxwell on Interpretation of Statutes (6) "Nova Constitutio futuris foruam imponere devet, non praeteritis – upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operations." Side by side with this presumption of prospective application is the well-established principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes were passed unless a retrospective effects are clearly intended. But there is another well-established principle of law which is that any enactments which relate to procedures and practice of the court have retrospective application, vide the Halsbury's Laws of England (5).

This rule of law has harsh implications especially when the enforcement takes away vested rights, or where it's application brings on a disadvantage to one or two parties, who were not disadvantaged before. The application of this rule of law 'prima facie' is contradictory to the sound principle of law against punishing a person for what he or she did or did not do at the time when such was not against the law. This principle of law makes it possible for the rules of procedures to be applicable to past as well as future transactions. This is a gray area.

In the case before us this gray area is even obvious as the leaned Deputy Chairman pointed out in his well reasoned out ruling, which is the subject of this appeal. We have noted, however, that the learned Deputy Chairman in his ruling dealt with the application for leave to lodge the complaint out of time. We are satisfied ourselves that although Section 85(3) of the Industrial and Labour Relations (Amendment) Act (3) introduced time limit on lodging complaints, this amendment did not state any time limit for application for leave. Our view, therefore, is that this amendment never took away the discretion of any court to allow deserving litigants to lodge complaints out of time. Also, more importantly, our view is that because the Industrial Relations Court has a mandate to administer substantial justice unencumbered by rules of procedures and taking into account the Moses Phiri case in which the former ground successfully litigated against the Respondent the learned Deputy Chairman was correct to have used his discretion in granting leave to the Applicants to lodge their complaint before the Industrial Relations Court even after seven (7) years. Because of this reason we in our judgment wish to strongly advise the Respondent not to wait for proceeding to commence in the Industrial Relations Court but to pay the Applicants what the former group got as their redundancy packages as this would lessen the litigation costs. We therefore, hold that the learned Deputy Chairman of the Industrial Relations Court was on firm ground to have granted the Applicants leave to lodge their complaint out of time. We however order that should the Applicants go ahead with lodging of the complaint they should do so within 60 days. The appeal therefore is not successful. We leave costs in the cause.

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D K Chirwa
SUPREME COURT JUDGE

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L P Chibesakunda
SUPREME COURT JUDGE

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P Chitengi
SUPREME COURT JUDGE