

FRIDAY J.M. NGWIRA v ZAMBIA NATIONAL INSURANCE BROKERS LIMITED
(1994) S.J. 57 (S.C.)

SUPREME COURT
GARDNER, CHAILA AND CHIRWA, JJ.S.
14TH JUNE, 1994 AND 28TH JULY, 1994
S.C.Z. JUDGMENT NO.9 OF 1994
APPEAL NO. 15 OF 1994

Flynote

Termination of employment - Reinstatement - When it can be ordered - Discrimination under section 108 of the Industrial Relations Act - Definition of the term 'social status' under the Act

Headnote

The appellant was charged with negligence resulting in the loss of company property and gross abuse of office, the particulars of which were that he, being head of personnel and administration, manipulated the tender procedure for several company vehicles to some members of staff at unrealistic low prices thereby occasioning financial loss to the company. There was also a further charge of having submitted a tender on behalf of the General Manager at an unrealistic low price without his instructions. A disciplinary committee found that the appellant had been guilty as charged and recommended that he be dismissed. The Managing Director, however, changed the punishment to ordinary termination of services, which meant that the appellant was able to receive some benefits on termination of contract which would otherwise have been lost. In an action before the Industrial Relations Court, the court refused to order reinstatement of the appellant and he appealed.

Held:

- (i) The word "social" relates to "society" and the expression "social status" means a person's standing in society generally, not his standing in an employers' organisation

For the appellant: H. H. Ndhlovu of Messrs H. H. Ndhlovu and Company
For the respondent: E. B. Mwansa of EBM Chambers

Judgement

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

This is an appeal from a decision of the Industrial Relations Court refusing to order reinstatement of the appellant in the respondent's employment.

The facts of the case are that the appellant was employed by the respondent as Chief Personnel and Administration Manager. In April 1990 the appellant, as Chairman of a Tenders Committee, sat with the members of the Committee to consider tenders for the purchase of several company cars. The appellant and some other members of the committee indicated that they had an interest in the proceedings because they themselves had submitted tenders for the vehicles. It was agreed that another member should chair the Committee although all the members would have to sit on the Committee, despite being interested parties, because they were needed to form a quorum. The Committee awarded the acceptance of tenders at very low prices including the appellant's tender for one of the vehicles at the sum of ten thousand kwacha although there had been a tender for over one hundred thousand kwacha for

the same vehicle.

The appellant was charged with negligence resulting in the loss of company property and gross abuse of office, the particulars of which were that he, being head of personnel and administration, manipulated the tender procedure for several company vehicles to some members of staff at unrealistic low prices thereby occasioning financial loss to the company. There was also a further charge of having submitted a tender on behalf of the General Manager at an unrealistic low price without his instructions. A disciplinary committee found that the appellant had been guilty as charged and recommended that he be dismissed. The Managing Director, however, changed the punishment to ordinary termination of services, which meant that the appellant was able to receive some benefits on termination of contract which would otherwise have been lost.

The appellant complained to the Industrial Relations Court claiming that he had been discriminated against because of his social status as previous Chairman of the Tender Committee in that his services were terminated while the other members of the Tenders Committee were merely reprimanded. The court found that, because a different Chairman had been appointed, the appellant had not manipulated the other members of the Tender Committee. It was also found that the respondent's contention that the appellant was dismissed because he was the most senior and Chairman of the Standing Committee was an admission that he was treated as he was because of his social status. As to the charge of having submitted a bid on behalf of the General Manager without instructions the court found that the allegation was not an offence covered by the disciplinary case and, if it was an offence at all, it was a minor one which did not call for dismissal. The court then found that the appellant had proved that his dismissal was based on discrimination because of his social status. In dealing with the question of reinstatement the court ruled:

“On the evidence it has been quite clear that the complainant and the other four members of the committee manipulated the situation to their advantage. In the circumstances reinstating him will be tantamount to condoning indiscipline.”

It was then ordered that he be paid ten months' salary as compensation. The present appeal is against that decision of the Industrial Relations Court.

Mr Ndhlovu on behalf of the appellant argued that, having found that the appellant had been discriminated against because of his social status, the court was in duty bound to order reinstatement. He argued that the judgement of the

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court has found that the appellant was not guilty of any manipulation and had further found that punishing one out of the five member committee would amount to discrimination. Mr Ndhlovu further argued that as the appellant had been successful in the court below he should have been awarded costs in that there was no impropriety in the way he handled the case.

Mr Mwansa on behalf of the respondent argued that as a senior member of staff and as the original Chairman of the Tender Committee the appellant had a responsibility to see that rules such as the acceptance of the highest tender should have been observed. He argued that the respondent was entitled to decide as it had done.

During the course of his judgement Mr Ndhlovu pointed out that there was evidence from some of the witnesses that the vehicles, which had been sold according to the recommendation of the Tender Committee, had been recovered, and that, therefore, no financial loss had been

suffered by the respondent. However, the grounds of appeal do not refer to this issue. Apart from the rule that all grounds of appeal should be included in the memorandum of appeal it is apparent from the facts of the case that the allegations against the appellant was that because he had failed to ensure that the members of the Tender Committee accepted the highest tenders the respondent would have suffered financial loss because of his conduct. If such loss was forestalled by the action of the respondent in cancelling the sales it would not affect the culpability of the appellant.

Section 108 of the Industrial and Labour Relations Act No. 27 of 1993 reads as follows:

“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.”

It is quite clear that the parties and the Industrial Relations Court misconceived the meaning of the expression “social status” when considering whether the appellant had been discriminated against within the terms of the section. The word “social” relates to “society” and the expression “social status” means a person’s standing in society generally, not his standing in an employers’ organisation. The fact therefore, that the appellant was Chief Personnel and Administration Manager in the respondent company had nothing to do with his social status. There is nothing improper in punishing a senior member of an organisation more severely on the grounds that he should be setting an example to others.

The intention of the legislature in this section must have been to indicate an abhorrence of a system whereby the people of a society are divided into different social classes and people of an allegedly “lower class” are discriminated against.

It follows therefore, that the finding of the Industrial Relations Court that the appellant had been discriminated against because of his social status was wrong. However, there has been no cross appeal against that finding neither has there been a cross appeal against the order of payment to the appellant of ten months’ salary as compensation. We note that the court below appears to have misunderstood the meaning of the charge against the appellant, the particulars of

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which were that he wilfully manipulated the tender procedure, not that he manipulated the members of the Tender Board as thought by the court. However, the court’s final finding that the appellant and the other members of the Committee manipulated the situation to their advantage was correct. That being so, the appellant was not entitled to an order in his favour at all, and it follows that the appellant cannot have an order for reinstatement as claimed in this appeal. There being no appeal against the order for compensation, that order must stand.

So far as the appeal against the order for costs is concerned, we agree that a successful party is usually entitled to costs and that it is usually that party’s conduct in the prosecution of an action which is taken into account to deprive him of costs. However, there is no doubt that costs are in the discretion of the court; and having regard to the findings of the court below that the appellant manipulated the situation to his advantage, we cannot say that the court exercised its discretion improperly.

At one stage in the court below it was argued that, as the services of the appellant had been terminated properly by the giving of the correct action and the payment of appropriate terminal benefits, no action could be taken to complain about such termination. Although this

matter was not raised in this court, we should point out that section 108 (2) of the Act gives a statutory right of complaint against discrimination, so that despite a contract of service's having been properly terminated, the Industrial Relations Court may inquire into the real causes of the termination of contract, and, if discrimination is proved, may make the order referred to in subsection (3). It follows that on subsequent appeal to this court the question of discrimination under section 108 will be considered.

For the reasons we have given the appeal is dismissed with costs to the respondent.

Appeal dismissed.
