BONAR TRAVEL LIMITED v LEWIS SUSA (1994) S.J. 71 (S.C.)

SUPREME COURT
SAKALA, CHAILA AND MUZYAMBA, JJ.S.
8TH JUNE 1994 AND 7TH SEPTEMBER 1994
S.C.Z. JUDGMENT NO. 13 OF 1994

Flynote

Appeal - Apllication for extension of time - Whether extension applied to the assessment of damages too - Adjective statute

Headnote

The respondent filed a complaint in the Industrial Relations court against the applicant. On 4th May, 1992 the court delivered a judgement in his favour. There then followed an assessment of damages by the Registrar of that court resulting in a certificate and an order on assessment of damages both dated 1st June, 1993 at pages 26-27 and 24-25 respectively of the record. Following the assessment, the applicant filed in this court on 18th June, 1993 a notice of application for an extension of time within which to file a notice of appeal. The application first came before a single judge of court who rejected it. It then came before the full court for consideration.

Held:
(i) Act number 27 of 1993 did not have a retrospective effect.

p72

Authorities referred to:
1. Elsie M. Moobola v Harry M M Muwezwa S.C.Z. Judgement No. 3 of 1991
2. Volume 44 Halsbury's Laws of England, 4th Edition p. 574
3. Barber v Pigden 1937 1 K.B. 664
4. Lusaka West Development Co. Ltd v Turnkey Properties Ltd S.C.Z. Judgment No. 1 of 1990
5. Tomlin v Standard Telephone and Cables Ltd 1969 3 Aller 201

For the appellants: G Kunda , George Kunda and Co.
For respondent: Mrs C K Kafunda, Kafunda and Co.

Judgment

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

This is an application for an extension of time within which to file a notice of appeal. The application first came before a single judge of court who rejected it. It then came before the full court for consideration.

Briefly, the history of this matter is that the respondent filed a complaint in the Industrial Relations court against the applicant. On 4th May, 1992 the court delivered a judgement in his favour. There then followed an assessment of damages by the Registrar of that court resulting in a certificate and an order on assessment of damages both dated 1st June, 1993 at pages 26-27 and 24-25 respectively of the record. Following the assessment, the applicant filed in this court on 18th June, 1993 a notice of application for an extension of time within which to file a notice of appeal. The first part of the notice, at pages 17-18 of the record,

reads:

> "Take notice that Bonar Travel Limited being desirous of appealing against the judgement (complaint No. 65/91) of the Deputy Chairman Mr N E Wanki and Mr F I Chiwawa and S I Sibongo as members, given in the Industrial Relations Court at Lusaka on the 4th day of May 1992)"

And par. 2(b) of the same notice reads:

> "The formula used by the Industrial Relations Court in awarding compensation as aforesaid, completely ignored the principles of mitigation of damages, which makes the award excessive and unjust."

Earlier in his argument, Mr Kunda tried to persuaded this court to accept the notice related to both the judgement and assessment of damages, but in his reply to Mrs Kafunda's submissions that the notice clearly showed the applicant intended to appeal against the judgement only he conceded that the notice did not relate to the assessment of damages and then applied for leave of the court to appeal out of time against the order of assessment of damages. It then became common ground that the only issue, and that was the position taken by the single judge of the court was whether on 4th May 1992 when the judgement was delivered the applicant had a right to this court and also whether the Industrial

p73

and Labour Relations Act 27 of 1993 which came into effect on 26th April 1993 had a retrospective effect. We will first deal with the issue of the right of appeal and later deal with the application for leave to appeal out of time against the order of assessment of damages.

Mr Kunda's arguments before the single judge which were repeated before us were that Section 77 of Act 36 of 1990 gave a right of appeal to an aggrieved litigant. That this right could not be exercised because the Chief Justice did not make rules to regulate the appeals and that because there were no rules the Minister responsible for labour matters could not bring into operation section 77. That the Minister had no powers to abolish the right which was granted by parliament and therefore that Act 27 of 1993 which had a similar provision, although it repealed Act 36 of 1990, had a retrospective effect in that the right of appeal is procedural and there is always a presumption that any legislation of procedural matters has a retrospective effect. He further submitted that in any case the matter was still pending and asked the court to look at the 'without prejudice' correspondence passing between the parties in May, 1993 to see this. That the new Act therefore applied. He cited a number of authorities in support of his argument which we shall be referring to shortly. He thus urged the court to allow the application. In response, Mrs Kafunda submitted that the same parliament which gave the right of appeal gave the Minister powers or discretion to decide when to bring into operation the relevant section. That the Minister did not pass any Statutory Instrument to bring into operation the section and therefore that although the right existed it did not accrue to the applicant. That since the right did not accrue it was lost when the act was repealed by Act 27 of 1993,. She further submitted that the new Act has no retrospective effect in that whereas the cases cited by Mr Kunda talked of legal fiction or technicalities, in this case there was simply no procedure and therefore no legal fiction or technicalities. On Mr Kunda's argument that the matter was still pending she submitted that the correspondence referred to by Mr Kunda was written after judgement and before the assessment of damages and that since damages were assessed before the notice of application it cannot be said that the matter is or was still pending. She thus urged the court to refuse the application.

We have carefully considered the arguments on both sides and the authorities cited in support of these arguments. Section 77 of Act 36 of 1990 provided:

"(1) Any person aggrieved by any award, declaration, decision or judgement of the court may appeal to the Supreme Court on any point of law or any point of mixed law and fact not on a point of fact.

(2) The Chief Justice may, by statutory Instrument, make rules regulating appeals under this section."

And section 1 of same Act provided:

(1) This Act may be cited as the Industrial Relations Act, 1990, and shall come into operation on such date as the Minister may, by Statutory Instrument, appoint;
(2) Different dates may be appointed by the Minister for the coming into operation of different parts or sections of this Act."

p 74

It is common ground that the Minister did not appoint or pass a Statutory Instrument to bring into operation section 77 subsection 1. Mr Kunda's argument is that the Minister could not do so without rules regulating the appeals. This, in our view, is not a sound argument because without the section coming into operation first there could be no rules as they would serve no useful purpose. There are in fact many legislations which have come into force without rules regulating any procedures to be followed. The 1993 Industrial and Labour Relations Act is one such example. It is not true therefore that the Minster did not bring into operation section 77 because there were no rules. In our view, he did not do so because for reasons best known to himself, he did not exercise his powers under section 1 of the Act. Since the section was never brought into operation the right of appeal did not accrue to the applicant and therefore when the Act was repealed and replaced by Act 27 of 1993 that right died or lapsed together with the repealed Act. This ground therefore fails.

Mr Kunda's further argument was that the 1993 Act had a retrospective effect and for his argument he cited Moobola case (1) Halbury's Laws of England (2) and Barber v Pigden (3). In Moobola's case (1) the issue facing the court was whether or not the deceased's estate fell for administration under the Intestate Succession Act 5 of 1989 which came into effect after the deceased had died. Citing Section 48 of the same Act, we need not reproduce here this court said at page 4:

> "The Act is concerned with the administration and distribution of a customary intestate estate. As we have endeavoured to illustrate, the wording of section 48 precludes the acquisition of newly created substantive rights or the imposition of newly created disadvantages in an ongoing administration as well as in one which was finalised at the time of the commencement of the Act. As the Act is concerned with administrations and distributions after its commencement, it can only be regarded as prospective in its operation and the question of retrospective operation does not even arise."

On the question of whether the application of the quantum formula fixed by the Act it would amount to a retrospective operation of the Act this court, at page 5, said:

> "The appellant's claim under the Act is in fact supportable on the basis that it attracts the operation of the Act in the prospective manner in which it was so clearly intended to operate. The fact that the Act has fixed a quantum to existing rights claimed by a

> widow in respect of an estate which has not yet been administered does not mean that there is to be a retrospective operation."

It is quite clear that what we said in Moobola case (1) was that the Act had a prospective and not a retrospective effect as it dealt with future administration.

We also said, at page 5 of same judgement:

> "In any case, the presumption against retrospection does not apply to legislation dealing with matters of procedure and provisions introducing new remedies, as opposed to new substantive rights, have generally been classed with provisions as to procedure so that they generally apply both to proceedings subsequently commenced in respect of existing cause of action and to existing proceedings."

p75

This statement is also found at paragraph 925 of Halbury's Laws of England (2). In Barber v Pigden (3) the issue was whether or not the husband of a co-defendant was liable for the torts committed by his wife before the coming into operation of the Law Reform (married women and Tortfeasors) Act 1935 whose intention was to abolish the common law legal fiction that a woman, on marrying become merged in the personality of her husband and ceased to be a fully qualified and separate human person from her husband and thus make her liable for her torts. It was held that the Act had a retrospective effect and in the course of his judgement at page 678, Scoot L.J said:

> "But as far as the present case is concerned, the dominant intention of the Act is clear beyond all doubt: it is to effect a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure; and I do not think the rule against retrospective interpretation, on which Mr Blade relies, is properly applicable to such a statute abolishing legal fiction any more than to a merely procedural statute. The purpose of Part 1 of the Act is to give back to a woman, though married, the full human statutes allowed by the common law to a man, a maiden or a widow, of which the common law had robbed her; in short, it restores to her natural status and capacity. It does it by sweeping away a host of legal fictions - fictions which in origin were inextricably mixed up with old procedural law. It is well recognised that the canon against retrospective interpretation does not apply to a statute dealing with adjective law, I.e., procedure, and I think that a statute abolishing old legal fictions is so nearly akin to a procedural statute that the canon can have little, if any, application. After all, the canon express no rigid or absolute rule. It rests on a presumption of common sense in a well ordered and civilised society."

We have examined both the repealed and new Act and found that they have a similar provision on appeals i.e. section 97 of the new Act is similar to Section 77 supra. The question therefore raised by Mr Kunda's submission in whether such a provision in a statute makes the statute adjective or procedural. In our view such a provision does not make a statute adjective. An adjective statute is one which lays down a procedure of how a litigant or prospective litigant should go about seeking a redress before a tribunal or how to exercise his right of appeal. Both acts cannot therefore be said to be adjective and therefore the question of legal fiction procedural technicalities does not arise at all. We do not therefore accept Mr. Kunda's argument that Act 27 of 1993 has a retrospective effect.

Mr Kunda's last argument was that the matter was still pending and therefore that the new act applied. That the court could discern this form the 'without prejudice' correspondence

exchanged between the parties after judgement was delivered. We have already held that the new act has no retrospective effect and while it is common cause, as we stated in cause of Lusaka West Development Company Limited and Turnkey Properties Limited (4) at page 2 and as held in Tamlin and Standard telephones and Cables Ltd (5) that as a general rule without prejudice communication or correspondence is inadmissible on ground of public policy to protect genuine negotiations between parties with a view to reaching a settlement out of court and that there may be situations where such

correspondence is admissible for that court to see whether the parties have reached an agreement for settlement out of court, it would, in our view be an academic exercise in the circumstances of this case for the court to examine the alleged correspondence. Moreover, once a matter is adjudicated upon and there is no right of appeal, as we held in this case, then such a matter cannot be said to be pending. Pending what? This argument therefore also fails. We would however add here that, as regards the assessment of damages which was made after the Act came into force the Act applies and the applicant was at liberty to appeal to this court against the assessment.

For the foregoing reasons we find that the single judge of the court was on firm ground to refuse the application to appeal against the judgement.

We will now deal with the application for leave to appeal out of time against the order of assessment of damages. Mr Kunda made the application in his reapply to submissions by Mrs Kafunda and after conceding that the notice of application for extension of time within which to appeal which we have just disposed of related only to the judgement. When asked by the court why he did not file a notice of appeal shortly after the assessment his reply was that he thought that the two i.e. Judgement and assessment were inter related. We have to decide therefore whether this is a sufficient reason or explanation for being out of time. In deciding this application we bear in mind what Mr Kafunda said in answer to a question by the court that she would have taken a different stand had the applicant applied for an extension of time within which to appeal against the assessment of damages only. We take it that she does not oppose the application and in that event the application is allowed and the applicant is given thirty days from the date of this judgement within which to file a notice of appeal.

We award costs of both applications to the respondent to be taxed in default of agreement.
Application granted.
