ZAMBIA NATIONAL BROADCASTING CORPOPRATION LIMITED v PENIAS TEMBO, EDWARD CHILESHE MULENGA AND MOSES PHIRI (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA JJ.S.
26TH JANUARY, 1995 AND 10TH MAY, 1995.
(S.C.Z. JUDGMENT NO. 9 OF 1995)

Headnote

The respondents were employed by the appellant in various capacities. Towards November, 1991, the respondents received letters from the appellant terminating their employment. The respondents brought an action against the appellant in the Industrial Relations Court on grounds that they were discriminated against because of their political affiliation. Although it was not a ground of complaint, the Court found that the official who signed the letters of termination, the acting Director General, had not been properly appointed because the Board of Directors, the only body having power to appoint a Director General, was not in existence at the relevant time, having been dissolved by the minister. The Court found, therefore, that the appointment was null and void and that this aggravated the circumstances so that orders for reinstatement were made. It is against those orders that the appellant appealed.

Held:

(i) The acting Director General, not having been properly appointed as Acting Director General, had no power to dismiss the respondents.
(ii) The respondent were discriminated against on grounds of their political affiliation within the meaning of section 108 of the Industrial and Labour Relations Act
(iii) The power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account
(iv) It is the duty of a wrongly dismissed employee to mitigate his loss. this principal applies even when there is statutory provision for compensation unless such compensation is fixed be law

Cases referred to:

(1) Ngwira v Zambia National Insurance Brokers (1994) S.C.Z. Judgment No. 9
(2) Zambia Airways Corporation Ltd S.C.Z. Judgment No. 5

For the appellant: E.B. Mwana of EBM Chambers
For the respondents: S.S. Phiri of S.S. Phiri and Co., and M.B. Mutemwa Chambers

---

Judgment

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

This is an appeal from a judgment of the Industrial Relations Court ordering reinstatement of the respondent and damages.

The facts of the case are that the appellant Corporation employed the three respondents. The first respondent was employed as regional Controller for the Northern Region, the second respondent was employed as Director of Engineering, who acted as Director General whenever the Director General was absent, and the third respondent was employed as Head of Programmes and Operations. Towards the end of November, 1991 the respondents received letters from the appellant informing them that their contracts of service were terminated and that they were being given three months salary in lieu of notice. The respondents then filed complaints with the Industrial Relations Court claiming that they had been discriminated against on the ground of their political affiliation.

The complaints were heard by the Industrial Relations Court, and by its judgment delivered on the 6th November, 1991 that Court found that, because they had been accused of bias in news coverage by prominent members of the Movement for Multiparty Democracy, (the present ruling Government Party - to whom we shall refer hereinafter as the MMD) it had been

proved that the services of the respondents were terminated because of political grounds or their political affiliation and consequently they were entitled, in terms of section 108 of the Industrial and Labour Relations Act, 1993, to be reinstated in their employment. Although it was not a ground of complaint, the Court also found that letters of termination of employment as acting Director General, had not been properly appointed because the Board of Directors, the onoy body having power to appoint a Director General, was not in existence at the relevant time, having been dissolved by the minister. The Court found, therefore, that the appointment was null and void and that this aggravated the circumstances so that orders for reinstatement should be made. It is against those orders that the appellant now appeals.

Mr Chayi, who wrote the letters of termination of service, unfortunately died before the hearing before the Industrial Relations Court, so his reasons for terminating the sevices of the respondents had to be inferred from the surrounding circumstances. In the course of their evidence each respondent said that, just prior to the General Elections and a proposed referendum in the last few months of 1991 there had been numerous complaints from senior members of the MMD that they had been responsible for failing to give the MMD as much news coverage as their opponents the United Independence Party (to whom we shall refer hereinafter as UNIP).

The respondents geve evidence that there had been an incident in which, through no fault of their own, a film clip of MMD activities had no sound recorded because of a failure in the equipment, and there was another occasion when a Mr Kristafor had been interviewed with the intention that five minutes of the interview would be broadcast, but, in view of the fact that Mr Kristafor whated the whole of the interview to be broadcast, in the result none of it was broadcast at all. There was allso evidence that there was a complaint that the swearing in ceremony of the new President was not broadcast live as an Outside Broadcast. These incidents were explained away by the respondents but there was no doubt that the complaints were made about them.

There was evidence that in a newspaper Mr Kristafor had published what he called a "Prayer requests" in which the public were asked to pray on many issues including item 19, "that all media heads be immediately dismissed as they were biased against MMD." In this connection the first respondent's name was specifically mentioned.

There was further evidence that during the election the MMB campaign committee in a press release that in the Zambia National Broadcasting Corporation premises during the election campaign there were posters calling upon people to "Vote K.K., Vote UNIP"., and that the Director General were a large UNIP badge and cap at a televised UNIP rally.

As to the made of dismissal, there was evidence that the letters of dismissal to each respondent had been signed by Mr E Chayi as Acting Director General, and that at the time of Mr Chayi's appointment the board of Directors of the Corporation had been dissolved by the Minister under the powers given to him under section 5 of the Zambia National Broadcasting Corporation Act No. 16 of 1987.

The Industrial Relations Court found that only the Board could appoint the Director General of the Corporation, and, as the Board was not in existence, the appointment of Mr Chayi as Acting Director General by whosoever else was null and void. For this reason the court found that, as the circumstances of the case had been aggravated by the fact that Mr Chayi had no power to terminate the services of the respondents, the court would order reinstatement.

Mr Mwansa on behalf of the appellant said that the question of the validity of Mr chayi's appointment was not pleaded and therefore should not have been adjudicated upon by the Industrial Relations Court, and that, in any event, if the respondents were entitled to damages for improper dismissal on this ground, they were entitled only to three months salary as such damages, and this they had already received.

In reply to this ground of appeal Mr Mutemwa, on behalf of the respondents, argued that the court had dealt with the matter properly and that damages should not be the only remedy for someone who was dismissed from his employment by a person who had no right to take such action.

With regard to this first ground of appeal we are satisfied, as was the Industrial Relations Court, that the question of the validity of Mr Chayi's appointment was full discussed in the court below and it was proper for that court to make a finding on the issue. We agree with the finding that Mr Chayi, not having been properly appointed as Acting Director General, had no power to dismiss the respondents.

We agree, however, with Mr Mwansa that this is a ground of wrongful dismissal which would

entitle the respondents to damages only. We also agree that such damages would amount to three months salary, and this they have already received.

Turning to the question of whether or not the respondents should have been reinstated, Mr Mwansa argued that, as the letters of dismissal did not mention that the respondents were being dismissed because they were members of UNIP, the appellant was within its rights to give three months salary in lieu of notice under the provisions of the contract of service.

Mr Mwansa further argued that the reasons for the termination of employment could not have been the political affiliation of the respondents because one of the respondents had said in his evidence that he was not a member of UNIP. He further pointed out that there was no evidence that other members of UNIP had been dismissed.

Mr Mwansa then argued that, if it were correct that there were other reasons for the dismissal of the respondents, then those reasons were as specifically argued by the respondents themselves, that is to say, that the respondents were dismissed because there were complaints that they had not done their jobs properly by giving equal coverage to all political parties. He pointed out that, under the regulations for a referendum which did not, in the event, take place, there was a specific provision that equal coverage should be given to all parties, and that, in any event, it was the duty of the respondents in their particular work not to favour one party more than another. Mr Mwansa agreed that had the respondents been dismissed simply for being members of UNIP they would be entitled to claim for reinstatement under the terms of the Act. He argued that, although Mr Kristafor was Minister for Information at the time of the dismissal, and, although he was author of the published "Prayer request" calling for dismissal of heads of media, he had said in his evidence that he was not behind the dismissals and that he had no wish for these particular respondents to be dismissed.

Finally Mr Mwansa argued that reinstatement was not appropriate in this case because the posts previously held by the respondents had already been filled. he also argued that the amount awarded as arrears was far too high for a Government institution to be ordered to pay. Full arrears of salary from 23rd December, 1991, the date of the complaint, to the 16th Novembe 1993, the date of the judgment of the court below, would result in sums which the corporation could not afford. Mr Mwansa argued that if this court found in favour of the respondents then the amounts they sould receive should be conpensation in lieu of reinstatement limited to a year's salary in each case.

Mr Phiri argued that there was overwhelming evidence that there were political reasons for the dismissal of the respondents. In answer to Mr Mwansa he said that because the complaints of bias were based on the subject matter of politics it followed that the dismissals were based on the political affiliation of the respondents. He conceded that no other UNIP members of the Corporation were dismissed solely because they were UNIP members, but pointed out that the complaints against the respondents from Mr Kristafor's "Prayer request" clearly showed that he wanted the respondents to be dismissed.

As to the argument that reinstatement would be inappropriate because the posts were filled, Mr Phiri argued that, if the posts were filled, it must have been done in bad faith, becuase, pending the hearing of this action, temporary appointments could have been made.

We have considered the evidence laid before the Industrial Relations court and the arguments presented before us. We take note that there were numerous complaints against the respondents on the grounds that they had been responsible for giving less coverage to one political party than to another during the last general election campaign. We also note that the letters of dismissal were written by Mr Chayi within a few days of his appointment as Acting Director General. We agree with the court below that there was obviously insufficient time for Mr Chayi to have assessed the merits of each of the respondents, and their dismissal could not have been for any other reason than that there were numerous complaints against them by prominent members of the MMD. the only question to be decided then is whether they were dismissed because of their political affiliation within the terms of section 108 of the Industrial and Labour Relations Act, No. 27 of 1993, which was the Act in force and applicable at the time of the judgment of the Industrial Relations Court, and which reads as follows:

108 (1) "No employer shall terminate the services of an employee on grounds of race, sex, marital status, religion, political opinion or affiliation tribal extraction or social status of the employee.

(2) .....

(3) The court shall, if it finds in favour of the complainant

(a) Grant to the complainants damages or compensation for loss of employment

(b) Make an order for reemployment or reinstatement in accordance with the gravity of the circumstances of each case."

As we said in the case of *Ngwira v Zambia National Insurance Brokers Limited* (1), despite a contract of service's having been properly terminated by notice or pay in lieu in accordance with the contract of employment, the Industrial Relations Court may equire into the real cause of the termination of a contract, and, if discrimination which the terms of the section is proved, may make the orders referred to in sub section 3. It follows therefore that in this case, although proper notice was given, the respondents are entitled to the remedies under sub section 3 if their dismissal was tainted by any of the reasons for discrimination referred to in sub section (1).

In considering the purpose of the section so far as it relates to discrimination on grounds of political opinion or affiliation, the proper construction of the intention of this law is that no person who is of a certain political opinion or affiliation shall have his services terminated substantially for that reason. We use the word "substantially" because, of course, there may be many other legitimate reasons for an employer's being entitled to terminate the services of an employee who is a member of a political party and and whose actions may be prompted by his loyalty to that party. It is clear that employers should not be prevented from giving notice, in accordance with contracts of employment, to employees who have given cause for dissatisfaction. We have to consider whether in such circumstances employers are debarred from giving notice to such unsatisfactory employees when they are also persons who must not be discriminated against within the meaning of section 108. it cannot possibly be said that an employer is bound for life to employ an employee just because that employee is a person who must be protected from discrimination by section 108. In such cases it is only when there are no other grounds that could reasonably have been the cause for a dismissal that a court could find that discrimination was the ground for dismissal. As an example of propwer dismissal of an employee in such circumstances we would envisage that, where a number of members of a political party engaged in an illegal strike for the purpose of bringing down the Government, their employer would obviously be entitled to dismiss the illegal strikers despite their political affiliation. the illegal strike would be the cause of the dismissal. Even an employer who is exasperated by an employee's improperly taking unofficial and unreasoballe time off to attend political meetings would be entitled to givennotice under the contract of employment, and would not b prevented from so doing by the fact that the employee is a member of a political party of which he disapproves. Although we have cited examples which would justify dismissal, it must be borne in mind that we are not considering here whether the employer was justified in giving notice, we are only concerned with the question of whether the reasons for giving notice contravene the spirit of section 108. there is no consideration of whether or not the employer in this case was acting unfairly or was unjustified. the question is whether the appellant gave notice to the respondents because they had a certain political opinion or affiliation.

The present case is distinguishable from the cases we have mentioned because in those cases the misconduct of the employees would be likely to lead to dismissal in any event, whatever were the political opinions for the employees. In this case, however, it is clear that, had the opposing party, UNIP, won the election, the respondents would not have been dismissed. This means that the respondents were dismissed not for the substantial reason that they were impartial in their reporting but that they were impartial in favour of UNIP. That is to say because of their political affiliation. In this connection it does not matter whether they were card carrying members of UNIP, or not. The political affiliation was deduced by the appellant from their conduct. It is clear in this case, as found by the Industrial Relations Court, that the respondents were dismissed because the appellant thought they had been impartial in favour of UNIP because of their political affiliation to that party. The appeal on the ground that they were not dismissed because of their political affiliation therefore, fails.

The fact having been established that the respondents were the subject of discrimination, within the terms of section 108 (1) of the Act, it follows that the lower court had power to order reinstatement under subsection (3). The power to order reinstatement is discretionary, and, apart from the gravity of the circumstances, the effect of making such an order should be taken into account. For instance, in a small organisation it would be undesirable to order reinstatement where there was personal antagonism. that consideration has not been shown to apply in this case but other circumstances should be taken into account. We do not think consideration has been shown to apply in this case but other circumstances should be taken into account. We do not consider that this is a case where temporary appointments should have been made to replace the respondents pending this litigation. We are bound to take a realistic view that to dismiss the present employees to make way for the reinstatement of the respondents would be unfair. This is an appropriate case for an order of compensation as damages for the dismissal of the respondents in breach of the statutory provisions. As we said in the case of *Zambia Airways Corporation Limited v Mubanga* (2), it is the duty of a

wrongly dismissed employee to mitigate his loss. this principal applies even when ther is statutory provision for compensation unless such compensation is fixed be law. In this case there was no evidence of mitigation of the loss sustained by the respondents and o evidence to justify the award of arrears of salary; the court must do the best it can to award fair compensation. Taking into account all the circumstances for the case including the conduct of the parties and the fact that any award would be met from public monies, the appropriate compensation payable to each respondent is one year's salary.

For the reasons we have given the appeal is allowed. The order for reinstatement and damages is set aside and is its place we order that each respondent be paid one year's salary at the rate appropriate to the time of termination of his employment less three months salary already paid in lieu of notice. This is an appropriate case to order that each party shall bear its own costs.

Appeal allowed