# EDWARD MWESHI CHILESHE v ZAMBIA CONSOLIDATED COPPER MINES LIMITED (1996) S.J. (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA, CHAILA, MUZYAMBA AND LEWANIKA ,JJ.S.
16TH MAY AND 30TH SEPTEMBER, 1996.
S.C.Z. JUDGMENT NO. 10 OF 1996

**Flynote**
**Labour law - Dismissal - Discrimination - What constitutes.**

**Headnote**
**The appellant appealed from a decision in the Industrial Realtions Court in an action which he had brought on the grounds of his dismissal on grounds of his social status. The Court declined to go into the merits or to make any finding. On appeal the Court was asked to revisit the definition of social status set out in Ngwira v Zambia National Insurance Brokers.**

**Held:**
**(1) The decision in Ngwira had to be qualified in order to permit the Industrial Relations Court the latitude to make findings of fact of any case before it without shutting the door on 'social status' discrimination in advance and in a wholesome manner.**
**(2) There was no need to lay down an exhaustive, exclusive or too categorical on the question of social status. However the attempt to transmute all and any unfairness and all differential A treatment or any kind of discrimination whatsoever into social status discrimination will continue to be pronounced against. The onus will be on litigants to establish the existence of reasonable cause to believe that the termination or other penalty or disdvantage was on account of social status.**

**For the respondent: Mr J K Kaite, Assistant Legal Counsel ZCCM**

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**Judgment**
**NGULUBE, C.J.:** delivered the judgment of the court.

The appellant brought a complaint in the Industrial Relations Court which has a statutory jurisdiction among other things to hear and determine any dispute between any employer and an employee and also jurisdiction to entertain complaints based on discrimination. This latter jurisdiction is based on Section 108 of the Industrial and Labour Relations Act (No. 27 of 1993) which reads:

> *"108 (1) 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.*

*(2) Any employee who had reasonable cause to believe that the employees' services have been*

*terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee had been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the Court:*

> *Provided that the Court may extend the thirty-day period for a further three months after the date on which the complainant had exhaust the administrative channels available to him.*

(*3) The Court shall, if it finds in favour of the complainant:*

*(a) grant to the complainant damages or compensation for loss of employment;*

*(b) make an order for re-employment or reinstatement in accordance with the gravity of the circumstances of each case."*

The appellant's complaint was filed under an equivalent section of the repealed Industrial Relations Act (No. 36 of 1990). He alleged that the respondent summarily dismissed him on the ground of his social status and he based his belief in this on the footing that he was allegedly dismissed for an offence of losing some property belonging to his employers when it was one of his superiors to whom he had delivered it who should have been held responsible for the loss. In the alternative, he alleged that he was dismissed for reporting his immediate boss to the Anti-Corruption Commission over some wrong doing and the dismissal based on alleged loss of property was to conceal the real reason. The respondent's answer was that the appellant was dismissed after several disciplinary steps and hearings for the loss of the property in suspicious circumstances. There was evidence that internal disciplinary hearings took place before various domestic tribunals and authorities, progressing upwards at each stage. There was no suggestion in the evidence of any collusion by the various officers who dealt with each level of disciplinary hearing. Despite all the evidence adduced, the Industrial Relations court specifically declined to go into the merits or to make any findings on the facts and evidence. Instead, the court below held that, because this court had allegedly decided in *Ngwira v Zambia National Insurance Brokers Limited*, (S.C.Z. Judgment No.9 of 1994) "that discrimination on the ground of social status was untenable at the place of work, undertaking or industry," there was no point in delving into the facts and submissions because to do so would not achieve anything.

The first ground of appeal alleged that Ngwira was wrong in its definition of social status and should be reversed. Our attention was drawn to various dictionary definitions of the words 'social', 'society' and 'status'. For example, Mr Kawanambulu drew our attention to the definition of status given by the Oxford Advanced Learner's Dictionary, New Edition, where status was defined as meaning a person's social, legal or professional position or rank in relation to others: and where women were given as an example of people with very little status in many countries. They also give the example of the use of the word in question: 'What is your official status in the company?' Another definition of status was that of a high rank or social position giving the example of the sentence: 'He is very much aware of his status'. Again we were referred to Webster's Dictionary and various other definitions on the words 'social' and 'society'. We have also referred to the Concise Oxford Dictionary where, among other meanings, 'social' is given as living in companies or organised communities or gregarious as opposed to practicing a solitary life. Various other definitions are given. Society itself is defined as a social mode of life, the customs and organisations of an ordered community. The stress is on 'community'. The late Mr. Kawanambulu contended that, in its ordinary and literal meaning, there was nothing in the expression 'social status' when used in legislation dealing with employment to exclude a standing in society attributable to the position held at the place of work. Mr Kaite, of course, supported the decision in Ngwira. After quoting the relevant subsection of section 108, we went on to observe the following in Ngwira:

> *"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 employer's 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."*

To appreciate the decision in Ngwira the facts of that case should not be forgotten. Here was an employee who had done something wrong, seriously wrong and who had no merit on his side on the facts of the case. He was, quite properly in fact, dealt with more harshly than his subordinates. The discrimination alleged was that only he suffered the severest penalty of dismissal and that this was discrimination on the ground of his social status. It was in answer to those facts that this court ruled as already quoted. All too often, cases have come up when employees who have no merits on the facts have alleged discrimination on grounds of social status more or less as a convenient shorthand for any unfair treatment or any kind of indescribable differential treatment. It is these kinds of strained and exotic glosses put on the expression 'social status' that this court has not viewed with favour.

On further reflection, however, and although we fully endorse the holding in Ngwira on its facts, we do have to agree that our observations and sentiments there expressed need to be varied in order not to produce the kind of attitude displayed below in this very case and in order to permit the Industrial Relations Court, as the tribunal of fact, the latitude to make findings on the facts of any given case before it without, as it were shutting the door on 'social status' discrimination in advance and in a wholesale manner. We fully endorse the cardinal rule of construction of statutory interpretation (see for example *Miyanda v Handahu S.C.Z. Judgment* No. 6 of 1994) that the intention of the legislature (e.g. in providing for social status discrimination in employment) is to be ascertained by taking the words in their natural, literal and usual sense. It follows that Ngwira has to be modified and varied so as not to be or to give the impression of being exhaustive, exclusive or too categorical on the question of social status and the relationship with the place of work. On reflection we find that there was no need to attempt to lay down an exhaustive guideline. Doubts arose whether there could ever be social status discrimination. It is no objection to the provision that examples of such discrimination do not readily spring to mind. However, the attempt to transmute all and any unfairness and all differential treatment or any kind of discrimination whatsoever into social status discrimination will of course continue to be pronounced against. The onus will be on litigants to establish and to demonstrate the existence of reasonable cause to believe that the termination or other penalty or disadvantage was on account of social status. A point needs to be made - and stressed - regarding the discrimination cases: In effect, the rule against discrimination on at least one of the grounds listed in the statute was clearly intended to guard against unwarranted victimisation or inexcusable unfairness. The liability of the employer and the entitlement of the employee to a judgment in his or her favour must necessarily depend on the absence of reasonable or just cause, where despite any colourable excuse cited or contractual clause cited, the real, substantial, dominant, or operative reason is the discrimination on one of the grounds. The rule could not have been designed to benefit or to protect workers who are guilty of wrong doing in fact which is sufficient to warrant the termination, penalty or disadvantage inflicted. The substantial justice which the statute calls upon the Industrial Relations court to dispense should endure for the benefit of both sides.

As previously noted, no proper adjudication took place in this case where the court felt there was no point to consider the claim based on social status discrimination. Again as already noted, the court has a general jurisdiction as well as a particular one based on Section 108. It should have made findings and a decision on the question of liability and if necessary on the issue of the remedy as well. It should have resolved any issues of credibility arising from hearing the witnesses on both sides. In the absence of any determination by the court below, we cannot say whether or not the court would have found that there was social status discrimination of the supportable and legitimate kind as we have endeavoured to point out and explain. We can even say whether or not the court would have found, under the general jurisdiction, any ground for condemning the employer in damages or other award. Both counsel quite properly indicated that the best course would be to order a re-trial.

In sum, the appeal on the first ground succeeds to the extent that we have accepted the desirability or modifying or varying our decision in Ngwira in the manner already indicated. We order that the case be re-tried before another panel in the Industrial Relations Court. There will be no order for costs in this appeal.

Retrial ordered.

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