ZAMBIA CONSOLIDATED COPPER MINES LIMITED AND JAMES MATALE

(1996) S.J. (S.C.)

SUPREME COURT
NGULUBE ,C.J., SAKALA,CHAILA, MUZYAMBA AND LEWANIKA, JJ.S.
17TH MAY AND30TH SEPTEMBER, 1996.
S.C.Z. JUDGMENT NO. 9 OF 1996

Flynote

Labour law - Dismissal - Jurisdiction of Industrial Relations Court - Nothing to stop the Court from delving behind or into the reasons given for termination in order to redress any real injustices discovered.

Headnote

In an appeal against a decision of the Industrial Relations Court which had held that the respondent's services had been wrongly terminated the Court had occasion to remark on the jurisdiction of the Industrial Relations Court to the following effect:

(1) The Industrial Relations Court has a general jurisdiction and should be able to award compensation or damages and any other suitable award. It would not be able routinely to award reinstatement if the case was not caught by the 'discrimination' provisions under which, in any case, reinstatement was not automatic either.

(2) There was nothing in the Industrial and Labour Relations Act 27 of 1993 to stop the Labour Relations Court from delving into or behind reasons given for termination in order to redress any real injustices discovered. In the instant case the Court upheld the decision of the Industrial Relations Court and dismissed the appeal.

Held:

(i) The Industrial Relations Court would have been justified to find for the complainant not on the fictitious basis of discrimination on the ground of social status, but under its general jurisdiction contained in Section 85 on the ground of a wrongful and most unwarranted termination

For the appellants: C.L. Mundia, of Mundia, Kakoma and Company
For the respondent: M.F.Sikatana of Veritas Chambers

Judgment

NGULUBE, C.J.: delivered the judgment in Court.

This is an appeal against the decision of the Industrial Relations Court which found in favour of the employee on his complaint brought under Section 129 (2) of the Industrial Relations Act, No. 36 of 1990 which has since been repealed. The corresponding section in the current Industrial and Labour Relations Act, 1993 (No. 27 of 1993) is Section 108 which reads:

"*(1) No employer shall terminate the services of an employee or impose any other enalty 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 has reasonable cause to believe that the employee's 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 has 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 has exhausted 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 cause of action as endorsed on the complaint form was that "the complainant's contract was unfairly terminated having regard to the fact that the complainant (had) served the respondent for 15 years".

There was evidence from the complainant that his contract which was aligned to permanent and pensionable tenure was summarily terminated under a clause providing for notice or payment in lieu and that the only explanation he had was that his supervisor (who gave evidence as RW1) had warned him that the conglomerate's Chief Executive was not comfortable working with him. The complainant testified that although he was employed by the Chief Executive, he was fired by RW1.

The complainant stated in evidence that:

"*I feel I was discriminated against, could be on tribe, or on social status since I was singled out.*"

Again under cross-examination he said:

"*I feel I was discriminated against. I am not sure as to what basis. I was unfairly treated, it is the same as being discriminated. My dismissal is null and void as I was unfairly treated.*"

RW1 had testified that although the notice clause was invoked in an effort to be considerate, the real cause of the termination was that the complainant was considered to be guilty of insubordination for wrongfully refusing to accompany one of his seniors who had business to discuss at the Ministry of Mines and which was within the complainant's area of responsibility. The Industrial Relations Court made a finding that the wrong person (RW1) terminated the complainant's employment. The court further found that since the aggrieved senior official who was alleged to have gone to the Ministry of mines was not called to testify, the court would assume that the complainant had committed no offence warranting the termination of his employment.

The Court also found that RW1 had not followed the rules of natural justice and the company's disciplinary procedures when he did not charge the complainant or offer him any hearing or opportunity to exculpate himself. The court then concluded in the following terms:

"*There being no justification for the termination coupled with the departure from the disciplinary procedure we find no other reason for the termination but that the complainant's employment was terminated because of discrimination and the reason given to him by RW1 that the Chief Executive did not feel comfortable to work with him. We do not find or accept RW1's evidence that he did not bring in the Chief Executive convincing. In fact his evidence, for example, that the offence the complainant committed was serious and warranted dismissal was not supported by any independent evidence. We expected him to produce the disciplinary code to support that evidence.*

In light of the foregoing, we have found that the complainant has proved on a balance of probabilities that he was discriminated on the basis of his social status."

The question arises in this appeal whether the Court came to the right conclusion or if we should interfere as proposed by Counsel for the appellants. The first ground of appeal attacked the finding that the employee had been discriminated against on the basis of his social status. Mr. Mundia drew our attention to the evidence which we have earlier on recited and which was, to put it mildly, quite vague and quite inadequate to establish the discrimination alleged. We bear in mind that parties can only appeal to this Court on a point of law or any point of mixed law and fact (See Section 97). The finding of discrimination was undoubtedly a finding of fact and in this regard, the question arises whether a finding of fact can be a question of law. There is ample precedent for answering this question in the affirmative. In dealing with a similar problem under the criminal law where the D.P.P. has a similarly restricted right of appeal, we said in *D.P.P. v Bwalya Ng'andu and Others* S.C.Z. Judgment No. 50 of 1975, that a finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view of the facts which cannot reasonably be entertained. We cite also the case of *D.P.P. v Chibwe* S.C.Z. Judgment No. 54 of 1975, which illustrated this principle and where the ground of appeal accepted as raising a question of law was that on the facts as found or construed in their most favourable light from the accused respondent's point of view, the accused as a matter of law was guilty. The finding of social status discrimination in this case was clearly one not supported by the evidence or at the very least it was one which was made on a view of the facts which cannot reasonably be entertained. In the case of *Chileshe v ZCCM* Appeal No.9 of 1996 (which was heard almost at the same time and the judgment in which will have been delivered just before this one) we have dealt with the question of social status. We have revisited our decision in *Ngwira v Zambia National Insurance Brokers* S.C.Z. Judgment No. 9 of 1994 and we have modified our construction of social status so as not to be exhaustive, exclusive or too categorical on the question on the question of social status and the place of work. We heard similar arguments for and against *Ngwira* in this case as we did in the *Chileshe* case. We adopt all that we said on the point in the latter case.

This case was yet another example of a litigant and the Industrial Relations Court attempting to redress an unfair or unjust termination by doing violence to the language of the section concerned. Social status is not synonymous with all and any unfair treatment. In our considered opinion, the Court below has not been fair to itself by adopting an unnecessarily restricted view of its own jurisdiction, giving the impression that unjustifiable, unwarranted, wrongful and unfair dismissals or terminations cannot be redressed other than by a fiction of labeling everything as social status discrimination. Let it be stressed that in disagreeing with Mr. Mundia and accepting Mr. Sikatana's submission on this, we hold the view that the Industrial Relations Court has a general jurisdiction - as we will demonstrate - and should be able to award compensation or damages, which are the universal remedy, and any other suitable awards. Of course, they will not be able to routinely award reinstatement if the case is not caught by the "discrimination" provisions under which, in any case, reinstatement is not to be automatic either.

The general jurisdiction of the Industrial Relations Court and the expansive extent of it is manifest in Section 85 under various subsections which cumulatively, confer a sufficient jurisdiction unrestrained by technicalities under which real justice can be dispensed. Subsection 4 of Section 85 for example confers jurisdiction to hear any dispute between employers and employees even if not connected with group rights or grievances. The subsection reads:

> "*The Court shall have the jurisdiction to hear and determine any dispute between any employer and an employee and an notwithstanding that such dispute is not connected with a collective agreement or other trade union matter.*"

There is nothing in the language of this subsection to suggest that certain genuine complaints of any particular kind or category may not be litigated, such as wrongful, unjust or unfair dismissal. The mandate in subsection 5 which required that substantial justice be done does not in any way suggest that the Industrial Relations Court should fetter itself with any technicalities or rules. In the process of doing substantial justice, there is nothing in the Act to stop the Industrial relations Court from delving behind or into reasons given for termination in order to redress any real injustices discovered; such as the termination on notice or payment in lieu of pensionable employment in a parastatal on a supervisor's whim without any rational reason at all, as in this case.

This brings us to consider us to consider the submissions and arguments which were advanced under the second ground of appeal which concerned the amount of damages. Some of these suggested that a man in the complainant's position which was equivalent to a General Manager in perhaps the largest and most impersonal of the parastatals in Zambia should be regarded as having been in the relationship of master and servant which could be terminated for good or bad cause or for none at all. The old fashioned language of master and servant is out of place in many of the employment situations nowadays; certainly in the large conglomerates or public companies. In many cases, the terms governing the employment indicate that there is a right to natural justice and a right not to be thrown out of work except on some rational grounds, some explicable basis which is reasonable in the circumstances.

In the instant case, the Industrial Relations Court found, in effect, that for a variety of reasons there was a wrongful and unwarranted termination since the wrong authority terminated the employment; and because there was no offence committed by the complainant; and that the rules of natural justice and the disciplinary code had not been followed. We have no doubt that on these finding, the Industrial Relations Court would have been justified to find for the complainant not on the fictitious basis of discrimination on the ground of social status, but under its general jurisdiction contained in Section 85 on the ground of a wrongful and most unwarranted termination. The normal measure of damages at Common Law is ousted by the requirement to do substantial justice.

The monetary award actually made, without any element of notional reinstatement, has to be examined to see if there are grounds for interfering with the resultant size of award. The Industrial Relations Court had ordered as follows:

> "
> *In the circumstances we would order that;*
>
> *(a) He be deemed to have been reinstated and paid his salary arrears as follows:*
>
> *(i) from 18th February 1992 to the date when he was employed as Director of the Zambia Privatisation Agency, his full salary and any allowances*

he was entitled to; and

(ii) from the date he became Director of Zambia Privatisation Agency to date of judgment, the difference between the salary he used to get and his present salary, if the salary and allowance he used to get were more than his present salary.

(b) He should be deemed to have retired with full benefits. The arrears in (a) above should be with interest at the current Bank lending interest. We order that the Respondents should bear the costs of these proceedings."

While altering and varying the decision below from a judgment for the complainant on a fiction of discrimination already discussed to one based on the general jurisdiction conferred by the provisions of Section 85 as discussed, we do not find anything in the computation of the award made (in the terms quoted) which results in any sum which deserves interference from us. Mr. Mundia had argued quite wrongly, that the order that the complainant be deemed to have retired with full benefits meant he must be paid for all the years up to the normal retiring age. The order meant no such thing. As Mr Sikatana pointed out, it is not unusual to find early retirements in various organisations. The complainant should be treated as having taken early retirement at the insistance of the employer.

We can find no justification to interfere with the quantum awarded. The net result is that we have simply altered the basis of the judgment which still remains a judgment in favour of the complainant, the respondent to this appeal. In the premises, it is only fair that there should be no order for costs in this Court. Effectively, the appeal is dismissed.

Appeal dismissed
