

NATIONAL BREWERIES LIMITED v PHILLIP MWENYA.

Supreme Court.

Lewanika, D.C.J., Sakala and Mambilima J.J.S.

7th february, 2002 and 30th september, 2002.

(SCZ Judgment No. 28 of 2002).

Flynote

Employment – Dismissal – Non-Compliance with procedure stipulated in contract – Effect of.

Headnote

This is an appeal from the decision of the Industrial Relations Court holding that the respondent was unfairly dismissed and deemed him to have been retired from the date of his dismissal. The Court ordered that the respondent be paid his benefits in accordance with his retirement package and that the said benefits would attract interest at the Bank of Zambia lending rate from the date of Judgment. The appellant appealed against the decision of the court.

Held;

- (i) Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity
- (ii) Having been properly dismissed, the respondent cannot be deemed to have been retired and he is not entitled to any retirement benefits.

Cases referred to:

- (1) *Zambia National Provident Fund v Chirwa* 1986 Z.R. 70
- (2) *Mulungushi Investments Limited v Mambwa* SCZ Appeal No. 141 of 1997
- (3) *Ward v Bradford Corporation* 1971 70 L.G. 27
- (4) *Zambia Airways Corporation Limited v Mubanga* (1990-1992) Z.R. 149
- (5) *Zambia Sugar PLC v Gumboh* Appeal Number 91 of 1996
- (6) *Copperbelt Bottling Company Limited v Fombe* SCZ Appeal number 37 of 1996
- (7) *Mubunga vs. Zambia Tanzania Road Services Limited* (1978) Z.R. 43.
- (8) *Contract Haulage Limited v Kamayoyo* 1982 Z.R. 13.

F. M. Chalenga of Ezugha Musonda and Company for the appellant

I.C. Ng'onga of I.C. Ng'onga and Company for the appellant.

Judgment

MAMBILIMA, J.S., delivered the Judgment of the Court:

This is an appeal from the decision of the Industrial Relations Court holding that the respondent was unfairly dismissed and deemed him to have been retired from the date of dismissal. The Court ordered that the respondent be paid his benefits in accordance with his retirement package and that the said benefits would attract interest at the Bank of Zambia lending rate from the date of judgment.

Before the lower court, the respondent had sought an Order that the termination of his employment was unfairly done and unlawful; payment of salaries accrued from the date of his dismissal; damages and all retirement benefits. The evidence, which was before the court was that the respondent was in the employment of the respondent as a Driver/Salesman. Before that, he worked for Supa Baking Company Limited in the same capacity since 1980 enjoying ZIMCO conditions of service. Supa Baking Company Limited and the appellant were in the Indeco Group of Companies. The respondent was transferred to the appellant's company in the same capacity. On 29th March, 1997, the respondent was selling beer in the plant while being assisted by his lorry mate, a Mr. Kabwe. The respondents responsibility was to issue receipts to customers while the lorry mate's responsibility was to pump beer into drums. On the date in question, the respondent issued a receipt for five drums to a customer but the lorry mate pumped six drums of beer instead. The respondent told the lower court that he was not aware of this mistake until the Acting Brewery Manager and the Auditor inquired from him. The money for the cost of sixth drum of beer was later brought by the lorry mate and consequently the appellant company did not suffer any loss.

The respondent was charged for the offence of negligence by the Acting Brewery Manager. He appeared before the Disciplinary Committee, which was also attended by the Brewery Manager and the Personnel Manager. The respondent was dismissed on 24th May, 1997, for dishonest conduct and negligence of duty. He contended before the lower court that he was unfairly treated because under his conditions of service, he ought to have been warned because this was his first offence. It was on record however that whilst working for Supa Banking Company, the respondent had been placed on a final warning on a charge of negligence of duty and failing to obey lawful instructions.

The appellant denied that the respondent's dismissal from the employment was unfair contending that the respondent was properly and lawfully dismissed from his employment after it had been established that he had acted negligently for failing to properly or correctly invoice a customer. He was charged with the offence of negligence and a case hearing was conducted at which he was granted an opportunity to make representations. The respondent further exercised his right of appeal to the General Manager.

The appellant's witness who was its Human Recourses Manager, narrated to the Court the procedure involved in the appellant's disciplinary process. This witness testified that the respondent was handled according to the applicable disciplinary procedure.

The court below, after evaluating the evidence which was before it, found that the respondent had been charged for the offence of negligence by the Acting Brewery Manager who was the senior most person at the Brewer, in Lusaka. The same Brewery Manager suspended the respondent and chaired a Disciplinary Committee which heard the respondent's case. He also attended the appeal hearing as Secretary. The Court below found that the case of negligence of duty had been established against the respondent. The Court however disregarded the respondent's previous warnings and regarded him as a first offender. The reasons for this finding is given on page J6 of the judgment where the Court observed:

“Ordinarily, the punishment of warning should have been followed by another warning because there is a standard practice after a period of six months has elapsed, you do not refer to any warning which elapsed. So, the sanction used was inappropriate.”

The Court also found that the chairing of the Disciplinary Committee hearing by the Acting Brewery Manager who also authored the letter of dismissal and the participation of the Brewery Manager as Secretary at the hearing of the respondent’s appeal was inappropriate and a breach of the rules of natural justice. On this basis, the Court found that the respondent had been unfairly dismissed and ordered that he be deemed to have been retired from the date of his dismissal and that he be paid his benefits in accordance with his retirement package.

The appellants has submitted two grounds of appeal. Namely that the Court below misdirected itself in law and in fact in finding that the disciplinary procedure was not properly followed and that there was a breach of the rules of natural justice and therefore that the respondent was unfairly dismissed; and secondly that the court below misdirected itself in law and in fact in holding that the respondent was entitled to be paid his benefits in accordance with his retirement package with interest.

Mr. Chalenga in support of the first ground of appeal, submitted that the Court below in arriving at its conclusion was heavily influenced by the appearance of the acting Brewery Manager in disciplinary hearings conducted in respect of the respondent. He referred us to portions of the Judgment of the Court below in which the Court alluded to the fact that the acting Brewery Manager suspended the respondent and then went on to chair the disciplinary Committee which heard the respondent’s case and later served as Secretary at the hearing of the respondent’s appeal. He goes on to state that based on this evidence, the Court below concluded that the procedure was not followed and that there was a breach of the rules of natural justice. Mr. Chalenga submitted further that the evidence on record is overwhelming and creates no doubt that the respondent was not an innocent employee. He had a string of disciplinary offences. On the finding by the Court that previous warning had elapsed, Mr. Chalenga points out that there was no express provision in the conditions of service that a warning could elapse.

Having found that the respondent was negligent, the Court should not have concentrated on the appearance of the Acting Brewery Manager in the disciplinary hearings. For these submissions, Mr. Chalenga has referred us to the case of *Zambia National Provident Fund v Y.N Chirwa (1)* in which we held that where it is not in dispute that the employee has committed an offence for which appropriate punishment is dismissal and he is also dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that a dismissal is a nullity. He has also referred us to the case of *Mulungushi Investments Limited v Gradwell Mafumba (2)* in which we held that once a Court finds that a dismissal is on the facts justified, the respondent was not entitled to damages.

Mr. Chalenga has also referred us to the statement by Lord Denning in the case of *Ward v Bradford Corporation (3)* when he stated that “we must not force disciplinary bodies to become instrumented in nets of legal procedure. So long as they act fairly and justly, their decision should be supported” and submits that employer disciplinary bodies should not be made to follow legal the appellant acted fairly and justly in dealing with the respondent’s case.

On the second ground of appeal, Mr. Chalenga referred us to case of *Zambia Airways Corporation Limited v Gershom Mubanga (4)* where we awarded damages equivalent to 12

months salary in place of reinstatement. He also referred us to the case of *Copperbelt Bottling company Limited v Phineas Fombe (6)* in which we held that where there is nothing extraordinary that would take a case out of the Kamayoyo, damages would be the usual salary for the notice period. Mr. Chalenga submitted that there is nothing extra-ordinary in this case which takes it out of the Kamayoyo case. If the Court were to award damages, the notice period would suffice.

In reply, Mr. Ng'onga for the respondent submitted that the Court below was on firm ground when it found that the disciplinary procedure was not followed and that there was a breach of the rules of natural justice leading to the conclusion that the respondent was unfairly dismissed. He points out that contrary to the ZIMCO Disciplinary and Grievance Procedure Code which governs the respondent's employment, the respondent was not charged and suspended by his Supervisor or Head of Department, but by the acting Brewery Manager who was in fact the most senior person at the appellant's Lusaka Plant. This is the same person who wrote the letter of suspension and went ahead to chair the Disciplinary Committee hearing and later wrote the respondent the letter of dismissal. Relying on the case of *Zambia Airways Corporation v Gershom Mubanga (4)*, Mr. Ng'onga submits that a purported dismissal was unlawful due to non compliance with the correct disciplinary procedure. He referred us to the case of *Zambia Sugar PLC v W. Gumbo (6)* in which this Court observed that parties were bound by the terms of their agreement freely entered into unless fraud is proved. Mr. Ng'onga also referred the court to the letter of dismissal in which the acting Breweries Manager stated that the respondent's action was "tantamount" to negligence of duty and dishonest conduct. He submitted that the respondent was not asked to answer to the second charge of dishonest conduct. Mr. Ng'onga went on to state that in this respect, the disciplinary code was not followed. He also pointed out that on the charge of negligence, there was no third beach to warrant dismissal. He however conceded that in the Disciplinary Code, there is no provision for a warning to lapse.

On the second ground of appeal, Mr. Ng'onga submitted that the trial Court in awarding the respondent his retirement benefits took into account the respondent's services and his age at the time of the purported dismissal. He pointed out that the respondent had served 17 years and 9 months and he was aged 52 years which was close to the retirement age of 55. He went on to state that the Court has a latitude to award damages according to what it deemed fit. He referred us to our decision in the case of *Rainward Mubanga v Zambia Tanzania Road Services Limited ()* where we held that:

"Whilst at common law a contract of personal service will not be the subject of an order for specific performance.....any purported termination of employment in breach of the regulations is ineffective. The results of the ineffectuality is a matter for trial Court to decide." Mr. Ng'onga argues that the appeal should fail on both grounds.

We have considered the issues raised and the submissions by Counsel. It is common cause that the respondent was employed by the Indeco Group of Companies in 1980 beginning at Supa Banking Company and was later transferred to the appellant from where he was dismissed. It is common cause that his dismissal was sparked by the events of 29th March, 1997, when the respondent under invoiced a customer who had bought beer by one drum. It is on record that the respondent admitted that he should have checked and on this omission, the Court below found that the act of negligence had been established.

The testimony by the respondent in the Court below shows that he was on a final warning. The Court however was of the view that the previous warnings had lapsed, having been given more than six months earlier. We have been unable to find the basis on which the Court below treated the previous warning as having lapsed. As pointed out by Mr. Chalenga and properly conceded to by Mr. Ng'onga, there is no provision in the Conditions of Service which provides for the lapse of warnings.

The Court below found that the rules of natural justice had been breached in that the acting Brewery Manager, who was not the respondent's immediate supervisor charged the respondent and later chaired the disciplinary hearing. He later served as Secretary at the hearing of the appeal. Indeed these facts show that the acting manager was both the accuser and the Judge.

In our view, however, the act of wrongdoing was established. The respondent admitted to having been on a final warning and the offence in question is one for which the respondent could be dismissed. As we held in the case of *Zambia National Provident Fund v Y.N Chirwa (1)* where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure, in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity. We uphold the first ground of appeal and find that on the facts of this case, the Court below misdirected itself in law and in fact to have found that the respondent was unfairly dismissed when negligence on his part was established.

Having upheld the respondent's dismissal, it follows therefore that the second ground of appeal should be allowed. He has been properly dismissed, the respondent cannot be deemed to have been retired and he is not entitled to any retirement benefits. We set aside the order awarding the respondent benefits in accordance with his retirement package.

We award costs to the appellant to be taxed in default of agreement.

Appeal allowed.