ZINKA v THE ATTORNEY-GENERAL (1990 - 1992) Z.R. 73 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., GARDNER, CHAILA AND CHIRWA, JJ.S.
29TH AUGUST, 1989 AND 5TH JULY, 1991
(S.C.Z. JUDGMENT NO. 9 OF1991)

Flynote

Administrative law - Regulations promulgated under incorrect legislation - Same power could be exercised under another statutory provision - Action not invalid.
Administrative law - Principles of natural justice - Rebuttable presumption that *audi alteram partem* rule applies where fundamental right affected - Rule not applicable where obvious from legislation that it does not apply in particular circumstances.
p74

Headnote

The appellant had been a licence holder whose licence had been revoked in terms of regulations promulgated by the President in terms of the Emergency Powers Act, Cap. 108. It had been a mandatory requirement for the regulations to be passed that a proclamation in terms of art. 30(1)(a) of the Constitution declaring a state of emergency be issued. The appellant had not been given a hearing before his licence was revoked.

Held:

(1) That the reference to the Emergency Powers Act had been wrong. However, the President could lawfully have exercised the same power under another statutory provision. In the circumstances, as the power he had exercised had been traceable to a legitimate source, the fact that he purportedly exercised that power under a wrong source did not invalidate his action.
(2) Further, that where there was no express statutory provision to exclude the *audi alteram partem* rule and a power was being used to limit or remove a fundamental right there was a rebuttable presumption that it was necessary to give prior notice and an opporunity to be heard.
(3) further, that where the relevant legislation derogated significant fundamental rights in particular circumstances the principles of natural justice would not apply where a power was properly exercised under those circumstances.

Cases referred to:

(1) P. R. Naidu v State of Uttar Pradesh A.I.R. [1977] S.C. 854.
(2) J. K. Steel Ltd v Union of India A.I.R .[1970] S.C. 1173.
(3) Hukum Chad Mills v State of Madhya Pradesh A.I.R.[1964] S.C. 1329.
(4) Afzal Ullar v State of Uttar Pradesh A.I.R. [1964] S.C. 263.
(5) Shamwana v Attorney-General (1981) Z.R. 261.
(6) Nkaka Chisanga Puta v Attorney-General (1983) Z.R. 114.
(7) Mario Satumbu Malyo v Attorney-General (1988-89) Z.R. 36.
(8) R. v Chancellor of the University of Cambridge (1723) 1 Str. 557.
(9) R. v Governor of Brixton Prison ex parte Soblen [1963] 2 Q.B. 243.
(10) Schidt v Secretary of State for Home Affairs [1969] 2 Ch. 149; [1969] 1 All E.R. 904.
(11) General Medical Council v Spackman [1943] A.C. 627.

For the appellant: H. Chama, Mwanawasa and Co.
For the respondent: M.P. Mvunga, Solicitor-General and G S Phiri, Director of Public Prosecutions.

Judgment

SILUNGWE, C.J.: delivered the judgment of the Court.

This is an appeal against a decision of the High Court dismissing the appellant's petition under art. 29 of the Constitution. The clauses of the article relevant to this appeal are in these terms:

> ''29(1) Subject to the provisions of clause (6), if any person alleges that any of the provisions of arts. 13 to 27 (inclusive) had been or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.''
>
> ''(2) The High Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by any person in pursuance of clause (1);
> (b) and may, subject to the provisions of clause (8), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of arts. 13 to 27 (inclusive).''

p75

Articles 13 to 27 (like arts. 28 to 31) fall under Part III of the Constitution and relate to the 'Protection of Fundamental Rights and Freedoms of the Individual'.

The facts of the case may be shortly stated. On 19th February, 1988, the President promulgated the Emergency (Essential Supplies and Services) Regulations under s. 3 of the Emergency Powers Act, Cap. 108 of the Laws of Zambia and received the approval of the National Assembly immediately before they came into force. The Regulations provide, *inter alia* (*vide* regulation 4(1)), that 'any property or undertaking, other than land' belonging to any person or company whose licence has been revoked by the President under the Trades Licensing Act, Cap. 707, may be acquired or taken possession of, or control over, by the Republic.

On the following day - 20th February - the President made Statutory Instrument No. 39 of 1988 under s. 24 of the Trades licensing Act: this was the Trades Licensing (Revocation) Order, 1988, under which a number of licences held (in many parts of the Republic) by named companies and individuals, including the appellant, were revoked.

During the night of the said 20th February, about seven Zambia Police Officers, led by Chief Inspector Mwango of Mufulira Central Police Station, awakened the appellant who permitted them (on request) to search his house and two shops, one of which was in Mufulira town centre and the other at Mokambo, on the border between Zambia and Zaire. The police officers said that they were looking for essential commodities, mandrax, cocaine and foreign currency. However, nothing relevant was found in the appellant's house or in either of his two shops; but an inventory of commodities found in the Mokambo shop was made.

On 21st February, the appellant surrendered his shop keys at the behest of the Zambia police officers and members of the Special Branch in the Office of the President.

On 4th March, the appellant brought a petition before the High Court against the respondent but, on being heard, the petition was dismissed, hence the appeal to this Court.

Mr *Chama*, learned counsel for the appellant, advanced six grounds of appeal which we shall now consider. In this first ground of appeal, Mr *Chama* argued that the learned trial judge had erred in holding that the Emergency (Essential Supplies and Services) Regulations, 1988, contained in Statutory Instrument No. 38 of 1988, were lawful. The essence of his submission was that the Emergency (Essential Supplies and Services) Regulations made under s. 3 of the Emergency Powers Act were unlawful and unconstitutional for the reason that the President had not all issued a proclamation declaring that a state of public emergency existed under art. 30(1)(a) of the Constitution as the said proclamation was a mandatory requirement.

Professor *Mvunga*, the learned Solicitor-General, conceded that there was no specific proclamation under art. 30(1)(a) of the Constitution. He argued, however, that the provision of s. 20(7) of the Interpretation and General Provisions Act, Cap. 2 of the laws of Zambia and the Indian cases *P. R. Naidu v State of Uttar Pradesh* [1]; *J. K. Steel Ltd v Union of India* [2]; *Hukum Chand Mills v State of Madhya Pradesh* [3] and *Afzal Ulla v State of*

U.P. [4] were authorities to justify the President's exercise of his powers under the law as the Emergency (Essential Supplies and Services) Regulations contained in Statutory Instrument No. 38 of 1988 and purportedly made under s. 3(1) of the Emergency Powers Act could lawfully have been made under s. 3(2) of the Preservation of Public Security Act, Cap. 106 of the laws. We shall return to Professor *Mvunga's* authorities in a moment.

Let us now look at some constitution and other statutory provisions germane to the matter at issue. Article 30(1) of the Constitution provides that :

> ''30(1) The President may at any time by proclamation published in the Gazette declare that :
>
> (a) a state of public emergency exists; or
> (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.''

There are here to two distinct types of emergencies envisaged in art. 30(1) of the Constitution, namely, an actual public emergency under clause (1)(a); and a threatened public emergency under clause (1)(b).

On the one hand, the relevant parts of s. 2 and 3 of the Emergency Powers Act state that :

> ''2. In this Act, unless the context otherwise requires :
> 'emergency proclamation' means a proclamation under the Constitution declaring that a state of public emergency exists.''
> ''3(1) Whenever an emergency proclamation is in force the President may, by statutory instrument, make such regulations as appear to him to benecessary

or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.''

On the other hand, s. 3(1) of the Preservation of Public Security Act is in these terms:

''3(1) The provisions of this section shall have effect during any period when a declaration made under para. (b) of ss. (1) of s. 29 (now para. (b) of art. 30(1)) of the Constitution has effect.''

(Words in brackets appearing in the quotation are ours.) Subsection (2) will be referred to hereinafter.

It is abundantly clear that the Emergency Powers Act and Regulations made thereunder can be invoked only when a proclamation declamation declaring that an actual public emergency exists under art. 30(1)(a) of the Constitution. Similarly, the Preservation of Public Security Act and Regulations made thereunder can be invoked only when a declaration of a threatened public emergency exists under art. 30(1)(b) of the Constitution. In other words, each type of emergency under discussion requires its own specific proclamation as a condition precedent.

The proclamation and its history so extensively discussed in such cases as *Shamwana v Attorney-General* [5], *Nkaka Chisanga Puta v Attorney-General* [6], and *Mario Satumbu Malyo v Attorney-General* [7] relates solely to art. 30(1)(b) of the Constitution. We would like to underline the fact that this is the only proclamation that have so far been made in Zambia in terms of arts. 30(1) of the Constitution and that all Constitution cases that

p77

have arisen under emergency legislation pertaining to the public security have been decided on the basis of the said proclamation.

As there is no proclamation declaring that a state of public emergency exists in this country under arts. 30(1)(a) of the Constitution, it follows that the President could not have validly promulgated the Emergency (Essential Supplies and Services) Regulations. There can thus be no doubt that the President's reference to the Emergency Powers Act was wrong.

The question that must now be asked is whether the President's wrong reference to the Emergency Powers Act vitiated the exercise of his power in this case. This brings us back to Prof *Mvunga's* submission already alluded to.

Section 20(7) of the interpretation and General Provisions Act states that :

''20(7) Every statutory instrument shall be made under all powers thereunto enabling, whether or not it purports to be made in exercise of a particular power or particular powers.''

Our understanding of ss. (7) aforesaid is that every statutory instrument shall be deemed to be made under an existing enabling power and that it is immaterial that the said statutory instrument purports to be made in exercise of a particular power or powers. In other words, if a power exists and its exercise can be traced to a legitimate source, then the fact that such

power is incorrectly or erroneously exercised under a wrong source or power will not vitiate the exercise of the power in question. That this is so is reinforced by a number of Indian authorities referred to by Prof *Mvunga*. For instance, it was held in *P. R. Naidu v State of Uttar Pradesh* [1] (in para. 18 at page. 358):

> ''This Court has taken the view that a wrong reference to power will not vitiate any action if it can be justified under some other power under which the Government can lawfully do the act.''

In *J. K. Steel Ltd v Union of India* [2] (para. 45 at page. 1188), the Supreme Court of India had this to say:

> ''There is no dispute that the officer who made the demand was competent to make the demand both under rule 9(2) as well as under rule 10. If the exercise of a power can be traced to a legitimate source the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question.''

In another case, namely, *Hukum Chand Mill v State of Madhya Pradesh* [3] (in para. 4 at page. 1332) the Supreme Court of India came to this conclusion:

> ''It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would not *per se* vitiate the actions done if can be justified under some other power under which the Government could lawfully do these acts. It is quite clear that the Government had the power under s. 5(1) and (3) of Act. 1 of 1948 to amend the tax rules for that was a law in force in one of the merged states. The mistake that the Government made was that in the opening part of the notification s.5 of the Act was not referred to and the notification did not specify that the Government was making a regulation under Act. 1 of 1948. It is not disputed that the

p78

> amendments could be validly made under s. 5 of Act. 1 of 1948. We are therefore of the opinion that the mere mistake in reciting the wrong source of power does not affect the validity of the demand.''

And in *Afzal Ullah v State of U.P.* [4] (in para. 14 at page. 268) the Supreme Court said:

> ''It is true that the preamble to the by-laws refers to clauses (a), (b) and (c) and J(d) of s. 298 and these clauses undoubtedly are inapplicable, but once it is shown that the impugned by-laws are within the competence of respondent No. 2 the fact that the preamble to the by-laws mentions clauses which are not relevant would not affect the validity of the by-laws. The validity of the by-laws must be tested by reference to the question as to whether the Board had the power to make those laws. If the power is otherwise established, the fact that the source of power has been incorrectly or inaccurately indicated in the preamble to the by-laws would not make the laws invalid.''

In this particular case under consideration, the relevant paragraphs of s. 3(2) of the Preservation of Public Security Act are as follows:

''3(2) The President may, for the reservation of public security, by regulation -
(c) make provision for the prohibition, restriction and control of residence, movement and transport of persons, the possession, acquisition, use and transport of movable property, and the entry to, egress from, occupation and use of immovable property;
(d) make provision for the regulation, control and maintenance of supplies and services;
(e) make provision for, and authorise the doing of, such other things as appear to him to be strictly required by the exigencies of the situation in Zambia.'

The foregoing clearly demonstrates that the power which the President purportedly exercised under the Emergency Powers Act could lawfully and vaidly have been exercised by him under s.3(2)(c), (d) and (e) of the Preservation of Public Security Act. In the circumstances, as the President's exercise of his power is traceable to a legitimates source, the fact that he purportedly exercised that power under a wrong source does not invalidate his action.

Although the learned trial judge came to his conclusion for the wrong reason, the first ground of appeal cannot succeed for the reasons above.

The second ground was that the learned trial judge erred in law in holding that the rules of natural justice do not apply to s. 24 of the Trades Licensing Act, Cap. 707 and, in particular, to this case.

It is common ground that the appellant's trading licence was revoked by the President under s. 24 of the Trades Licensing Act. Mr *Chama* contended that the revocation of the licence without giving the appellant an opportunity to be heard was contrary to the rules of natural justice.

The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased (*nemo judex in causa sua*); and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (*audi alteram partem*). As was quaintly stated by an eighteenth-century judge, Foretescue, J., in *R. v Chancellor of the University of Cambridge* [8] at page 567:

p79

'Even God himself did not pass sentence on Adam before he was called upon to make his defence.'

We are, of course, here concerned with the second principle.

The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly or by necessary implication. (See *Halsbury's Laws of England*, 4th ed., para. 64; and S.A. de Smith's *Judicial Review of Administrative Action*, 3rd ed.). In order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial character or that it involves the determination of a *lis inter partes*; however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact. *Prima facie,* moreover, a duty to act judicially will arrive in the exercise of a power to

deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty. However, the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation to act judicially (see *R. v Governor of Brixton Prison, ex parte Soblen* [9] and *Schmidt v Secretary of State for Home Affairs* [10].

Mr *Chama* argued that the revocation of the appellant's trading licence deprived him of his livelihood and property rights without notice and opportunity to be heard. In aid of this submission, he cited, *inter alia*, the case of *General Medical Council v Spackman* (11) wherein Lord Wright said at page 644:

> ''If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision.''

Section 24 of the Trades Licensing Act provides that :

> ''24. The President may, at any time, by statutory order, revoke any licence and , notwithstanding anything to the contrary in this Act contained, any licence so revoked shall expire upon the commencement of such statutory order.''

It is in the President only that this power of revocation is vested. The section contains no procedure safeguards for an aggrieved party. This would appear to have been done deliberately on the part of the Legislature especially in view of the fact the s. 19 of the Act makes provision for anyone aggrieved by a decision of the licensing of the authority to appeal against such decision to the Minister; but no similar provision exists in relation to s. 24 to enable an aggrieved party to appeal or make representations to the revoking authority. As S. A. de Smith (already referred to) points out in his book at page 144, under the general heading ''The path of deviation'' :

> ''Where no statutory provision is made for prior notice to be given, it can often be assumed that the omission is deliberate.''

There is here no express statutory provision to show that prior notice of opportunity to be heard should be given before a licence can be revoked under s. 24 of the Trades Licensing Act. It is necessary to consider whether, in this case, the *audi alteram partem* rule can be excluded by implication. In an ordinary case, the assumption referred to by S. A. de Smith might be made.

However, where there is no express statutory provision, as in this case, to exclude the *audi alteram partem* rule, and a power is being exercised to impose penalties or to deprive a person of his livelihood; legal status (not being terminable at pleasure); personal liberty (not involving an illegal immigrant); property rights or any other legitimate interests or expectations, then a rebuttable presumption arises of the necessity to give prior notice and opportunity to be heard. Equally, the presumption arises where revocation of a licence causes deprivation of livelihood or serious pecuniary loss, or is dependent on a finding of misconduct. In other words, where a power is being exercised to deprive a person of the rights and freedoms referred to in this paragraph, the exclusion of the *audi alteram partem* rule cannot be implied,

it must be express to oust the presumption. Here the presumption clearly arises and this is unrebutted.

But there is a special dimension to this particular case in the sense that the revocation of the appellant's licence occurred in the context of a declared threatened state of public emergency under art. 30(1)(b) of the Constitution. The question is whether the operation of the *audi alteram partem* rule is ousted in these circumstances? Prof *Mvunga's* submission to this question was in the affirmative. He cited art. 26 of the Constitution which permits derogation from fundamental rights and freedoms, including property rights enshrined in art. 18 of the Constitution.

Article 26 of the Constitution provides that:

> ''26. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of art. 15, 18, 19, 21, 22, 23, 24 or 25 to the extent it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under art. 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of such law shall be held to be in contravention of any of the said provision unless it is shown that the measures taken exceed anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question.''

The fundamental rights and freedoms protected by the articles referred to in art. 26 relate to the protection of the right to personal liberty (art 15); the protection of property (art. 18); the protection for privacy of home and other property (art. 19); the protection of freedom of conscience (art. 21); the protection of expression (art. 22); the protection of freedom of assembly and association (art. 23); the protection of freedom of movement (art. 24); and the protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed (art. 25).

These are significant fundamental rights and freedoms whose derogation art. 26 permits when the Republic is at war or during the existence of an emergency or a threatened emergency declared under art 30(1)(a) and

p81

(b) of the Constitution. These fundamental rights and freedoms are plainly superior to the common-law principles of which the principles of natural justice are a part. The synopsis of it all is that the principles of natural justice will not apply where a power is properly exercised when the Republic is at war or during the existence of a declaration of an emergency or a threatened emergency. The declaration of a threatened emergency under art. 30(1)(b) of the Constitution has been in existence prior to the attainment of this country's nationhood. In the circumstances, therefore, the *audi alteram partem* rule has no application to the revocation of the appellant's licence.
For the reasons given, this ground cannot succeed.

The third ground was that the learned trial judge erred both in law and in fact when he held that the appellant had dealt in essential commodities between 1983 and 1986 and that the definition of 'essential commodities' in issue was that under reg. 6(2) of the Emergency (Essential Supplies and Services) Regulations 1988.

Referring to reg. 3 and column 1 of the First Schedule contained in Statutory Instrument No. 121 of 1981, that is, The Control of Goods (Essential Commodities) Regulations, 1981, Mr *Chama* argued that there was no evidence in the Court below to show that the appellant had dealt with any of the commodities listed in the First Schedule (already referred to) between 1983 and 1985. On the contrary, there was evidence to the effect that a permit to deal in essential commodities with effect from 1st January, 1984, had been issued to the appellant. The permit was, however, revoked on June 13th , 1984 as is evidenced by the Mufulira District Executive Secretary's letter - marked 39 - of 13th June, 1984.

In any event, the appellant was again issued with a permit in 1987 which was short-lived as it was revoked within a month of its issue. But despite the revocation of the permit, the appellant continued to sell sugar in his Mokambo shop which was being procured through Kamuchanga traders in Mufulira. This emerges from the testimony of DW4. The revocation of the permit merely served to extinguish his formal source of supply but he continued to obtain the commodity from an informal source. The sugar that the appellant sold is an essential commodity within the definition of Statutory Instrument No. 121 of 1981.

In our opinion, the President's Regulation - the subject of this case - related to essential supplies and services and the learned trial judge was, therefore, in order to refer to reg. 6(2) of those Regulations as well as to s. 2 of the Control of Goods Act, Cap. 690. There can be no doubt in this case that sugar falls within the category of essential supplies as well as of essential commodities.

The fourth ground was that the learned trial judge had misdirected himself in presuming the 22 pairs of scissors, 43 plastic bottles of shampoo and other listed items had been illegally obtained or imported into Zambia.

Although there was evidence to indicate that the appellant had produced clearance receipts and given a reasonable explanation as to how he had come to be in possession of some of the items in his border shop, we do not consider that the issue raised here is relevant to the determination of this appeal.

The fifth ground was that the learned trial judge erred in law and in fact when he held that the appellant's goods had been confiscated by the President and that the appellant had no cause to complain.

The learned Solicitor-General stated that the appellant's goods had not been confiscated but that they had merely been taken over since the appellant was entitled to compensation and was free, if dissatisfied with the level of compensation awarded, to appeal to the National Assembly. In the circumstances, the term 'confiscated' was inappropriate. We are of the view that this ground is innocuous and does not advance the case either way.

The sixth and final ground was that the 1988 Regulations in this case have been used to punish the appellant and that the learned trial judge sought to have found that the appellant had been deprived of his property illegally.

This ground falls away as we are unable to find any evidence in support thereof. Indeed, the

measures complained of were taken to curb activities prejudicial to the maintenance of essential supplies and services. Under reg. 7 of the Regulations, compensation is payable by the Minister of Finance to anyone adversely affected by measures taken against him by the executive. In case of a dispute arising as to the amount of compensation, reg. 8 provides that any claimant or the Attorney-General 'may, if such dispute is not settled within six months, refer the dispute to the National Assembly which shall by resolution determine the amount of compensation to be paid'.

In light of the foregoing, the appellant is unsuccessful on all the grounds raised and so the appeal is dismissed.

In view of the fact that some of the novel issue raised in the first and second grounds have been decided upon for the first time, there shall be no order as to costs.

Appeal dismissed.
