GODFREY MIYANDA v THE ATTORNEY-GENERAL (No.1) (1985) Z.R.185 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
3RD JUNE AND 31ST JULY, 1985
(S.C.Z. JUDGMENT NO. 21 OF 1985)

Flynote
Employment - Conditions of Service contained in a statute since repealed - Accrued rights - Application of principals.
Employment - Wrongful dismissal - Remedy - Non-compliance with statute - Discretion of court as to choice of remedy.

Headnote
The appellant joined the Army as cadet officer during the currency of the Defence Act, 1955, which provided, inter alia, that officers could only be dismissed after they had been given an opportunity to be heard on any allegations against them. By the time the appellant received his commission, that Act had been repealed and re-enacted, the repealing law omitting the terms referred to. The appellant was later summarily dismissed and the issue arose whether or not he had an accrued or acquired right not to be dismissed without opportunity to exculpate himself. The question also arose whether to award damages only or to grant the declaration sought that the dismissal be held null and void.

Held:
(i) Generally speaking, the law preserving rights acquired or accrued does not preserve abstract rights conferred by the repealed statute but only applies to specific rights given on the happening of events specified in the statute;
(ii) Section 14 (3) (c) of the Interpretation and General Provisions Act does not preserve rights of the public at large; it only preserves the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition.
(iii) The appellant's attestation during the currency of the Defence Act, 1955, set in motion the relevant claim of events sufficient for the rights to accrue and be acquired despite their being at the time inchoate and contingent upon his successful completion of the cadet officer's course and being granted a commission.
(iv) A declaration is a discretionary remedy and can only be made on proper principles and considerations. It will not be made when, inter alia, no useful purpose can be served or when an obvious alternative and adequate remedy is available in the form of damages.

p186

Cases Referred to:
(1) Attorney-General v Thixton (1967) Z.R.10.

(2) Paton v Attorney-General and Others (1968) Z.R.185 .
(3) In re Joseph (1973) Z.R.256.
(4) Hamilton Gell v White [1922] K.B. 422.
(5) Lusaka City Council v Mumba (1977) Z.R.313.
(6) Chikuta v Chipata Rural Council (1983) Z.R.26.
(7) Vine v National Dock Labour Board [1956] 1 All E.R.1 and [1956] 3 All E.R. 939.
(8) Attorney-General v Kang'ombe (1973) Z.R.114.
(9) Attorney-General v Mpundu (1984) Z.R.6.
(10) Addis v Grammaphone Co. Ltd [1909] A.C.488.
(11) Shanzi v United Bus Company of Zambia (1977) Z.R.397.

For the appellant: In person.
For the respondent: A.G. Kinariwala, Acting Parliamentary Draftsman.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

On 3rd June, 1985, we allowed this appeal and said we would give our reasons later. We also said we would consider the question of compensation. This we now do. This is an appeal by the appellant against the dismissal by the High Court of his action against the respondent for damages and/or, in the alternative, a declaration which would result in his reinstatement in the Defence Forces; the cause of action being an alleged wrongful dismissal therefrom.

The salient facts can be summarised as follows:

The appellant joined the Defence Forces as a Cadet Officer and was attested in the then Northern Rhodesia Defence Force on 2nd September, 1964. On 2nd April, 1965 he was granted a commission as Second Lieutenant, as appears in Gazette Notice No.757 of 1965. He rose through the ranks to the post of Brigadier - General. On 30th October, 1974, the appellant was seconded to the Mechanical Services Branch (henceforth called MSB) as Director thereof. On 11th June 1976, His Excellency the President was pleased to appoint the appellant to be the head of the Logistics Department in the Defence Force and it was in that same letter that the appellant was promoted to the rank of Brigadier - General. He thereupon ceased to head the MSB. By a letter dated 24th April, 1977, His Excellency invoked his powers under regulation 10A of the Defence Force (Regular Forces) (Officers) Regulations (FGN 127 of 1960) and cancelled the appellant's commission and summarily dismissed him from the Army. The letter read:

> "IN EXERCISE of the powers vested in me by Regulation 10A (1) of the Defence (Regular Forces) (Officers) Regulation (F.G.N. No.127 of 1960, as amended by the Defence (Regular Forces).

p187

> (Officers) (Amendment) Regulations, 1965, I hereby cancel your Commission and order your removal from office."

On the same day, His Excellency held a press conference the proceedings of which were reported

by the press and from which it transpired that the appellant (who was at the time no longer the in-charge of MSB) was removed because indiscipline and other misconduct had reached unacceptable levels at MSB. The appellant was refunded his own pension contributions and five months later, he obtained a. letter of clearance from His Honour the Secretary - General of the Party who was also Chairman of the Defence Council. The appellant was then able to secure alternative employment.

It is common ground that the terms and conditions applicable to the appellant's employment when he first joined the Army were those provided for by and under the Defence Act of 1955 (Act No. 23 of 1955 of the Federation of Rhodesia and Nyasaland Statutes), (hereinafter called the 1955 Act). Indeed Regulation 10A which was applied in the appellant's dismissal formed part of the principal Regulations (FGN 127 of 1964) which were made under section 155 of the 1955 Act. The appellant's commission was cancelled under Regulation 10A (1) which was introduced by S.I. No. 217 of 1965 and which was a replacement of the former Regulation 10A, introduced by FGN 237 of 1962, which in turn was an amendment to FGN 127 of 1980, Briefly stated, Regulation 10A allows His Excellency, upon the recommendation of the Army Commander, to cancel the commission of an officer if satisfied that the officer is inefficient or otherwise unsuitable to remain in the regular force or if the officer's conduct has been discreditable.

There was a ground of appeal concerned with the question whether or not there was in fact a recommendation by the Army Commander, as required by the Regulation, and Mr Kinariwala indicated that he would have argued to the effect that, though Regulation 10A was cited, His Excellency in fact relied on other provisions not in the letter. But in the view that we took, it was unnecessary to deal with this and other grounds since the ground to which we will shortly turn was of its own, and in our considered view, sufficient to resolve this appeal. However, for completeness, it is necessary to refer very briefly to ground of appeal which alleged that, because the 1955 Act was repealed by Section 215 of the Defence Ordinance, 1964, (Act 45 of 1964 of Northern Rhodesia ;and now Cap.131), the Regulations in FGN 127 of 1960 were automatically revoked, and that, therefore, His Excellency could not invoke a Regulation which had ceased to exist. This argument is fallacious having regard to section 15 of the Interpretation and General Provisions Act, Cap. 2, which is to the contrary and which preserves Statutory Instrument made under a repealed Act until it is specifically repealed under the new law. The existence and validity of Regulation 10A can be traced through, inter alia, the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963 (GN 24 of 1964) which, in section 2, provided for the continuation and adaptation of existing federal laws. By

GN 28 of 1964 the Governor continued the 1955 Act and the Regulations in FGN 127 of 1960 (see first schedule dated 31st December, 1963 at page 332 of GN 28 of 1964); the Northern Rhodesia (Constitution) Order in Council, 1963 (GN 25 of 1964) in section 9, continued the existing laws as defined in section 9(5) and subject to any amendments by the Governor. The Zambia Independence Order, 1964 (GN 496 of 1964) in section 4 also continued the existing laws, as defined in section 4(6) and subject to any amendments by the President. The continuation of existing laws not specifically repealed or revoked can be traced right down to section 6 of the Constitution of Zambia Act, Cap. 1, and there is certainly nothing on the statutes to support a contention that Regulation 10A had ceased to have effected with the repeal of the 1955 Act. By virtue of the various provisions

providing for continuation, the Regulations in FGN 127 of 1960 became the applicable principal Regulations under the Defence Ordinance of 1964 (now Cap.131) and His Excellency properly exercised his powers under section 12(1) to make the amending Regulations under S.I. 217 of 1965 specifically amending FGN 127 of 1960 by introducing by way of revocation and replacement, the new Regulation 10 A under which the appellant was dismissed.

We now turn to the ground upon which the appeal was allowed. In the first place we should make it clear that, in our considered view; the question at hand is not whether or not His Excellency has power to dismiss an officer, which he undoubtedly has. The question is whether the dismissal was or was not wrongful, inter alia, for non-compliance with the applicable statutory conditions of service. There is no dispute that the 1955 Act applied to the appellant's engagement when he first joined the Army and it is his contention that, the said Act conferred terms and conditions, amounting to accrued or acquired rights, which survived the repeal of that Act by virtue of section 14(3)(c) and (e) of (Cap. 2, as well as Article 138 (13) (c) (iii) and (v) of the Constitution (formerly Article 125 of the Constitution under the Zambia Independence Order, 1964). The principal rights contended for the appellant are the right not to have his commission cancelled without prior notification of his misdeeds and without affording him an opportunity to exculpate himself. These rights were contained in section 13 of the 1955 Act which reads:

> "An officer shall hold his appointment during the pleasure of the Governor - General, but his Commission shall not be cancelled unless he is notified in writing of any complaint or charge made and of any action proposed to be taken against him and is called upon to show cause in relation thereto: Provided that no such notification shall be necessary in the case of an officer absent frown duty without leave for a period of three months or more."

By virtue of the Defence Act, 1955 (Modification and Adaptations) Regulations (GN 28 of 1964) made under the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963, reference to the

p189

Governor - General became a reference to the Governor; and by virtue of the Republic of Zambia (Modification and Adaptations) (General) Order, 1964 N 497 of 1964) made under the Zambia Independence Order, 1964, reference to the Governor become a reference to the President. Thus, it was the appellant's contention that His Excellency could not dismiss him without following the procedure in section 13 of the 1955 Act. The learned trial judge had determined that, as that section was omitted in the 1964 re-enactment which came into force on 18th September, 1964, the appellant could not claim any rights under that section. Mr Kinariwala answered the appellant's submissions on two alternative propositions: The first was that, as the appellant was attested as a mere cadet officer on 2nd September, 1964, and did not hold any commission until 2nd April 1965, he was not an officer as defined in section 2 of the 1955 Act which was to the effect that an officer was any person holding a commissioned rank in the Defence Forces. Mr Kinariwala, therefore, argued that, because the 1955 Act was repealed before the appellant became an officer properly so-called, section 13 could not apply to him. The second and alternative proposition was that, even if section 13 applied to the appellant, the rights conferred were not automatic and could only accrue if a qualifying event occurred during its currency, namely if the appellant was dismissed during the

currency of the 1955 Act.

It is convenient at this point to set out the relevant subsections under discussion. Section 14(3) (c) and (e) of Cap.2 read as follows:

> "14 (3) Where a written law repeals in whole or in part any other written law, the repeal shall not:
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> > (c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
> > (e) Affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

Article 138 (13) (c) (iii) and (v) provides similarly and was in effect a re-enactment of Article 125 (15) of the Constitution under the Zambian Independence Order which applied the Interpretation Act, 1889, which, in section 38(2) (c) and (e), is virtually word for word the sections now under discussion.

Both parties referred us to *Attorney-General v Thixton* (1) which concerned an accrued right to immunity from deportation. Thixton was considered in *Paton v Attorney-General* (2) which discussed a similar right. It was also considered in *In Re Joseph* (3) where an accrued right by a practitioner to petition for a admission was found to have existed but was held to have been lost because the language of the relevant repealing Act made it clear that no such right survived. The position in this case is different in that; in terms of section 213 of the Defence Act, Cap.131

(which, as already noted, is the former Defence Ordinance, 1964), it is specifically envisaged that affected officers would not be subject to terms and conditions including rights and privileges -less favorable than those they would have been subjected to under the 1955 Act. The cases which we have mentioned discussed the question of accrued and other rights which can be preserved within the ambit of section 14 of Cap.2. It was said, in *Thixton* (1) in particular, that some rights did not vest automatically but required some incident or some action to be taken or some event to occur before they can be said to accrue or to be acquired. But *Thixton* (1) also acknowledged the fact that some rights, by their very nature, accrued or became acquired automatically. Generally speaking, the law preserving rights acquired or accrued does not preserve abstract rights conferred by the repealed Act, but only applied to specific rights given on the happening of events specified in the statute - see *Hamilton Gell v White* (4); per Atkin, L.J., at page 431. But in *Lusaka City Council v Mumba* (5) (a case concerned with an accrued right of appeal from a decision of the Local Government Service Commission under a law which had meanwhile been repealed), we said, in relation to section 14 (3) (c) of Cap.2, that, it does not preserve rights of the public at large; that only the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition can survive.We also said that the appeal of the Commission had set in motion the relevant train of events including the right of appeal to the high court and that, at the

time of the supervening repeal of the former Act, the appellant in that case had a contingent right to appeal if and when an adverse decision was made by the Commission. We rejected, in that case an argument that the right to appeal only accrued when the adverse decision was made.

Applying the foregoing principles to the facts of this case, it is certain that Mr. Kinariwala's contention, that the appellant's contingent right to the terms of section 13 of the 1955 Act did not accrue or was not acquired, cannot be sustained. The appellant never joined the Army as a private but it was in the contemplation of the parties at all material times that, provided he was successful as a cadet officer, he would become a commissioned officer. He had thus, an inchoate and contingent right to the terms of section 13 which would vest upon becoming a commissioned officer. The rights we are here discussing where the conditions of service governing the appellant's employment and the very fact that he had joined the Army on that footing was a sufficient event occurring during the currency of the 1955 Act to vest those conditions and terms in him. The attestation set in motion the relevant chain of events sufficient for the rights to accrue and the fact that the rights so acquired and accrued were contingent upon a successful graduation and grant of a commission did not diminish their effect. The case of *Lusaka District Council v Mumba* (5) and other cases therein cited all support the accrual of a right though such right be dependent on a further contingency.

p191

Mr Kinariwala's second proposition, that the relevant event would have had to be a dismissal during the currency of the 1955 Act, is startling, to say the least of it. All the provisions under discussion are concerned, not with rights under a current statute, but those alleged to have been acquired or to have accrued under a repealed law; and if Mr Kinariwala's contention were valid there would be no point in having these provisions which are for the preservation of rights, privileges, and so forth, under repealed laws.

It was for the foregoing reasons that we upheld the appellant's submissions concerning his accrued rights not to be dismissed without notification and without affording him an opportunity to exculpate himself. It was on this basis that we found it unnecessary to deal with the further submissions concerning the alleged non-compliance with the conditions set out under Regulation 10A; or indeed to deal with the uncontested claim that the appellant was dismissed for events at MSB at a time when he was no longer running that establishment. For the reasons which we have endeavoured to adumbrate hereinbefore we allowed the appeal and entered judgment for the appellant on his claim for wrongful dismissal.

With regard to the remedy to be awarded, the appellant has submitted that, though he does not wish to rejoin the Army, a declaration should be made in his favour which would entail his nominal reinstatement upon which he would retire of his own accord.

In *Chikuta v Chipata Rural Council* (6) we acknowledged the fact that there are cases which have held that, in an exceptional case, the unilateral repudiation of a contract of employment by a party in breach would be regarded as ineffectual if the innocent party has chosen not to accept such repudiation. We referred to such cases as *Vine v National Dock Labour Board* (7) and several other authorities, just as we have considered all the cases cited in the present case. We accepted that in

an exceptional case, an employer in breach may have a declaration or other order made against him which has the effect of forcing him to retain the employee in his service. The authorities, such as *Attorney-General v Kang'ombe* (8) would also seem to indicate that a declaration is more readily available in cases governed by some statute or statutory regulations but what is clear is that the facts and circumstances of each individual case determine whether, in any given case, this wholly discretionary remedy is appropriate or not.

As already stated, a declaration is a discretionary remedy and can only be made on proper principles and considerations. Thus, it will not be made when, inter alia, no useful purpose can be served. In this regard, we can not lose sight of the fact that the commission was held, and granted, on the authority, at the pleasure, and under the hand, of the President who personally dismissed the appellant. On the facts, as they emerge from the record, it is obvious that the appellant cannot be accommodated back in the Army and it would, therefore, be wholly eccentric for this court to grant a disruptive declaration when an obvious alternative

p192

and adequate remedy is available in the form of damages. What we are entitled to do, however, is to declare the rights of the parties and, in this behalf, we have adjudged that the dismissal was wrongful for non-compliance and, for that reason, the appellant will be entitled to receive some monetary compensation by way of damages. This brings us to consider what a fair measure of damages would be in this case, having regard to all the circumstances of the case. There was evidence that, for a period of five months, the appellant did not have clearance from his employers to enable him to obtain alternative employment, which he did obtain as soon as he was finally cleared. There was also evidence that the appellant only received a refund of his pension contributions without any gratuity from his employers - a gratuity, we may add, though obiter, which would have been payable in any event under the principles of accrued rights, in terms of Regulations 74(1) (b) of FGN 127 of 1960 as read with Article 133(1) which protects pension rights acquired under previous and current laws.

In addition to the foregoing, there was pleaded, and established at the trial, the fact that the summary dismissal resulted in the appellant being summarily evicted from his official residence and that, thereafter, he suffered severe distress and hardship during the period that he was unable to secure other employment. In *Attorney-General v Mpundu* (9), this court approved an award in respect of distress, hardship and inconvenience and, in our considered view, the present is a suitable case in which the compensatory damages should carry an element of this type of damages. Of course, these damages should not be awarded unless the distress, hardship or inconvenience, as the case may be, results from some act or omission on the part of the defendant (either in his conduct or in the manner of effecting the wrongful breach or if such result must have been in the contemplation of the parties as likely to bring about undue suffering) - which does occasion suffering which goes beyond the normal consequences of a wrongful breach. It seems to us, therefore, that the appellant should receive, by way of compensatory damages, the following amounts:

(a) The amount equal to five months' salary less income tax;
(b) Gratuity calculated up to the date of dismissal on the basis applicable had the appellant

retired and not been wrongfully dismissed.

(c) Kl,000 for distress hardship and inconvenience under the principles in *Mpundu* (9).

We now have to consider the question of interest. It is within our discretion to award interest and we consider this an appropriate case for interest to be awarded on both general and special damages from the date of the issue of the writ until the date of this judgment. As to the rate of interest, this court last gave a guideline on the appropriate rate of such interest in the case of *Shanzi v United Bus Company of Zambia* (11). At that time we considered that 7% per annum interest was an appropriate rate. We take into account, however, that there has been an

p193

increase in bank interest since that date and we consider that 8% per annum is more appropriate today. We award interest at this rate on the awards under all three heads.

We enter judgment accordingly, with costs limited only to the appellant's reasonable and actual out-of-pocket disbursements in prosecuting his claim in person both here and below.

Appeal allowed
