PAMODZI HOTEL v GODWIN MBEWE (1987) Z.R. 56 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
30TH OCTOBER, 1986 AND 13TH MARCH,1987.
(S.C.Z. JUDGMENT NO. 4 OF 1987)

Flynote
Employment - Contract of Service - Collective Agreement -Dismissal in terms of - Effect.

Headnote
The respondent was employed by the appellant as a waiter and supervisor. There was in existence a Collective Agreement incorporated into the terms of the employment which bound both parties. The Agreement provided a penalty of dismissal after a written warning for a first breach for offences related to drunkenness and summary dismissal without any need for a previous warning for drunkenness.

On an allegation that the respondent was drunk on duty he was dismissed. He sought a declaration in the High Court that his dismissal was null and void. Evidence was adduced at the trial that he was found to be drunk by security guards and was seen by the hotel manager who, from the smell of his breath and appearance, found be was not his usual self and concluded he was drunk.

The court found that under the Collective Agreement dismissal could only occur after a final written warning for a previous breach and as no warning had been given summary dismissal was unlawful. The appellant appealed.

The appellant argued that the reason for dismissal was satisfied under the Agreement on the evidence of a supervisor and one witness and that the degree of drunkenness for dismissal was not as applied in the case of drunken driving. It was sufficient that the dismissal was carried out fairly as laid down in the Collective Agreement.

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Held:
Instant dismissal is justified if an employee is drunk. The state of drunkenness to justify the dismissal of an employee is not the same as the state which renders a person incapable of having proper control of a motor vehicle. It was sufficient under the Agreement to justify dismissal if there was drunkenness as evidenced by a supervisor and one witness. The decision to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion.

Per curiam:
The court considered obiter the case of *Contract Haulage Limited v Kamayoyo* (1982) Z.R. 13 and indicated a view, that where there was a Joint Industrial Council Agreement which has statutory effect in a contract of employment and provides for a certain procedure to be followed before

dismissal, any breach of a procedure resulting in a dismissal might well result in a declaration that a dismissal was null and void. The court referred to the dicta of *Lord Morris of Borth - y - Gest in Francis v Municipal Councillors of Kuala Lumpar* [1962] 3 All E.R. 633 to the effect that where there has been a purported termination of a contact of service a declaration to the effect that the contract of service still subsists will rarely be made and it will not grant, except in special circumstances, specific performance - Editor.

Cases cited:

(1) Contract Haulage Limited v Kamayoyo (1982) Z.R. 13
(2) Malloch v Aberdeen Corporation [1971] 2 All E.R. 1278
(3) Francis v Municipal Councillors of Kuala Lumpar [1962] 3 All E.R. 633

For the appellant: O.Dzekedzeke, D. H. Kemp & Co.
For the respondent. A.Musanya, Zambezi Chambers.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal from a judgment of the High Court declaring that the respondent's dismissal from his employment by the appellant was null and void.

The facts of the case are that the appellant, which is a hotel, employed the Respondent as a Waiter and a Coffee shop Supervisor, and the terms and conditions of the employment were set-out in document known as a Collective Agreement, made between the Hotel and Catering Association of Zambia and the Hotel and Catering Workers Union of Zambia, dated the 28th of March, 1983 and duly gazetted under Gazette Notice number 513 of 1983.

Both the appellant and the respondent were bound by that agreement. On the 23rd of March, 1982, a Prime Minister's cocktail party was held at the appellant's hotel at which it was alleged by the appellant that the respondent was found drunk on duty, and on the 29th of March, 1982 the respondent was summarily dismissed. He issued a writ claiming that he had been wrongfully dismissed because he had not been drunk as alleged, and asking for a declaration that the dismissal was null and void. The appellant in its defence alleged that the respondent was drunk on duty and that his dismissal was recommended by the Works Council and subsequently ratified by the Works Council and Party Committee and approved by the Hotel Catering Union of Zambia.

At the trial, the respondent gave evidence that on the night in question he was instructed to take charge of the bar at the Prime Minister's cocktail party. He said that at 22 hours three security guards came to him and called to follow them. He was told that they had been instructed to send him home because he was drunk. He then went outside, changed his clothes and went home. He denied that he was drunk. In cross-examination the respondent said that Mr Thomson DW1 was present on the night of the cocktail party but the security guards did not take him to see Mr Thomson and he did not meet Mr Thomson after the incident. In this connection, he said:

> "I agree that after the security guards removed me from duty, I changed my clothes and

went home."

DW1 Mr David Herman Thomson gave evidence that he was a principal of the hotel management and that on the night in question the Chief Security Officer came to him and asked him to witness the state of one employee who was alleged to be drunk. He went with the Chief Security Officer to the backyard where he found the respondent and two security guards. He said that it was quite clear that the breath of the respondent smelt of alcohol and the respondent was upset and did not seem to be his usual self. He further said that he was satisfied by looking at the respondent that he was drunk. This witness concluded his evidence by saying that a meeting of the Works Council was convened and the respondent was present at the meeting.

In his judgment the learned trial judge referred to clause 29(b) of the Collective Agreement and quoted the penalty for drunkenness on duty as being:

> "1st Breach - Final written warning, suspension without pay for not more than thirty days. 2nd Breach - Dismissal."

He then went on to note that, under Rule and Regulation 28 (19) in the staff handbook, instant dismissal was provided for drunkenness. The learned trial judge then went on to comment that it would seem that between the collective agreement and the staff handbook there was a clear conflict between the penalties provided for. As a result, he held that, as there had been no previous warning to the respondent, his summary dismissal was unlawful.

Mr Dzekedzeke on behalf of the appellant has pointed out that the learned trial judge was misled by the manner in which the penalties and offences were set-out in the collective agreement into misleading the penalty for drunkenness. We have seen the collective agreement and we agree that the penalty of a final written warning for a first breach and dismissal for a second breach relates to a different offence, and the penalty for drunkenness is in fact summary dismissal without any need for previous warming. Mr Musanya has very properly conceded that the learned trial judge misdirected himself in this respect.

In addition to that finding, in which it has been agreed that the learned trial judge was mistaken, he also found that there was insufficient evidence of drunkenness to warrant the dismissal of the respondent. In this connection the learned trial judge said this:

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> "The only evidence of the plaintiffs drunken state in question comes from the defendant's witness DW1. DW1 had come to the conclusion that the Plaintiff was drunk purely from the smell of alcohol from his mouth and in the Plaintiff not being his self. On the question of the Plaintiff being not his self, it is more than possible that the Plaintiff could not have been his self on account of accusations of drunkenness which he did not accept. With regard to DW 1 's conclusion of the plaintiff being drunk purely from his breath smelling of alcohol, I, with respect to DW1, find it difficult to accept that one, in absence of other visible symptoms e.g. staggering, slurred speech, unable to wale straight, can absolutely conclude one to be drunk, merely because of breath smelling of alcohol. In my considered view, it would be

> great injustice caused if a person's livelihood could be jeopardised on a person being concluded to be drunk purely from smell of breath. In my opinion, the basic human right cannot be tampered with so lightly. On the evidence of DW1, I am not satisfied that the Defendant has succeeded in establishing the plaintiff to be drunk to qualify dismissal.

Mr Dzekedzeke has also pouted out that clause 29(b) of the agreement reads:

> "Offence - Then, fraud or forgery at work, malicious damage to employer's property, drunkenness on duty as evidenced by the supervisor, a supervisor and one witness, riotous behaviour at or near work place, refusal to obey lawful instructions, fighting with customers or co-workers on the premises."

This, argued Mr Dzekedzeke, indicates that the union had agreed, that in order to obviate the difficulty of arranging for a medical examination, the test of whether or not an employee was drunk should depend upon the evidence of a supervisor and one witness. Furthermore, he argued, the extent of drunkenness to justifier the dismissal of a hotel employee should not be judged by the she criteria that applied to cases of drunken driving. He pointed out that the DW1 had stated that he was satisfied by looking at the respondent that he was drunk and that witness was the person best qualified to decide whether the extent of the respondent's drunkenness as an hotel employee justified his dismissal. Mr Dzekedzeke further argued that the learned trial judge was not called upon to decide the issue of drunkenness and for this reason no other detailed evidence of the respondent's behaviour was given. He said that the only question for the learned judge to decide was whether in dismissing the respondent for drunkenness the appellant had carried out properly and fairly the procedure laid down in the Collective Agreement. In this respect, Mr Dzekedzeke pointed out that, despite the fact that no other witnesses could be called because they had left the appellant's employments there was in fact evidence that the security guards had removed the respondent from the cocktail party because they alleged he was drunk, that DW1 in his capacity as supervisor gave the necessary supporting

evidence under the terms of clause 29(b), and that there had been a proper Works Council Meeting at which the Works Council, who were there to protect the interest of the respondent, were satisfied that the evidence justified the dismissal of the respondent.

In reply, Mr Musanya argued that the learned trial judge was right in saying that the smell of alcohol on the respondent's breath was not enough to justify his dismissal for drunkenness and that the respondent may well have behaved in a manner other than his usual self because he was very annoyed with having been accused of drunkenness by the security guards. Mr Musanya further argued that there was no evidence of what occurred at the Works Council meeting and that the learned trial judge's finding should be upheld.

We agree with Mr Dzekedzeke that the state of drunkenness to justify the dismissal of any hotel employee is not the same as the state which renders a person incapable of having proper control of a motor vehicle. In this respect the learned trial judge did not have his attention drawn to the words in clause 29(b) of the agreement which indicate that it is sufficient to justify dismissal if there was

drunkenness as evidenced to by the supervisor, a supervisor and one witness. We agree with Mr Dzekedzeke that the effect of these words is to justify instant dismissal if an employee is drunk in the opinion of the supervisor and one witness. In our view, if there is evidence of such opinions the decision of the employer to dismiss cannot be questioned unless there is evidence of malice or if no reasonable person could form such an opinion. In this case there was evidence that the chief security officer called DW1 because of the drunkenness of the respondent, and that DW1 was of the opinion that the plaintiff was drunk to the extent that his behaviour justified instant dismissal. The respondent in his statement of claim alleged in paragraph 12 that the appellant did not even bother to take the respondent for medical examination to prove that he was drunk. So far as this question is concerned we agree with Mr Dzekedzeke's argument that the provision referring to the opinion of the supervisor and one witness obviates the necessity for medical examination, and, in this connection, we also agree that the bonafide opinion of the supervisor and the witness as to drunkenness is sufficient to support the order for summary dismissal. There is no evidence of mala-fides in this case.

With regard to Mr Musanya's argument that there was no evidence of what occurred at the Works Council meeting, this was not the matter in issue. There was, however, evidence from DW1 that the respondent was present at such a meeting. If the respondent wished to allege that the Works Council did not agree that he should be dismissed he should have pleaded this and called evidence to support his allegation. He did neither and this argument does not assist him.

We agree with Mr Dzekedzeke that there was no breach of the Collective Agreement with regard to the procedure for dismissal, that the learned trial judge misdirected himself in applying the wrong test of drunkenness and that the respondent was properly summarily dismissed for that reason.

In his written grounds of appeal Mr Dzekedzeke raised a further matter which he did not press in argument but we consider that we should discuss it here. He referred to the case of *Contract Haulage Limited v Kamayoyo* (1). In that case a stores clerk was dismissed without notice because he failed to resume his duties after his leave and

his employers wrote to him to say that they had heard that he was involved in a police case, that they were not prepared to wait for the police investigation results, and therefore, they terminated his services. There was in that case a Joint industrial Council Agreement which governed the contract of service between the parties. One of the clauses in that agreement provided that an employee who absented himself for a period in excess of seven days without reasonable explanation should be deemed to have led the employer's service without notice. Another was to the effect that both parties were entitled to terminate the agreement by thy days notice. This court discussed the law relating to pure master and servant cases and those in which a master was bound to follow a certain procedure in dismissing a servant failing which a dismissal might be declared to be void. In this connection, we quoted from the case of *Malloch v Aberdeen Corp.* (2) in which Lord Wilberforce said at page 1294:

> "One may accept that if there are relationships in which rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have

> been called 'pure master and servant cases' which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter parties aspects the relationship may be called that of master and servant, there may be essential procedural requirement to be observed, and failure to observe them may result in a dismissal being declared to be void."

Having considered these arguments this court found from the facts in that case that the letter of dismissal did not amount to a dismissal for disciplinary reasons and it was not a case for invoking any of the provisions of the Disciplinary Code but one for termination by notice in accordance with the specific clause providing for notice in the agreement. We then went on to find that any breach of the term of contract as to the mode of termination could give rise only to a remedy in damages. Before withdrawing his argument Mr Dzekedzeke indicated that he had intended to say that in this case there was a pure master and servant relationship and them could not be specific performance thereof, as that, if there had been a breach by the appellant, the respondent's remedy was only in damages. In view of our finding in the *Kamayoyo* case that the dismissal was not for disciple reasons there was no need for this court then to decide whether if there had been a breach of the provision as to the procedure for dismissal laid down in the Disciple Code a declaration could have been made that the dismissal was null and void. We did, however, say:

> "I have no hesitation in finding that there was nothing more the a pure master and servant relationship between the parties, and the respondent is in no different position from that of an employee of any other company whose procedure for termination of contract is not affected by the elements outlined by Wilberforce, L.J., in *Malloch* (2) reproduced

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> above. Any breach of any of the terms of contract between the appellant and the respondent as to the mode of termination can give rise only to a remedy in damages."

This comment was not essential to the decision of that case on the facts before the court and was, therefore, obiter. We are bound to say that, on reconsidering the question in light of the facts at present before us, the fact that there was a Joint Industrial Council Agreement, which may well have been properly gazetted should have been taken into account. Had it been necessary for us in that case to decide whether there had been a breach in the procedure for the termination of the contract as laid down in the Disciplinary Code of that contract, we should have taken into account Section 84 (3) of the Industrial Relations Act (Cap. 517), which provides that upon registration of a collective agreement by the Registrar it shall have statutory effect but it shall come into force only after publication is duly gazetted. It follows, therefore, that, where there is a collective agreement which has been properly published in the Gazette and which contains a disciplinary code providing for a certain procedure to be followed before dismissal, there is statutory support for such procedure and a breach thereof might well result in a declaration that a dismissal was null and void. In this respect, therefore, so far as our obiter remarks in the *Kamayoyo* case suggest that in such a case damages are the only remedy, they are incorrect and should not be followed. We would emphasise, however, that a declaration that a dismissal is null and void followed by an order for reinstatement

is a discretionary remedy and courts should always consider carefully the remarks of Lord Morris of Borthy - Gest in the case of *Francis v Municipal Councillors of Kuala Lumpar* (3) at paragraph 637:

> "In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration."

In that case the plaintiff was dismissed by the Council, his employers, when, by statute, he could only be dismissed by the President. His dismissal was therefore wrongful and contrary to the procedure laid down by statute; but, despite this, the Privy Council held that re-instatement was not an appropriate remedy.

For the reasons we have given we allow this appeal and set aside the judgment and declaration of the High Court. Costs in this court and in the court below to the appellant.

Appeal allowed
