

RAINWARD MUBANGA v ZAMBIA TANZANIA ROAD SERVICES LIMITED
(1987) Z.R. 43 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, J.J.S.
15TH SEPTEMBER, 1987.
(S.C.Z. JOINT NO. 24 OF 1987)

Flynote

Employment - Unlawful dismissal contrary to Employment (Special Provisions) Regulations - Whether employment subsists.

Headnote

The appellant's employment was terminated with the "approval of the proper officer in writing" contrary to Reg. 4 of the Employment (Special Provisions) Regulations, 1975. He took his case to the High Court claiming a declaration that his dismissal was null and void and that he was therefore entitled to reinstatement. The matter came before the Court of Appeal on a preliminary issue. The respondent argued that termination of employment was a factual matter and there was no automatic right to reinstatement or a declaration to that effect.

Held:

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 result of the ineffectuality is a matter for the trial court to decide.

Cases cited:

- (1) Mallock v Aberdeen Corporation [1971] 2 All E.R. 1278
- (2) Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All E.R. 633
- (3) Miyanda v The Attorney-General (1985) Z.R. 185.
- (4) Bridget Mutwale v Professional Services Limited (1984) Z.R. 72

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Legislation referred to:

Employment (Special Provisions) Regulations, 1975.

For the appellant: L.P. Mwanawasa, Mwanawasa and Company.

For the respondent: S.Malama, Jaques and Partners.

Judgment

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

This is an appeal from a judgment of the High Court in an action for unlawful dismissal holding that a purported termination of employment in breach of Regulation 4 of the Employment (Special Provisions) Regulations 1975 operates to end a contract of employment and the employee's only remedy is limited to a claim for damages.

The facts of this case are that the appellant, who was employed by the respondent, was given notice of dismissal but no approval was sought from a proper officer under the terms of Regulation 4(1) (a) of the Employment (Special Provisions) Regulations 1975. That Regulation reads as follows:

"4.(1) No person shall dismiss or otherwise terminate the employment of any employee, irrespective of whether previous notice of such dismissal or termination has been given to the employee or not, unless . . .
(a) approval of the proper officer in writing has been given to such dismissal or termination;
or. . . "

Further sub-regulation (2) provides that any person who contravenes the regulation shall be guilty of an offence. Under regulation 11 any such person shall be liable on conviction to a fine not exceeding K6,000.00.

When an action claiming a declaration that the dismissal of the appellant was null and void came before the High Court a preliminary issue was raised as to whether or not the regulation to which we have just referred rendered a purported dismissal of an employee null and void to the extent that it had no effect whatsoever and, therefore, there was an automatic right for reinstatement.

Mr Mwanawasa on behalf of the appellant has argued that in view of the fact that there is a mandatory provision in the regulation that no person may be dismissed without approval of a proper officer the effect of the dismissal is a nullity. The result, therefore, Mr Mwanawasa argued, is that the employee, the appellant in this case, is entitled automatically to reinstatement in the office which he held.

Mr Malama on behalf of the respondent has argued that the termination of employment was a factual termination and there is no automatic right for the employee, the appellant in this case, to reinstatement or a declaration to that effect.

The question of the rights of persons who have possibly been improperly dismissed has been decided in a number of cases in the courts of this country and elsewhere. Basically the common law provides that a contract of personal service will not be the subject of an order for specific performance. There have, however, been cases of employees who are employed in circumstances where there are statutory provisions

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that they may only be dismissed after certain procedures or where they are employed in public organisations, where it has been held that it is possible that an order for reinstatement in the service from which they have been improperly dismissed may be made. In this respect we would refer to the judgment of Lord Wilberforce in the case of *Mallock Aberdeen Corporation* (1). There the learned Lord of Appeal indicated the circumstances where an employee whose employment is governed by statute or whose employment can be said to be of a public nature may be held to be entitled to a declaration that he should be reinstated in employment when he has been improperly dismissed.

In this particular case there is most certainly a statute which provides in no uncertain terms that it is improper to dismiss an employee such as the appellant without the approval of a proper officer. There is no doubt in this case that the employee was in fact dismissed without approval and we are asked to decide what is the result thereof. In the case of *Francis v Municipal Councillors of Kuala Lumpur* (2), a Privy Council case, it was held as follows:

",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 that case the president of the country concerned had power to dismiss an employee of the local council, however, the employee was dismissed wrongfully by the use of the wrong procedure. It was held that despite the fact that the dismissal was quite improper there was no reason to grant the applicant a declaration that he was entitled to reinstatement. Similarly in this country in the case of *Miyanda v The Attorney-General* (3), where this court held that an army officer had been improperly dismissed, contrary to statutory regulations we also held that in the circumstances of that case it was not appropriate to make a declaration to the effect that the officer was entitled to reinstatement in the service.

We are quite satisfied that regulation 4 is a specific provision which must not be ignored by employers. In this case the failure to obtain the approval of a proper officer was contrary to the regulation. The purported dismissal was, therefore, wrong and contrary to the law. In the case of *Bridget Mutwale v Professional Services Limited* (4), this court held, in relation to section 13 of the Land Conversion of Titles Act, which provides that no person can lease premises without Presidential consent, that when that Presidential consent has not been obtained a letting of premises was unlawful and in the circumstances of that case the landlord had no recourse to law to enforce his purported rights under the illegal letting. In the same way in this case the law as laid down in regulation 4 cannot be ignored and the purported termination of employment was ineffectual. However, the result of that ineffectuality is a matter for the trial court to decide bearing in mind the admonitions put forward in the *Malock* (1) case and in *Francis v Municipal Council of Kuala Lumpur* (2).

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We, therefore, hold that this appeal is successful. The appeal will be allowed and the case will be sent back to the trial judge for continued hearing.

Costs will be reserved to the learned trial judge
Appeal allowed
