ZAMBIA BREWERIES LIMITED v WHISKY KAWISHA (1993 - 1994) Z.R. 32 (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA AND CHIRWA, JJ.S.
2ND DECEMBER, 1992 AND 22ND JANUARY, 1993.
(S.C.Z. JUDGMENT NO. 8 OF 1993)

Flynote

Employment - Dismissal - Grounds for - Effect on statutory rights.

Headnote

Zambia Breweries appealed against a decision by the High Court ordering reinstatement of the respondent, and payment to him of all arrears of salary and benefits since the alleged wrongful dismissal on 12th July, 1979. The Court considered all five grounds of appeal, in the light of the facts.

Held:
Even where the basic conditions are fulfilled, such as the contract being governed by statutory provisions or there being an element of public employment, the discretion of the Court to order reinstatement as opposed to damages has to be exercised on grounds which can be identified and defended. The present facts did not reveal such grounds.

Legislation referred to:
1. Employment Act, cap. 512, s. 36.
2. Employment (Special Provisions) Regulations, cap. 515, reg 4.

For the appellant: A.G. Kinariwala of Legal Services Corporation.
For the respondent: H. Chama of Mwanawasa and Co.

Judgment

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

For convenience we will refer to the appellant as the defendant and the respondent as the plaintiff. The defendant appeals against a judgment of the High Court which found in favour of the plaintiff on his claim to be reinstated in his former employment and to be paid arrears of salary and all benefits due to him since the alleged wrongful dismissal on 12th July, 1979. The facts were that the plaintiff was on 21st July, 1970, employed by the defendant as a general worker. He did not enjoy good health as he had asthma and ingunial hernia. The events leading to dismissal were that, at the plaintiff's own request and insistance, he was given 22 days sick leave from 13th November, 1973, to 12th December, 1978, to enable him to travel to a hospital of his own choice at Kasempa. This was despite the availability locally of a doctor retained by the defendant who attended to the plaintiff and who certified him fit for work. The plaintiff was suffering from smoker's cough which caused pain in the groin area where he had the hernia. The plaintiff did not resume work on 13th December, 1978, as expected and the defendant did not hear from him. They consulted the Labour Office who were to be notified in terms of the Employment (Special Provisions) Regulations, 1975, before the termination of the employment of an affected employee could be effected.

The plaintiff, who had absented himself from work for over five months without leave, reported for work on 6th June, 1979. His explanation that he had been undergoing medical treatment at Kasempa was

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checked out where it was ascertained that the plaintiff was admitted to the Mukinge Hospital on 11th December, 1978, and discharged on 28th December, 1978, with instruction on the discharge slip that the plaintiff should not do any work involving lifting for three weeks. He underwent an operation to repair the hernia and the doctors at Mukinge confirmed that the surgery was elective and could have been worked into a time of convenience for both the plaintiff and the defendant. It was also ascertained that the plaintiff was again admitted on 19th May, 1979, when, contrary to the plaintiff's complaint, no hernia was demonstrated and he was discharged on 25th May, 1979, after being treated for smoker's cough and advised to stop smoking. After a disciplinary hearing, the defendant found that the plaintiff had given a false explanation to account for his lengthy absence without leave and discharged him from employment for misconduct and desertion.

The learned trial judge found that the plaintiff had not misconducted himelf and had not deserted his job because he gave an explanation that he was unwell and recuperating and such explanation was reasonable. The learned trial judge further determined that the defendant's investigation of the matter was inadequate and that instead of terminating the plaintiff's service, they should have given him unpaid leave. The learned trial judge also held that the defendant did not comply with the disciplinary procedure set out in the relevant collective agreement and that, in any case, the termination related to illness and the defendant did not comply with s. 36 of the Employment Act cap 512, which required the prior approval of a proper officer. Regulation 4 of the Employment (Special Provisions) Regulations under cap. 515 was also held to have been breached, desisting correspondence with the Labour Office and in spite of a letter of consent the production of which was objected to on technical grounds since the bundles in Court contained an unauthenticated typed copy. Needless to say, an original or authenticated copy could have been demanded and produced in order to do proper justice between the parties. As it turned out, the learned trial judge found that prior consent had not been obtained from the Labour Office solely on account of the rejection of the typed copy before the Court. The Court, accordingly, held that the termination had been unlawful for want of such consent. The learned trial judge also took into account some correspondence which occurred three years later between the defendant and the Investigator-General. While the letter of discharge of 1979 referred to the misconduct arising from the plaintiff's absence without leave, a letter dated 16th February, 1982, to the Investigator-General suggested that the plaintiff had been retired on medical grounds because of illness and unsuitability to do the heavy work available for a general worker in his position. The learned trial judge drew from this contradiction the conclusion that the defendant was suffering from indecision and the inference to be drawn was that the plaintiff had neither been dismissed nor retired. The learned trial judge found for the plaintiff and concluded, without specifying the same, that there were special circumstances to justify, in the Court's discretion, the rare declaration to reinstate the plaintiff from 12th July, 1979, and to order payment of salary arrears and other benefits since then.

For completeness we should recite that the judgment reinstating the

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plaintiff was rendered on 22nd February, 1991, and that is over 11 years after dismissal. The

writ itself was issued on 17th August, 1984, that is five years after the dismissal. We should also mention that there were provisions regarding sick leave and absences in the collective agreement before the learned trial judge, a published copy of which is to be found in the Government *Gazette* of 4th August, 1978, as *Gazette* Notice No. 800 of 1978. Under the collective agreement, certain benefits during sickness and the periods for which they were to be available to various categories of employee (based on the length of service) were set out and there was a clause disentitling employees who failed to support this absence due to illness with a certificate from a registered medical practitioner. There were also provisions in the collective agreement dealing with disciplinary procedures and these were followed up to the rejection of the plaintiff's appeal to the highest domestic tribunal. The plaintiff's additional bundle of documents in the Court below also showed that he had lost his case before the Industrial Relations Court and the Investigator-General before launching upon the present litigation.

We have taken the trouble to recite at some length the facts and circumstances disclosed by the record because the defendant's grounds of appeal have complained against all the adverse findings and orders made below. We have taken this trouble for the additional reason that, while the defendant's apparent or alleged shortcomings were highlighted, the factors unfavourable to the plaintiff's case were either glossed over or excused.

The first ground of appeal alleged error on the part of the learned trial judge in finding that there was neither desertion nor misconduct in the French leave taken by the plaintiff in respect of elective treatment which was not supported by any appropriate medical certificate. Mr Chama's response, on behalf of the plaintiff, was that the learned trial judge had accepted the oral evidence given and there was, therefore, no need for documentary evidence to support the absence due to illness. We are unable to accept Mr Chama's submission which was in support of the stance taken by the learned trial judge. The contract between the parties was evidenced in large part by the collective agreement and this document contained a specific term requiring such documentary evidence. The plaintiff was in breach of this requirement. The learned trial judge ought to have given effect to the contract governing the employment in this respect and the failure to do so was clearly a misdirection. The result was that the party who, on the facts, was clearly at fault received a more sympathetic hearing against the employer who had insisted on compliance with the terms of the collective agreement. There is misconduct at common law (which the collective agreement stated to be equally applicable) if an employee absents himself or herself without leave. The failure by the plaintiff to support his inordinate absence in the manner agreed in the contract fully justified the defendant's view of the matter and the provision was, in any case, an eminently sensible way of I preventing malingering. The first ground of appeal succeeds. The second ground of appeal alleged error on the part of the Court below in the finding that the discharge of the plaintiff from employment, with benefits, was contrary to statute. The facts which we have recited show that a letter of consent by the Labour Office to the termination was objected to on a technicality

with the result, in our considered view, that, thereafter, the issue was resolved on a fiction that the appropriate officer was not consulted and did not approve. However, in view of the fact that we have allowed the first ground of appeal, it would not follow, even had there been a non-compliance with the regulation previously mentioned, that the result would be automatically to nullify the termination. As was pointed out by us in *Rainward Mubanga v Zambia Tanzania Road Services Limited* [1] and further explained in *Hapeeza v Zambia Oxygen Limited* [2] the consequence of non-compliance, in the case of an innocent employee, may be that a dismissal contrary to law may attract the remedy of damages or, in very special

and rare circumstances, reinstatement on the principles iterated in the *Hapeeza* case. In the case of an employee guilty of misconduct, in fact, there was nothing in those regulations (which incidentally only ran with the state of emergency) to oust the common-law rights of an employer and no question of the dismissal being invalidated by the regulation can arise. *Hapeeza* fully dealt with this aspect also and it should be referred to. The learned trial judge referred to *Hapeeza* and found for the plaintiff only because he had held that there was no misconduct, a conclusion which we have reversed. The second ground of appeal also succeeds.

The third ground of appeal alleged error below in the holding that the plaintiff was neither dismissed nor retired and remained an employer. From the facts which we have already recited, it is plain that the learned trial judge contrasted the reasons for termination contained in the letter of discharge with these advanced three years later in a letter to the Investigator-General. He found that there was indecision as to the precise grounds. We agree with the defendant's submission to the effect that the termination was a *fait accompli* and could not have been affected, three years later, by the alleged contradiction. We can find no rule or principle of law which says that a termination of employment which has already taken effect and been acted upon by the parties can be invalidated three years later by a misstatement on the part of the employer in response to an enquiry. This ground also succeeds.

The fourth ground of appeal related to the finding that the Labour Office did not approve the discharge of the plaintiff on the basis that the production of a typed copy of their letter was objected to. We have already alluded to this matter and the fact that, thereafter, the issue was decided on a fiction, a situation which this Court can hardly be expected to encourage. However, we have also considered what, if any, would have been the consequence of non-compliance with the relevant regulation and, for the reasons already given, the alleged non-compliance could not advance the plaintiff's case.

The fifth ground of appeal alleged error in the finding that there were special circumstances warranting an order of reinstatement. The learned trial judge simply declared that there were such circumstances but did not specify them or elaborate. Mr Chama argued that there was no requirement that he does so. We can only assume that the special circumstances related to the findings that there was no misconduct; that the plaintiff had given a reasonable explanation for his inordinate absence; that the defendant dismissed the plaintiff without adequate investigations; that the

termination here had been contrary to the Employment Act and the Employment (Special Provisions) Regulations; and that the defendant had neither dismissed nor retired the plaintiff because of the conflicting correspondence already discussed. We have not upheld the learned trial judge on these matters and so they can not assist the plaintiff. We must point out also that, quite apart from Hapeeza, the question of reinstatement has been discussed quite extensively in cases such as *Ridgeway Hotel v Sinyama* [3], *Mbewe v Pamodzi Hotel* [4] and several others. Even where the basic conditions are fulfilled, such as the contract being governed by statutory provisions or there being an element of public employment, and so on, the discretion of the court to order reinstatement as opposed to damages has to be exercised on grounds which can be identified and defended. It would be very surprising if reinstatement could be defended after a lapse of over 11 years as in this case and for a person whose poor health made him unsuitable for the heavy work of a general worker. This is not to mention his unsuccessful visits to the Industrial Relations Court and to the Investigator-General.

In sum, the grounds of appeal are upheld and the appeal itself succeeds. We reverse the Court

below and enter judgment for the defendant. Costs follow the event.

Appeal allowed.
