NYAMBE LYUWA v THE COUNCIL OF THE UNIVERSITY OF ZAMBIA (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA, JJ.S.
16TH FEBRUARY, 1995.
(S.C.Z. APPAEL NO. 63 OF 1994)

Flynote
Appeal - Wrongful dismissal - Reinstatement - Court's refusal to order reinstatement

Headnote
The Court awarded the appellant damages for wrongful dismissal but refused to order reinstatement. The appellant appealed against the court's refusal to order reinstatement.

Held:
(i) The learned trial judge should have considered the possibility of reinstatement without rejecting it on the grounds that it had not been pleaded.
(ii) This was not a proper case to order reinstatement

Cases referred to:
(1) Harris & Ors v Archfield & Ors (1950) E.R pp 427
(2) Miyanda v Attorney general (1985) Z.R 185
(3) Mutale v Crushed Stones Limited (1994) S.C.Z. Judgment No. 17
(4) Mubanga v Zambia Airways (1992) S.C.Z. Judgment No. 5
(5) Francis v Municipal Council of Kuala Lumpar (1962) 3 All E.R 633

For the Appellant: J.P. Sangwa of Simeza Sangwa & Associates
For the Respondent : N.K. Mubonda of D.H Kemp & Co.

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

This is an appeal against a judgment of the High Court awarding damages for wrongful dismissal, but refusing to order reinstatement. The appeal is against the refusal to order reinstatement.

The facts of the case are that the appellant was employed by the respondent as an Internal Auditor. He was on probation for one year, and, within one month of his employment, he purchased some furniture from the organisation but failed to adhere to the normal tender procedure. For this reason he was held by the respondent, in a letter written on the 21st August 1989 to have been involved in irregular sale of the furniture to an extent that the University felt that the confidence of the position that he held had been breached by the incident. They did not find it possible to cofirm him in his employment and his employment was terminated with effect from 10th August, 1989.

The University of Zambia conditions of service as supported by the University of Zambia Act, 1979, set out the procedure that should be followed before any employee could be dismissed. The learned trial judge was quite satisfied that this procedure had not been followed and therefore the dismissal was wrongful. The learned trial judge then went on to find that although the appellant had claimed the remedy of reinstatement in his writ no such claim had been put forward in the statement of claim, and he cited the case of Harris & Others v Archfield & Ors (1) for dinding that, if a claim is omitted from a statement of claim, although it was put forward in the writ, such claim is deemed to have been abandoned. Consequently, as in this case the claim was not in the statement of claim, the learned trial judge refused to

order reinstatement. At the same time, the learned trial judge quoted the case of Miyanda v Attorney General (2) in which this court held that in the circumstances of that case, where a senior army officer had been dismissed through entirely wrong procedure by the wrong authority, that it was not an appropriate case for the order of reinstatement. The appellant appealed against the refulsal to order reinstatement.

Mr Sangwa on behalf of the appellant has argued two grounds of appeal. One was that the judge was wrong in the circumstance to have held that the appellant had abandoned his claim for reinstatement. He argued that the functions of the pleadings was to assist the court, and that it depended on the circumstances whether or not the necessary notice required in the pleadings had been given. In this particular case it was drawn to our attention that before the opening of the case the very first statement by counsel for the appellant was that he intended to show the court that the dismissal was null and void because the defendant had not followed the statutory procedures, and he said: "He will therefore, seek the remedy of reinstatement." No objection was made to this statement by the court or by counsel for the respondent and, in the circumstances, it was argued that the necessary notice of the claim had been given.

The second ground of appeal was that this was an appropriate case to order reinstatement because the disciplining authority that dismissed the appellant was not the correct one with power to dismiss and the procedure laid down had not been complied with. Mr Sangwa was invited by the court to suggest reasons why this was an exceptional case against the general principle that reinstatement is very rarely granted and he was unable to put forward any specific reasons why this was such a case.

Mr Mubonda on behalf of the respondent argued that, because the claim for reinstatement was not set out in the pleadings, it was not possible for the court to have made an order for reinstatement unless there had been a proper application for amendment of the pleadings. He maintained that the statement made by the counsel for the appellant for the trial was not an application for amendment of the pleadings, and he was under not duty as defence counsel to make objection to a claim for reinstatement when it had not been pleaded. As to the second ground of appeal Mr Mubonda argued that this was not an exceptional case and that the general principle should apply that reinstatement was an appropriate remedy. As to the first ground of appeal we agree with all the authorities, including the Harris case, that claims must be set out in the statment of claim. It is immaterial that claims are put forward in the writ, and under Order 18 of the rules of the Supreme Court (the White Book) the necessity for including all claims in the statement of claim is made quite clear. We agree that if no claim is mentioned in the statement of claim it must be deemed to have been abondoned. We also agree with Mr Mubonda that thereafter such claim cannot be dealt with unless the statement of claim is amended.

This court has had occasion to indicate, in the case of Mutale v Crushed Stones Limited (1994) SCZ Jugement No. 17, that notice by letter of details of proposal to claim for special damages can be sufficient notice of such a claim to satisfy the requirements of Order 18. The reasons being that the danger of the defendant's being taken by surprise no longer exists.

In this case, when counsel gave notice that he intended to apply for reinstatement, cousel for the respondent could have objected on the grounds that the proposal amounted to an amendment of the statement of claim, that the notice was too short and that he required an adjournment, with costs against the appellant, because he had been taken by surprise. No such objection was made, and counsel must be taken to have waived the right to object. We entirely agree with Mr Mubonda that the notice so given was not in the correct form but it cannot be said that the appellant was unaware of the proposed claim. The important consideration, when a claim is not included in a statement of claim is whether the defendant had notice of the claim. If he has notice of the of the claim but objects on the ground that it was not properly pleaded he must make objection as soon as the plaintiff indicates that he wishes to claim something which has not been pleaded. the court must then make a ruling. In the circumstances, therefore, in this case the first ground of appeal succeeds, and we find that the learned trial judge should have considered the possibility of reinstatement without rejecting it on the grounds that it had not been pleaded.

With regard to the second ground of appeal that reinstatement was appropriate in this case, we confirm the principle set out in Francis v Municipal Council of Kuala Lupar (4), and we agree with Mr Mubonda that in this particular case no evidence was led to indicate that this was an exceptional case where reinstatement should have been ordered. In this connection we would refer to the case of Mubanga v Zambia Airways (1992) SCZ Judgment No. 5 where a person was found by the learned trial judge to have been the subject of a vicious feud resulting in entirely false charges against him which were not established, and where the Managing Director who had carried out the feud against the plaintiff had since left the empying

organisation, and an order of reinstatement was made. This court found no reason to interfere with the finding that it was a suitable case for reinstatement as an exception to the general rule. No such circumstances arose in this case so that, in any event, reinstatement should not have been ordered. The learned trial judge in the court below found that the appellant was entitled to damages for wrongful dismissal and awarded three months salary with interest at the rate of 15% per annum. We find this to have been a correct order.

Appeal partly allowed
