

CHOMBA CHRISTOPHER MULENGA v KASAMA MUNICIPAL COUNCIL

Supreme Court
Sakala, CJ, Mambilima and Chitenengi, JJS
3rd December, 2002 and 4th March, 2004
(SCZ Judgment No. 20 of 2003)

Flynote

Employment Law – Interpretation of Statutory Instrument – Inconsistent with Act – Effect of thereof.

Headnote

The history of this case can be briefly stated. The appellant was employed by the respondent on probation as Director of Finance and while so employed allegedly engaged himself in, inter alia, serious misappropriation of funds belonging to the respondent. Consequent upon this, the appellant was formally charged and suspended for these financial irregularities. Later, the respondent's Establishment Committee, met on 5th June, 2001, to consider the appellant's case and after deliberation, resolved to withdraw the appellant's employment on probation and dismissed him with immediate effect. The appellant then appealed to the Local Government Appeals Board against the dismissal. However, by the time the appellant commenced this action, the Local Government Appeals Board had not heard and determined his appeal.

This action was commenced by originating summons requesting the court to determine that in terms of regulation 35 (4) of Statutory Instrument Number 115 of 1996, the appellant was entitled to all his fringe benefits whilst his appeal against dismissal was pending. The respondents position was that the appellant committed theft and was consequently dismissed and was therefore not entitled to any payment. The learned trial judge held that regulation 35 (4) aforesaid, conflicted with Section 26 of the Employment Act, Chapter 268 of the Laws of Zambia which provides that on summary dismissal the employee shall be paid wages and other allowances due to him up to the time of his dismissal. For this reason, the learned trial judge held that the appellant was not entitled to the fringe benefits he was claiming, but would only be entitled to the salary which would have accumulated during his dismissal if his appeal succeeded. The appellant appealed against that judgment.

Held:

1. In terms of the Interpretation and General Provisions Act, any provision of a Statutory Instrument which is inconsistent with the provision of an Act or Ordinance shall be void to the extent of the inconsistency.
2. Fringe benefits include perquisites or benefits supplementing wages or salaries.
3. The learned trial judge therefore fell into error when he held that regulation 35(4) conflicted with the provision of Section 26 of the Employment Act.
4. Regulation 35 (4) is intended to protect an officer against withdrawal by the

council of such benefits as a rent free house, use of a council car and not to pay a dismissed officer who has appealed, a salary pending determination of the appeal because that would, in terms of Section 26 of the Employment Act be unlawful.

Legislation referred to:

1. Employment Act, Chapter 268 of the Laws of Zambia Section 26.
 2. Statutory Instrument Number 115 of 1996. Regulation 35 (4)
 3. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia Section 20 (4).
- S.M. Twumasi of Messrs Kitwe Chambers* for the appellant
W. Mwale of Messrs Mwale and Musonda Associates for the respondent

Judgment

CHITENGI, JS, delivered the judgment of the court.

We regret the delay in delivering this judgment. During the year, the court has been kept busy on the Presidential Election Petition. In this appeal, we shall refer to the appellant as the plaintiff and the respondent as the defendant, which is what they were in the court below.

The history of this case can be briefly stated. The plaintiff was employed by the defendant on probation as Director of Finance and while so employed allegedly engaged himself in, inter alia, serious misappropriation of funds belonging to the defendant. Consequent upon this, the plaintiff was formally charged and suspended for, these financial irregularities. Later, the defendant's Establishment Committee, met on 5th June, 2001, to consider the plaintiff's case and after deliberations resolved to withdraw the plaintiff's employment on probation and dismissed him with immediate effect. The plaintiff then appealed to the Local Government Appeals Board against the dismissal. However, by the time the plaintiff commenced this action, the Local Government Appeals Board had not heard and determined his appeal.

This action was commenced by Originating Summons asking the court to determine that in terms of Regulation 35(4) of Statutory Instrument No. 115 of 1996, the plaintiff was entitled to all his fringe benefits whilst his appeal against dismissal was pending. Without explaining how he arrived at the figure, the plaintiff put his fringe benefits at K44,642,000.00.

The Originating Summons was supported by an affidavit the contents of which were to explain how the Plaintiff was employed, suspended, dismissed and how he appealed to the Local Government Appeals Board and how he was victimized by the defendant who refused to pay him his fringe benefits. The sum and substance of the affidavit in opposition sworn by the defendant's Town Clerk, one Joseph Mukusa Sampa, was that the plaintiff committed theft and was consequently dismissed and was, therefore, not entitled to any payment.

On this affidavit evidence, the learned trial judge held that Regulation 35(4) aforesaid conflicted with Section 26 of the Employment Act Chapter 268 of the Laws of Zambia, which provides that on summary dismissal the employee shall be paid wages and other allowances due to him up to the time of his dismissal. For this reason, the learned trial Judge held that the plaintiff was not entitled to the fringe benefits he was claiming but would only be entitled to the salary which would have accumulated during his dismissal if his appeal succeeded.

The plaintiff appeals to this court against that Judgment. The plaintiff filed two grounds of appeal. The first ground of appeal is that the learned trial court erred in law and fact in holding that Regulation 35(4) of Statutory instrument Number 115 of 1996, was in conflict or inconsistent with Section 26 of the Employment Act, Chapter 268 of the Laws of Zambia as Regulation 35(4) allows for the payment of the Plaintiff pending the determination of his appeal.

The second ground of appeal is that the Honourable Court erred in holding that the plaintiff was, therefore, not entitled to his fringe benefits whilst awaiting the outcome of the Appeal. Both Mr Twumasi, learned counsel for the plaintiff, and Mr Mwale, learned counsel for the defendant, filed heads of argument and also made oral submissions in which they took us through the various provisions in the Local Government Act Chapter 281 of the Laws of Zambia, Regulation 35(4) of Statutory Instrument Number 115 of 1996, Section 26 of the Employment Act, Chapter 268 of the Laws of Zambia and the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia. However, on account of the view we take of this appeal, we do not intend to go into the details of these submissions and the provisions of law cited to us. Suffice it to say that we have given our careful consideration to the submissions by counsel and we have studied the provisions of law to which we have been referred.

We propose to deal with the issue of conflict of Regulation 35(4) of Statutory Instrument Number 115 of 1996 and Section 26 of the Employment Act first. It is correct, as Mr Mwale submitted, to say that in terms of Section 20(4) of the Interpretation and General Provisions Act, any provision of a Statutory Instrument which is inconsistent with the provision of an Act, Applied Act or Ordinance, shall be void to the extent of the inconsistency.

The critical issue in this case is whether Regulation 35(4) is in fact inconsistent with Section 26 of the Employment Act. For completeness, we reproduce Regulation 35(4) and Section 26 of the Employment Act. Leaving out what is not necessary. Regulation 35(4) of Statutory Instrument Number 115 of 1996 reads: -

“35(1)
(2).....
(3).....
(4) A council shall not victimize an officer who has filed an appeal and shall not deprive him of any fringe benefits that the officer is entitled to by virtue of being an officer of the Council.”

Section 26 of the Employment Act reads: -

“26. Where an employee is summarily dismissed he shall be paid on dismissal the wages and working or other allowances due to him up to the time of such dismissal.”

Neither the Local Government Act nor Statutory Instrument No.115 of 1996, defines fringe benefits. We must, therefore, assign to fringe benefits their ordinary meaning in English Language.

The Concise Oxford Dictionary of Current English, Seventh Edition, at Page 394 defines fringe benefits as: -

“Perquisite or benefit supplementing money wage or salary.”

It can be seen that while Section 26 of the Employment Act talks about wage and other or working allowance, Regulation 35(4), talks about fringe benefits which by definition are not wages or allowances. Clearly, from the definition we have given above, fringe benefits will include things like a rent free house and the use of a car, additional to wages or salary. The learned trial Judge, therefore, fell into error when he held that Regulation 35(4) conflicted with the provisions of Section 26 of the Employment Act. The first ground of appeal, therefore, succeeds for the reasons we have given but not for the reasons advanced by Mr Twumasi.

But that is not the end of the matter. The question arises whether the plaintiff is entitled to the K44, 642,000.00 he has claimed. As we have said above, the Plaintiff did not say what these fringe benefits which can amount to K44, 642,000.00 from 16th July, 2001, date of lodging the appeal, to 16th April, 2002, when the plaintiff brought this action, are. From the submissions by Mr. Twumasi, learned counsel for the plaintiff, it is clear to us that the plaintiff is claiming his wages. Such a claim flies in the teeth of the very regulation 35(4) which the plaintiff relies upon. Regulation 35(4) is intended to protect an officer against withdrawal by

the Council of such benefits as a rent free house, use of a Council car etc. and not to pay a dismissed officer who has appealed a salary pending the determination of the appeal because that would, in terms of Section 26 of the Employment Act, be unlawful.

All in all, the plaintiff proved no fringe benefits that were denied to him during the time his appeal to the Local Government Appeals Board was pending.

From what we have said above it follows that ground number two fails.

As Mr. Mwale submitted there is no merit in this appeal. We dismiss this appeal for the reasons we have given and not for the reasons given by the learned trial judge.

The defendant will have his costs in this court to be agreed upon and in default to be taxed.

Appeal dismissed