Gwembere v Malawi Railways Limited

Judgment

Court:	Supreme Court Of Appeal
Bench:	Skinner, CJ, Honourable Justice Villiera, Ag. JA., Honourable Justice Topping, Ag.
Cause Number:	9 MLR 369
Date of Judgment:	June 07, 1980
Bar:	Mhango, Counsel for the Appellant. Alufandika, Counsel for the respondent.

SKINNER C.J.:

Delivering the judgment of the court: The appellant in this appeal was employed by the respondent as an electrical foreman at a salary of K262 per month. He had been employed by it for about 20 years when on the September 17th, 1977 he was arrested by the police on a criminal charge, namely, that of theft by servant, but he continued working for the respondent until October 10th, 1977, when he was suspended on half salary with effect from September 17th. During the period of his arrest and before his suspension he was absent from work for two days. The appellant was convicted of the offence of theft by a servant whereupon he was dismissed from his employment by letter dated May 6th,

1978. In that letter he was told that as soon as the administrative procedure had been complied with he would have his pension contributions refunded to him. The refund of pension was not however paid, and we shall refer to this at length later in our judgment. The appellant instituted proceedings by writ in July 1978, in which he claimed:

(a) K1,045 being arrears of salary for the period September 17th, 1977 to May 6th, 1978;

(b) K381 for leave pay in respect of 48 days;

(c) K3,054.02, being the refund of the pension contributions payable by the respondent to the appellant;

(d) interest on the pension refund to be assessed.

In its defence the respondent pleaded that the appellant's suspension and subsequent dismissal from its employment were lawful having regard to the terms of the contract of employment between the parties, and it denied owing the appellant the sum claimed for arrears of salary and leave pay. It was admitted that the appellant was entitled to K149.40 in respect of leave pay and salary that had accrued to him before his suspension, and it was averred that that money had been paid to the appellant and accepted by him but that he later returned it to the respondent. It was further pleaded that the respondent had always been and was willing to pay to the appellant both the sum of K149.40 in respect of the salary and leave pay and the sum of K3,054.02 in respect of the pension fund contributions. It was denied that any interest on the pension fund moneys was due. There was a small counterclaim for K30.34. It is not necessary to refer to it as the respondent was unable to prove it and it was dismissed with

costs by the learned trial judge.

The learned judge held that the appellant was not entitled to the moneys claimed for arrears of salary other than the sum of K79.83 being in respect of his salary from September 17th to October 10th, 1977 less certain deductions. That sum was awarded on the basis that suspension cannot be ante-dated, and with respect we concur with the learned judge's finding thereon. He further allowed the claim for leave pay but to a limited extent only. He allowed it for 27 days' leave which amounted to K221.69. He held that the claim for 21 days' leave failed in that no leave accrued during a period of suspension. He found that the claim in respect of interest on the pension refund from the time it came into the hands of the respondent from the insurance company failed.

Mr. Mhango for the appellant has taken three points before us. The first of these relates to the learned judge's finding that the suspension clause in the disciplinary code was effective in suspending the relationship of master and servant from October 10th, 1977 until the appellant was dismissed on May 6th, 1978. Counsel argues that the relationship was suspended from October 10th–24th only but subsisted from the latter date until the time of dismissal. His argument is based on an interpretation of the disciplinary code as it stood in October 1977. The disciplinary code constitutes part of the conditions of service and there is no argument about that. Clause 6 of the code deals with suspension. It reads as follows:

"*Where an employee is suspected of having committed an offence which seriously affects the safety or security of trains, the working of the*

Railway, or property or cash he may be suspended from duty on half pay. Notice of suspension will be given in writing on the authority of the

head of department who shall advise the Chief Personnel Officer immediately. This notice will give the employee the reasons for suspension;

informing him that the suspension shall be entirely without prejudice to the subsequent imposition of any penalties which may arise from any

enquiry which may be held; and that he must report daily, at a time specified, to his head of department during the period of suspension. The

employee is to be warned that any failure to report daily as instructed would make him liable to further disciplinary action."

The only power to suspend the employee is that contained in this clause. It was the subject of interpretation in an earlier case before this court, namely, ***Mkwapatira v Malawi Railways Ltd*** (1978), 9 MLR 90**.** In giving the judgment of the court in that appeal I said, with reference to the clause:

"*Where, in a contract of employment, there is a term, such as the present one, empowering the employer to suspend the employee from duty*

pending investigation of his conduct, the effect is that, when the employee is suspended from duty, the whole contract is suspended, the operation

of the mutual obligations of the parties is suspended. The employee ceases to be under any duty to work and the employer ceases to be under any

duty to pay him wages other than as specified in the term. Such a precautionary suspension term, in so far as the suspension of mutual duties and

rights under the contract is concerned, is in our view no different from a term designed as a punitive measure. In the instant case clause 6 is such a

clause, and we fully concur with the learned judge's findings that the defendant company had power under it to suspend the plaintiff and that

during the period of such suspension all mutual obligations, except those that were specifically agreed to by the parties and contained in the

disciplinary code, were suspended. Under clause 6 the only wages due to the plaintiff were one half of his salary."

In the instant case the learned trial judge was of opinion that the suspension clause, cl. 6, was effective and the duties of the employer were suspended and those of the employee were also suspended except those duties which were agreed upon in the contract of employment, and he referred to ***Mkwapatira***'s case. However, in the instant case it is argued by Mr. Mhango that cl. 6 is not the end of the matter because the procedure to be followed in the use of cl. 6 was negotiated between the respondent and the union. Such procedure, he submits, was incorporated into the contract of service as a result of an agreement made

between the respondent and the trade union. He contends that a further document sets out the terms of the amendment.

That further document is stated to be an "amplification of the general staff regulations applicable to local wages personnel and local salaried staff of the Railways," and it is said in the introductory paragraph thereto that the conditions of service contained therein apply to all local employees of Malawi Railways and that they are intended to supplement and expand the conditions set out in the general staff regulations and other conditions of service.

The document is dated April 2nd, 1962 but the relevant page—and the entire numbering has been made in ink it seems at some later date—is in the form of a General Manager's circular dated December 16th, 1976 dealing with suspension from duty. It provides that no order of suspension from duty will be issued except under the signature of the head of the department concerned or the deputy head of the department, and it provides that a copy must be sent to the General Manager. Next is a paragraph which it is unnecessary to set out until later, and then there are three paragraphs which are of the essence of Mr. Mhango's submission. We set them out in full.

"*A notice of suspension from duty will be valid for an initial period of 14 days only. Within that time the provisions of the disciplinary code must*

be applied and the punishment, if any, inflicted. If the punishment amounts to less than discharge from the service, the suspension order must be

lifted forthwith. If the punishment inflicted is discharge or dismissal from the service and an appeal is lodged, the employee must remain under

suspension until such time as the appeal has been considered and the decision conveyed in writing to the appellant. No notice of suspension may,

however, be extended beyond the initial 14 days without the prior agreement of the General Manager or the Deputy General Manager. In seeking

such agreement the head of department must furnish full details of the circumstances in which and the date from which the notice of suspension

was issued, the progress of the disciplinary procedures in respect of the alleged offence and the reasons why an extension of the notice of suspension

is requested. Unless this is done and the approval of the General Manager or Deputy General Manager to an extension of the initial period of

suspension has been obtained before the expiry of the initial 14-day period of suspension, the employee concerned must be reinstated.

Once an extension of the initial 14-day period of suspension has been agreed by the General Manager or the Deputy General Manager a progress

report must be submitted to the General Manager at 7-day intervals until either the suspension order is lifted or the punishment of discharge or

dismissal has been imposed and any appeal in respect thereof has been rejected."

Due to the form of the exhibit before the court we were concerned as to whether this page formed part of the amplification of the general staff regulations and thereby of the conditions of service, or whether it was simply inserted into the exhibit by someone and was really no more than a form of instruction from the General Manager to heads of departments. However, there was evidence in the court below relating to the page, first that of Mr. Geddes, the then General Manager of Malawi Railways. He was shown the page and he confirmed that the page bore his signature and that it dealt with the subject of how suspensions from duty were to be dealt with and formed part of the staff regulations. Again there was evidence from a Mr. Njilu, who was chairman of the Malawi Railways trade union in 1976, who said that he had negotiated the provisions contained on that page.

There was evidence from a Mr. Gordon, the works manager of Malawi Railways, who said that some parts of the disciplinary code had been amplified in the supplementary document, and he agreed that the exhibit had been modified and brought up to date since it had been first issued in 1962, and that it was part of the terms that bound the employees and the employer, and he further agreed that the relevant page was issued because procedures with regard to the

suspension clause were not being followed by heads of departments and that suspension was being treated as a penalty and that sometimes employees were kept under suspension up to six months without any action being taken. His evidence as to what the relevant page actually was is not clear, but he did say that he regarded himself as being bound by it. It seems to us from the evidence, and particularly from the evidence of Mr. Geddes and from an examination of the document in its entirety, that the provisions of the relevant page were to form part of the amplification of the general staff regulations applicable to local wages personnel and local salaried staff, and were so negotiated between the respondent and the trade union and are incorporated into the contract of service between the respondent and its employees. The provisions, it seems to us, provide for procedure which is to be followed in the case of suspension. The provisions are badly drafted—the procedure is not at all clear—and are such as to be bound to give rise to trouble and endless litigation. However, one thing is certain and that is that suspension cannot be for a longer period than 14 days without the agreement of the General Manager or the Deputy General Manager. This is not a question which was considered in ***Mkwapatira****'s case.*

In the instant case it appears that such agreement was not given. The Deputy General Manager gave evidence and said that he had no recollection of ever having been asked to agree to the extension of the suspension of the appellant, and the General Manager's evidence was that he could find no letter on the relevant file dealing with the appellant which showed that he had been asked to extend the period of suspension. There was evidence from Mr. Gordon, the works manager of Malawi Railways, who said that he had spoken to the General Manager on a number of occasions on the appellant's case and "we kept saying we will wait for the court case." He agreed that they did not reach any decision

because the supplementary rules did not refer to the procedure when cases are being dealt with by the court. His view was that it was unnecessary for the General Manager to agree to an extension when matters were being dealt with by the police, and he said that that was the reason why he did not apply for such agreement.

Mr. Alufandika has argued in this court that the procedure set out in the document did not apply in the instant case because the respondent was not supposed to issue a Form D–1, as envisaged in cl. 7 of the disciplinary code, and that the procedure only applied to matters which Malawi Railways were dealing with themselves, and not where there was investigation by the police. This is not an argument which we can accept. The only power of suspension which the respondent can exercise is that provided for in cl. 6 of the disciplinary code, and the procedure relating to it and its continuance is spelt out in the supplementary order. Counsel further contended that the procedure was applicable to what he described as railway offences only, but there is nothing in the document to suggest that. The second paragraph of the relevant page reads as follows:

"*No one will be suspended from duty unless the offence in respect of which he is to be suspended is one for which, if proven, the employee would be*

discharged or dismissed from the service of the company. Save only that if the offence relates to the safe operation of train services or to the safety

of life and company property, then the employee may be suspended from duty if there is no other work on which he can be gainfully

employed."

The paragraph clearly does not speak only of what is described as railway offences; it provides that a worker can be suspended in respect of any offence for which he would be discharged or dismissed.

It seems to us that the suspension of the appellant lapsed on October 24, 1977 and that he would be entitled to full salary, instead of half salary, from that date until May 6th, when he was dismissed. He has been paid half of his salary, and the other half of his salary would amount to K852.49. It follows that he would also be entitled to leave for the period September 17th, 1977 to May 6th, 1978, other than for the period when validly suspended, which amounts to 21 days less 1½ days not earned during the valid suspension period, and we calculate this at K154.82. We would add these sums to the judge's figure and award the appellant K1,308.88 in respect of the claims for arrears of salary and for leave pay.

The next point taken by counsel for the appellant relates to the question of interest on the amount due in respect of a refund of pension contributions. The appellant by his statement of claim claimed the sum of K3,054.02, being refund of the pension contributions payable by the respondent to him together with interest up to the date of payment, and in the last paragraph of his statement of claim he asked for the interest on the pension refund to be assessed. Now a considerable amount of unnecessary difficulty arose about the pension refund It was never disputed. By letter dated June 27th, 1978, addressed to the appellant's legal practitioners, it was said *inter alia* that the amount of money

due to him as a refund of contributions to the pension fund was K3,054.02. It was further said in that letter that a cheque in this amount less tax, and less K30.34 being the sum which was later the subject of the unsuccessful counterclaim, would be sent to the legal practitioners. This money was never tendered before action nor was it paid into court.

There was no plea of tender raised on the defence. Those are odd omissions. There was an admission that the sum of K3,054.02 was owing in respect of the refund of pension contributions and that the respondent had always been and was willing to pay it. The learned judge found that the respondent had never disputed that this amount was owing and the failure to pay it was because another cheque which was in respect of salary due and which was paid to the appellant had been returned. The respondent did not pay the money into court because it appeared to the judge that it was confused, but it was in a position to hand the amount to the appellant or his counsel. The money had been put in the respondent's current account. He referred to the appellant's evidence that he could have invested the money if paid and earned interest in the Building Society, and that he had been deprived of this opportunity, and claimed to be compensated. He further referred to a submission on behalf of the respondent that the money was always available to be collected by the appellant, but he chose not to do so, and that the respondent had not benefited by keeping the money. He then dealt with the matter as follows:

"*The general rule is that interest on a principal amount begins to accrue only when judgment is given in favour of a litigant. It becomes a judgment*

debt bearing fruit by way of interest. There may be exceptions to this rule where for instance a contract specifically provides for interest. It is my

opinion that moneys will attract interest where in all the circumstances it is just to so order, for instance, if the party holding the money has been

enriched or he has unjustly prevented the claimant from earning his interest. In other words an element of unjust enrichment must be present before

interest can be awarded. In this particular case I would have fixed the rate of interest at 7½%, taking the interest rate now current at the Building

Society. I come to the conclusion in this case that the claim for interest fails because (a) there is no element of unjust enrichment on the part of the

defendant, and (b) there was no specific demand by the plaintiff for the principal moneys and categorical denial of its return by the defendant."

It is this passage which is the subject of criticism by the appellant. He argues that the judge found that as there was no element of unjust enrichment on the part of the respondent in withholding payment of the principal amount the claim for interest failed, but he says that such finding had no foundation in law or in fact. He submits that there does not need to be an unjust enrichment. It is

sufficient, he argues, if the money is paid to the respondent.

Now it is true that the learned trial judge said that an element of unjust enrichment must be present before interest can be awarded, but it seems to us that he explained what he meant by this in the preceding sentence of the paragraph which is the subject of criticism. He said that it would be just to order interest if the party holding the money had been enriched or had unjustly prevented the claimant from earning interest.

Mr. Mhango places great reliance on the passage from the judgment of Lord Denning, M.R. in ***Harbutt's "Plasticine" Ltd. v Wayne Tank & Pump Co. Ltd.*** ([1970] 1 Q.B. at 468):

"*An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money;*

and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

What Lord Denning was discussing in that case was the exercise of the discretion under the Law Reform (Miscellaneous Provisions) Act 1934, and the principle which is laid down in the passage relates to the award of interest under that statute. That Act, which was applied to this country, was repealed in its entirety by the Statute Law (Miscellaneous Provisions) Act (cap. 5:01). Consequently, it is necessary to ascertain whether the High Court has now a discretionary power to

award interest in any proceedings for debt. Interest, of course, is recoverable as a debt in cases where it is payable under a contract, express or implied, or under a statute which fixed the rate at which it is payable, but there was no contract either express or implied in the instant case as to interest and it was not pleaded or suggested that there was a statute which governed the payment of interest. Section 11 of the Courts Act (cap. 3:02) confers certain additional jurisdiction on the High Court. We set out those parts of the section which are necessary for the purposes of our present enquiry.

"*Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have—*

(a) jurisdiction—

.....

(v) to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties or on sums found due

and unpaid by receivers or other persons liable to account to the High Court ...."

Can it be said that this section is analogous to s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 and that it gives a discretion to the High Court to award interest, albeit in cases of debt as distinct from damages, and in that way widens the rules as to the awarding of interest in civil proceedings? It seems to us that it does. It is significant that the verb is to direct interest to be paid, and that the additional jurisdiction provided for in the paragraphs of the

section relates to powers of the court ancillary to the power of the court to give judgment on the substantive issue, to matters such as the inter-preservation of property, the enforcement of a judgment, the transfer of civil proceedings, the arrest of defendants, the attachment of property, the payment of judgment debts by instalments, the charging or mortgaging of land where there is jurisdiction to order a sale, and the appointment or control of guardians. All of these are aids only to carrying out the jurisdiction of the High Court provided for by s. 62 of the Constitution.

It is not s. 11 which gives the court jurisdiction to try an action for interest. In our judgment sub-para, (v) does not provide that interest can be claimed as of right. It allows of a discretion in the court to direct the payment of interest but only in the case of debt as distinct from damage. In this sense the section gives the High Court a narrower jurisdiction in awarding interest than was allowable to courts in England under s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934, but in another sense is wide as it provides no statutory restrictions upon the exercise of the discretion. In England the principles which a court ought to be able to apply in awarding interest were the subject of judicial pronouncement for about a century prior to the enactment of the 1934 Act. In the case of ***Jefford v Gee*** [1970] 2 Q.B. 130; [1970] 1 All E.R. 1202 , Lord Denning, M.R. delivered the judgment of the court and dealt very fully with the history prior to the statutory reform which allowed for a discretion in the court. That case also deals with the principles upon which interest was paid in England under the Law Reform (Miscellaneous Provisions) Act which were stated as such as would be awarded to a plaintiff for being kept out of money which ought to have been paid to him. This followed the principle stated by Lord Herschell, L.C. in ***London, Chatham & Dover Ry. Co. v South E. Ry. Co.*** ([1893] A.C. at 437):

"... I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the

amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his

possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could

see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from

the time of action brought at all events."

Lord Herschell, because of the state of the law in 1893, was unable to apply that principle, but after the courts were given a discretion in England by the 1934 Act the principle was applied in the case quoted to us by Mr. Mhango, namely, ***Harbutt's "Plasticine" Ltd. v Wayne Tank & Pump Co. Ltd.*** and that principle was again recognized by the Court of Appeal in ***Jefford v Gee***. We think that the principle is one which should guide the High Court in the exercise of the discretion give by s. 11 of the Courts Act. It has the advantages of fairness and logic as well as being the subject of a hallowed judicial preference.

It was pointed out in the case of ***Business Computers Ltd. v Anglo-African Leasing Ltd.*** [1979] 1 W.L.R. 578; [1977] 2 All E.R. 741, that the award of

interest should not be exercised virtually automatically by analogy with the rule that costs follow the event; it was said that the judicial discretion was not so narrowly confined and that the money should have been wrongfully withheld in the sense explained by Lord Denning, M.R. in ***Jefford v Gee***, adopting the principle set up by Lord Herschell in ***London, Chatham and Dover Ry. Co. v South Eastern Ry. Co.***

The question which the High Court should ask itself and which we now pose to ourselves in the instant case is whether the evidence showed that money was owing from the respondent to the appellant and that the appellant was driven to have recourse to legal proceedings in order to recover it, the appellant being kept out of his money which should have been paid to him. It is clear that the money was due to the appellant in June and that the last of the other employees to whom money was due at the same time was paid on July 3rd. It is of significance that the respondent admitted in June that the money was owing and tendered other moneys which were owing. The other moneys were returned by the appellant and he or his legal adviser made no effort to take the respondent up on the offer to pay but issued a writ on July 17th. It does not seem to us that the appellant can be said to be a person who, in the words of Lord Herschell, is driven to have recourse to legal proceedings in order to recover the amount due to him. The appeal relating to the claim for interest fails.

The last point taken on behalf of the appellant concerned the order as to costs in the court below. The learned trial judge for the purpose of costs split the issues on the claim. In respect of the claim for wages and leave pay, where he awarded K301.57, he gave the appellant his costs but on the subordinate courts scale

only. We do not think that any purpose will be served now in dealing with the points raised by Mr. Mhango, because the appellant in this court has succeeded on the question of wages and leave pay and brought himself over the limits of the subordinate jurisdiction and it is correct to award him the costs of such issue here and in the court below.

In respect of the claim for refund of pension contributions the judge does not appear to have made an award. He dismissed the claim for interest on such moneys. At the outset of the trial Mr. Mhango asked for judgment on an admission of facts contained in the pleading in respect of the refund of pension contributions. The judge refused to give judgment but it is fair to say that Mr. Mhango had not pressed the application with any vigour. When the learned judge came to give judgment at the end of the trial he said immediately after he had dealt with the question of interest: "For the avoidance of any doubts, the plaintiff is entitled to the sum of K3,054.02 only."

That was the sum admitted on the pleadings to be due in respect of the refund of pension contributions. Later in the judgment, and when considering the question of costs, he said as follows:

"*I now come to the claim for K3,054.02 and interest. This amount was not the subject of dispute. In* ***Wambugu v Public Serv Commn.*** *[1972] E.A. 296*

it was held that a successful party may be deprived of his costs not only for misconduct but for any other good reason. In that case the plaintiff failed

to give notice of his intention to sue, and there would have been no harm to his interests if he had given such a notice. Admittedly this authority is

persuasive only and not binding on this court.

Having regard to all the circumstances I am of the view that this is a suitable case where the successful plaintiff ought to be deprived of his costs. I

have already given costs for the plaintiff on the counterclaim."

It is said by Mr. Alufandika in this court that the judge did not give judgment on this issue and that there had been in effect a settlement of this part of the claim, and he referred us to the first three pages of the record in aid of this interpretation, but when one examines that part of the record all that is shown is that Mr. Alufandika told the court below that there was no dispute regarding the sum of K3,054.02, which of course would have been self-evident from the pleadings anyway, and then Mr. Mhango asked for judgment in respect of it and was refused. Such an exchange does not in our view constitute a settlement. Mr. Mhango concedes that the judgment in the trial court does not show that an award was made for the K3,054.02, but he has not as part of the relief sought from this court asked for judgment in respect of this part of the claim. All that he has asked for is the interest on the refund of pension contributions. We understand from counsel that the amount of K3,054.02 was paid shortly after the trial. In our view the learned trial judge must have intended that there should have been judgment in respect of this part of the claim. It was open to him to

give judgment at the outset of the trial for it. It indeed had been open to Mr. Mhango from a very early stage in the action, namely, from August 17th, 1978 when the defence was filed, to have applied under O. 27, r. 3 for judgment on the admission of facts contained in the defence. The appellant was entitled to judgment on this part of the claim, but an omission to make an award—if there was such an omission—is not the subject of this appeal. We think that the learned judge's order disallowing costs was the correct one in any event. The appellant's legal advisers had issued a writ without seeking this money—which they knew was available to them—and then let the issue go to trial when they could have obtained judgment under O. 14 or O. 27 of the Rules of the Supreme Court.

The appeal is allowed to the extent earlier indicated in this judgment. There will be judgment for the appellant in the sum of K1,308.88 with costs in the court below, such costs to be agreed or taxed on the High Court scale but of course not to include any items attributable to the claim for refund of the pension moneys. The trial judge's order dismissing the counterclaim with costs is confirmed.

Appeal allowed in part.