

COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
11TH JUNE, 1986. FCA/E/122/85
CORAM:- U. MAIDAMA, O. OLATAWURA,
O. AJOSE-ADEOGUN, JJCA

THE CROSS RIVER STATE APPELLANTS
NEWSPAPER CORPORATION

AND

BENEDICT EFFIONG ETIM & ANOR. RESPONDENTS
(For themselves and on behalf of all the
other employees of the Cross River State
Corporation locked out by the Cross River State
Newspaper as a result of the 1980 Industrial Dispute
between the Workers and the said Corporation)

JUDGMENTS - Comments - By the trial judge - Which did not go to the root of the matter before him - Will not vitiate his judgment.

LABOUR LAW - Lock out - Before an employer can declare or take part in a lock out - Such employer must comply with sections 3 or 4 of the Trade Disputes Act, 1976.

LABOUR LAW - Trade Disputes Act, 1976 - Provisions of s. 13 (1) - Non Compliance with it before a strike is declared by the workers or a lock out by the employer - Such an action is illegal.

LABOUR LAW - Lack out that was illegal - Which was to arrest an illegal strike action - Two illegal actions cannot by any manipulation become legal.

FACTS

The plaintiffs/respondents sued the defendant/appellant for a declaration that the total and persistent lockout of the plaintiffs and all the other employees of the defendant by the defendant is irregular, illegal, null and void; a declaration that the request by the defendant to the plaintiffs that they should fill fresh reapplication forms prior to their reinstatement is irregular illegal null and void; and an order of reinstatement. In August and September 1979 , the appointments of five members of staff of the defendant were terminated. Efforts were made to settle the matter amicably between their union and the defendant. A meeting was held, at the end of which a communique was issued. There were 22 points involved but the parties disagreed on one point. All efforts made to see that the one point is resolved was to no avail. The plaintiffs then embarked on an industrial strike. They were eventually locked out by the defendants. They were also not paid their salaries. The defendants issued a form requesting those of the workers who were still desirous of working to reapply. Hence the plaintiffs instituted the action.

At the conclusion of hearing the learned trial judge found for the plaintiffs. Dissatisfied by the decision the defendants have appealed to the Court of Appeal, Enugu Division.

ISSUE FOR DETERMINATION:

Whether the lockout of the respondents by the appellants was illegal.

HELD (Unanimously dismissing the appeal per lead judgment of **OLATAWURA JCA**)

Labour law - Lock out

1. Simply put, before an employer can declare or take part in a lockout, such employer must comply with sections 3 or 4. Then section 3 or 4 is a condition precedent to a legal lockout or legal strike. Non observance or performance of the conditions in these two sections renders the strike or lockout illegal. (p. 2187 B)

Trade Disputes Act, 1976

2. It appears to me that ground 1 of the appeal is misconceived in that the respondents have not sought a declaration nor claimed that their strike was proper or in accordance with the 1976 Act. What they sought for was a declaration that their lockout was illegal. What the 1976 Act stipulates before there can be a lockout is either that the Arbitration Tribunal has made a binding award (See s.13(1)(b) of the 1976 Act, or the dispute has thereafter been referred to the National Industrial Court (See s.13(1) (c) of the same 1976 Act or the National Industrial Court has issued an award based on the reference (See s.13(1)(d) of the 1976 Act. Where any of this provision is not complied with before a strike is declared by the Workers or a lockout by the employer such an action is illegal and will be caught by the provision of section 13(2) of the 1976 Act.

(p. 2187 C)

Lock out that was illegal

3. The appellants in their brief had submitted that "The lockout was as a result of the illegal and unauthorized strike actions taken by the plaintiff, and it was to arrest the commission of an illegal act". The consequences of an illegal act is to invoke the sanction provided by the law and not to "cure" it by another illegal action. Two wrongs don't make a right, two illegal actions cannot by any manipulation become legal. Since the appellants themselves have admitted their illegality as a result of the lockout, the respondents' claim in respect of their declaration should succeed.

(p. 2188 A)

Judgments - Comments

4. I now come to ground 3. Miss Udom the learned counsel for the appellants had submitted that the quotation relied upon by her has weighed on the mind of the judge thereby his judgment was affected. I will regard what the learned trial judge said as a mere comment which did not go to the root of the matter before him. It would have been a different thing if the learned trial judge had said that because of the assault, callousness and inhumanity on the part of the appellants he would find the appellants li-

able. The learned trial judge's comments are within bounds allowed and did not in any way affect his mind. The question one should ask is if the evidence which forms the basis of the complaint in ground 3 is expunged, can the judgment still stand? (p. 2188 E)

B

CASES REFERRED TO

Ogiamen v. Ogiamen (1967) N.M.L.R. 245

Owoniye v. Omotosho (1961) All N.L.R. 304

C Emegokwe v. Okadigb (1973) 4 S.C. 113

Umofia v. Nedem (1974) 4 E.C.S.N.L.R. 674/677

STATUTE REFERRED TO

Trade Dispute Act. 1976, ss. 3, 4 and 13

D

OLATAWURA JCA

The Respondents who were the plaintiffs in the lower court sued the defendants who are now the appellants in this court for:

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"(1) A declaration that the total and persistent lock out of the plaintiffs and all the other employees of the defendant represented by the plaintiffs, by the defendant as a result of the industrial action of 1980 by the workers of the defendant Corporation is irregular, illegal, null and void.

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(2) A declaration that the request by the defendant to the plaintiffs that they should fill fresh reapplication forms prior to their reinstatement is irregular, illegal null and void.

G

(3) An order of the court that the plaintiffs and all the other employees of the Defendant corporation represented by the said plaintiffs locked out by the defendant as stated above be reinstated with effect from the date they were alleged to have withdrawn their services with full salaries and an order that the defendant pays to the plaintiffs all the entitlements as employees of the defendant with effect from the date of lock out."

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Pleadings were ordered, filed and exchanged.

The facts are simple. In August and September 1979, the ap-

pointments of five members of staff of the appellants were terminated as a result of which their Union - The Printing and Public Workers' Union of Nigeria appealed to the Management to rescind their decision and to re-absorb them. This appeal was turned down by the appellants. The respondents then declared a trade dispute. They submitted a memorandum admitted in evidence as Exhibit 1 wherein they made some demands, none of which, according to them, was granted. Consequently they placed a restriction on their working-hour period and limited it to 7.30 a.m and to end at 3.30 p.m. They again issued a Notice which was admitted in evidence as Exhibit 2. Apparently it was also ignored. The Head of Service in the cross River State Government intervened and two days were fixed for negotiations. A communique was issue but they discharged on the contents of the communique because it did not contain what was agreed upon. The respondent refused to sign the communique. The efforts made to see that the communique really reflected the decisions arrived at during the negotiation broke down. Consequently they resumed working between 7.30 and 3.30 p.m. On 6th October, 1980, they were locked out by the appellants and were prevented from entering the premises. They were not allowed to work and they were not paid the salary either. The appellants issued a form requesting those of them who were still desirous of working under the management to reply. The form was admitted in evidence as Exhibit 4. The matter went further to the Cross River State House of Assembly. The House instituted a probe and issued a report admitted as Exhibit 6. The white paper issued by the Government of the Cross River State was admitted in evidence and marked Exhibit 7. The appellants did not comply with the request of the Government that the respondents should go back to work. At a later stage the appellants called them for interview but refused to grant any interview on the ground that the matter was subjudice.

The case of the appellants was that the respondents were locked out by the management of the corporation as a result of the Industrial action of October, 1980. The appellants regarded the respondent's action illegal. As a result of the meeting between the appellants and the respondents communique was issued. There were 22 points involved, the Union

agree to only 21 and despite appeals by the management the respondents insisted on initial strike due to their insistence on the 22nd point in issue. The respondents then embarked on an industrial strike. This led to the lockout by the management. As a result of the intervention by the government and the Cross River State House of Assembly the workers were invited by the appellants but refused to participate because the case was sub-judice. The Minutes Book concerning the negotiation was tendered in evidence and marked Exhibit 12.

After the addresses of counsel on both sides, the learned trial judge found for the respondents as follows:

"(1) The total and persistent lockout of the plaintiffs and all the other employees of the defendant represented by the plaintiffs by the defendants as a result of the industrial action of 1980 by the workers of the defendant corporation is irregular, illegal null and void.

(2) The request by the defendants to the plaintiffs that they should fill fresh reapplication forms prior to their reinstatement is irregular null and void."

I hereby order that:

(a) The plaintiffs and all the other employees of the defendant Corporation represented by the said plaintiffs lockout by the defendants as stated above be reinstated with effect from the date they were alleged to have withdrawn their services with full salaries.

(b) The defendants shall pay N3,000.00 as costs to the plaintiffs".

It is against this judgment that the appellants filed Notice and grounds of appeal. They are as follows:

"ERROR IN LAW

(1) The learned trial judge erred in law in failing to uphold the appellant's submission that the respondents did not give the appellant notice of their intention to embark on an industrial action as required by the Trade Dispute Act, 1976.

(a) PARTICULARS OF ERROR

The learned trial judge failed to apply the provisions of sections 3 and 4 of the Trade Dispute Act, 1976 correctly or at all in his

construction of notice and thereby came to a wrong conclusion.

"ERROR IN LAW

(2) The learned trial judge erred in law in failing to uphold the appellants submission that the circumstances surrounding the incidents of 3rd October, 1980 made it absolutely impossible for the appellant to give notice of lockout to the respondents as required by section 13 of the Trade Dispute Act, 1976.

PARTICULARS ERROR

(a) The respondents met on 2nd October, 1980 during official working hours and took a decision to proceed on an industrial action on 3rd October, 1980 without communicating the decision to the appellant.

(b) The learned trial judge failed to appreciate the distinction between giving notice of intention to embark on an industrial action and "a resumption and/or continuation of a suspended action."

(c) The learned trial judge failed to apply the provisions of section 13 of the Trade Dispute Act, 1976 correctly or at all and thereby came to a wrong conclusion.

ERROR IN LAW

(3) The learned trial judge erred in law in allowing evidence of facts not pleaded to weigh in his mind as reflected in the judgment appealed.

PARTICULARS OF ERROR

The respondents did not plead that any of them was assaulted let alone being rendered impotent but the learned trial judge found that "when they reported for work and those of them who were in, were assaulted and indeed one of them became important."

(4) The judgment is against the weight of evidence."

It appears to me, and bearing in mind the main claim by the respondents, that the real issue is whether the lockout of the respondents by the appellants was illegal. The objection raised in the respondents' brief was withdrawn with the leave of the court. It was accordingly struck out. Before her oral submissions in support of her written brief Miss Udom learned counsel for the appellants applied to correct page 1 of her brief.

Her oral submission was limited to ground 3 of the appeal. This ground in substance complained that the learned trial judge allowed evidence to be led in respect of matters not pleaded and that consequently this evidence affected his mind. Learned counsel cited OGIAMEN v OGIAMEN (1967) N.M.L.R. 245 and submitted that it is not open to parties to depart from their pleadings. Consequently, learned counsel submitted that a judge cannot depart from the case as pleaded by the parties. Counsel referred to a passage on p.61 lines 5-23 and that this weighed on his mind and that though no objection was raised the court of Appeal can still entertain the objection and cited: OWONIYI v OMOTOSHO (1961) All N.L.R. 304; EMEGOKWE v OKADIGBO (1973) 4 S.C 113. It was as a result of this frame of mind of the learned counsel contended that the judge failed to consider the legality of the Trade Disputes Act 1976.

Mr. Bassey the learned counsel for the respondents also relied on his brief and in reply to ground 3 repeated that what the learned counsel for the appellants relied upon did not affect the mind of the trial judge and that it was a passing comment and cited: UMOFIA v NEDEM (1974) 4 E.C.S.N.L.R. 674/677. Learned counsel then submitted that the Trade Disputes Act 1976 not only applies but that it is in issue. He referred to s.13(2) of the Trade Disputes Act 1976 and submitted that the penalty for illegal act is not a lockout. Counsel further pointed out that if the appellant had given notice of the lockout, then the appellants would have been right in respect of the lockout. Counsel regarded ground 2 of the appeal as a misconception as the contention of the learned counsel for the appellants was not before the lower court. He referred to s. 13 of the Trade Dispute Act of 1976.

Miss Udom in her reply said she was taken by surprise as the oral submissions of learned counsel were not in his written brief.

The court must bear in mind that the claim before the lower court was about the illegality of the lockout. The question is: was the lockout illegal? Both parties appear to me to have adverted their mind to this issue which is the crux of the matter. What then is the provision about lockout and strikes under the Trade Disputes Act of 1976 which shall simply be referred to as the 1976 Act. Section 13(1) (a) of the 1976 Act provides:

"13(1) An employer shall not declare or take part in a lockout and a worker shall not take part in a strike in connection with any dispute where

(a) the procedure specified in section 3 or 4 of this Decree has not been complied with in relation to the dispute;" or

Simply put, before an employer can declare or take part in a lockout, such employer must comply with sections 3 or 4. Then section 3 or 4 is a condition precedent to a legal lockout or legal strike. Non observance or performance of the conditions in these two sections renders the strike or lockout illegal. From the facts of this case, the pertinent question is whether the appellant complied with the letters of the law. This really is the second issue raised by the appellant in the brief of argument. **It appears to me that ground 1 of the appeal is misconceived in that the respondents have not sought a declaration nor claimed that their strike was proper or in accordance with the 1976 Act. What they sought for was a declaration that their lockout was illegal. What the 1976 Act stipulates before there can be a lockout is either that the Arbitration Tribunal has made a binding award (See s.13(1)(b) of the 1976 Act, or the dispute has thereafter been referred to the National Industrial Court (See s.13(1) (c) of the same 1976 Act of the National Industrial Court has issued an award based on the reference (See s.13(1)(d) of the 1976 Act. Where any of this provision is not complied with before a strike is declared by the Workers or a lockout by the employer such an action is illegal and will be caught by the provision of section 13(2) of the 1976 Act.** It appears to me that the appellants appreciated the illegality of their action hence the reason adduced in their ground 2 of their appeal for non-compliance with section 13. At the risk of repetition, I reproduce ground 2.

"The learned trial judge erred in law in failing to uphold that the circumstances surrounding the incidents of 3rd October 1980 made it absolutely impossible for the appellants to give notice of lockout to the respondents as required by s. 13 of the Trade Dispute Act 1976".

In other words the appellants now admit that they should give a notice

before the lockout but the "circumstances surrounding the incident" made it impracticable. That is a plea that fits appropriately after conviction under section 13(2) of the 1976 Act. **The appellants in their brief had submitted that "The lockout was as a result of the illegal and unauthorized strike actions taken by the plaintiff, and it was to arrest the commission of an illegal act". The consequences of an illegal act is to invoke the sanction provided by the law and not to "cure" it by another illegal action. Two wrongs don't make a right, two illegal actions cannot by any manipulation become legal. Since the appellants themselves have admitted their illegality as a result of the lockout, the appellants' claim in respect of their declaration should succeed.** The evidence of DW.1 Mr. Francis Richard Ewa Henshaw who described himself as the Secretary to the Appellants put an end to any doubt on the lockout. He stated thus:

"The strike of August was legitimate because they served us with all the Notices. Lockout is not within the condition of service. The power to lockout came from the Management. We did not give them any notice before the lockout. We did not refer their conduct to the Industrial Arbitration Tribunal".

I cannot see how any tribunal can gloss over this piece of evidence which is the basis for the action. Besides, the arbitrary power of the Corporation is a violation of the 1976 Act in respect of which they must be made to answer for its breach.

I now come to ground 3. Miss Udom the learned counsel for the appellants had submitted that the quotation relied upon by her has weighed on the mind of the judge thereby his judgment was affected. I will regard what the learned trial judge said as a mere comment which did not go to the root of the matter before him. It would have been a different thing if the learned trial judge had said that because of the assault, callousness and inhumanity on the part of the appellants he would find the appellants liable. The learned trial judge's comments are within bounds allowed and did not in any way affect his mind. The question one should ask is if the evidence which forms the basis of the complaint in ground 3 is expunged, can the judgment

still stand? I think there is enough evidence on record without this evidence to enable the judge to arrive at the same conclusion. There is no merit in respect of ground 4. On the whole, I will dismiss appeal as lacking in merits. Costs of N200.00 in favour of the respondents.

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MAIDAMA JCA

I have had the opportunity of reading in draft the judgment of my learned brother Olatawura JCA. I entirely agree with his reasoning and the conclusions reached that this appeal should be dismissed. I do not have anything useful to add. C

I will accordingly dismiss this appeal and award costs to the Respondents as ordered by my learned brother in his judgment.

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OLATUNJI-AJOSE JCA

I concur.

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