IN THE SUPREME COURT OF ZAMBIA Appeal No. 25 of 1993

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N :

VULCANISERS OF ZAMBIA LIMITED Appellant

and

BENT JOHANNES HILLMAN Respondent

Coram: Bweupe, D.C.J., Sakala and Muzyamba, JJS.,

on 9th June and 9th December, 1993

For the Appellant: Mr. G. Kunda of Messers George Kunda and Co.

For the Respondent: Hon. Dr. J. Mulwila, MP and Hon. Kasonde, MP., both of Messers Ituna Partners.

Bweupe, D.C.J. delivered judgment of the court.

Case referred to:

(1) AFRO BUTCHERIES LTD AND EVES LTD Judgment No. 28 of 1987.

This is an appeal against the decision of the High Court Commissioner allowing the Respondent's claims for:-

(a) Damages for breach of contract to pay inducement allowance at the fixed rate of Twenty-Four Thousand United States Dollars per annum from 1st June, 1991 to 30th April, 1992 persuant to a written agreement between the plaintiff and the Defendant dated the 1st Day of June, 1991 or in the alternative payment of the sum 5,500 United States Dollars being the balance outstanding in respect of the inducement allowance for 11 months from the 1st June, 1991 to 30th April, 1992 pursuant to the written agreement;

(b) two air tickets to Denmark for the plaintiff pursuant to the said contract.

(c) interest on the above said sum of money at the current Bank lending rate;

(d) Costs.

The facts emerging were these: The Plaintiff, a Danish National, came to Zambia on 27th January, 1984. At the time he was employed by ZCCM Ltd as Adviser to the Central Workshop. However, in March 1991 he attended an interview whereby he was offered a job by the appellant in Ndola. He signed a contract in June, 1991. The terms were that he was to receive a salary of K72,000.00 per annum; travelling allowance: K6,000 per month; Medical allowance: K4,000.00; vehicle allowance: K4,000.00: Inducement allowance subject to Bank of Zambia approval at fixed rate: US$2000 per month; and one calendar month's paid holiday allowance after satisfactory completion of one year service. He was also entitled to two servants, one garden boy and a security guard. Gratuity was however not mentioned in the contract. He said the Bank of Zambia later approved $750 of which the first remittance of $750 for June and July was remitted. However, the balance of $1250 US was paid in Zambian Kwacha leaving a balance of $500 which has not been paid to him. On 31st January, 1992 the Respondent tendered his notice for 3 months of his intention to resign on 30th April, 1992. This was done through his lawyers. He said he was entitled to exit allowance of two economic air tickets from Zambia to Denmark. He said gratuity was covered by an oral contract. He was not paid pro rata gratuity and the amount of gratuity which has to be paid to him was not known but he could only quote a discussion with the Managing Director who fixed it at 25% of the annual salary of US$24,000.00 which was his inducement allowance. The 25% gratuity should cover the contract period for two years.

The appellant gave evidence. DW1 its General Manager said that he attended interviews relating to the Respondent's employment and that he signed the contract of employment on behalf of the company in presence of the Managing Director. He admitted the remunerations, terms of conditions of service were embodied in the agreement.

The Respondent was employed on a contract period of two years commencing on 1st June, 1991: Position: Production Manager; Remuneration:

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(a) Local salary K6,000.00 per month (b) Travelling allowance K6000.00 per month (c) Medical allowance K4000.00 per annum; (d) vehicle allowance K4,000.00 per month (e) Foreign Allowance US$2000 per month - subject approval from Bank of Zambia (f) Education allowance as required for daughter to attend one of the private schools in Ndola; (g) At the end of the contract period two return tickets to Denmark shall be provided for Respondent and daughter (h) suitable accommodation provided; Termination: 3 months written notice served by either party or payment in lieu thereof, or in event of extenuating circumstances notice may be waived at the discretion of the employer. Leave: 30 working days per annum.

On 19th March, 1991 the Respondent accepted the terms and conditions of employment. On 31st January, 1992 the Respondent tendered 3 months notice of his intention to resign on 30th April, 1992. The appellant accepted the Respondent's resignation by paying his money in lieu of notice. After that the Respondent was paid all his terminal benefits including air tickets. DW1 said that the delay to give him air tickets was based on the fact that the Plaintiff was still holding on to the motor vehicle and the house and that he was still owing the company money in terms of unpaid telephone bills. He said the notice did not take its full course because the Respondent was instead paid money for three months in lieu of notice. By doing so the appellant acted in accordance with clauses of the contract. As regards payment of US$2000 DW1 said that the approval by Bank of Zambia relates to remittance and not the Respondent being entitled and that the US$750 which was paid to him in Zambian Kwacha was part of US$2000 but the balance of 500 US Dollars was still unpaid.

After considering the evidence adduced by both parties the learned trial High Court Commissioner came to the conclusion that although the Respondent had given three months' notice to resign it was induced by the appellant and consequently it was the appellant who was in breach of the contract dated 1st June, 1991 and not the Respondent. In consequence the Court ordered that the Respondent should be paid damages as follows:-

(1) That the Respondent should be paid the balance of unpaid inducement allowance of 500 US Dollars in Zambian Kwacha at the ruling Bank rate for 11 months;

(2) That payment of US$1833.33 to cover 27½ leave days is allowed to be paid in Zambian Kwacha at the ruling Bank rate because its remittance was not sanctioned by Bank of Zambia;

(3) That the Plaintiff is entitled to payment of pro-rate gratuity in Zambian Kwacha. As there is no evidence to support the figure of US$12000 damages to be assessed by the District Registrar;

(4) That the Plaintiff is entitled to payment of unemployment benefits similar to the ones paid in the Plaintiff's home country to cover the period of 7 months;

(5) Payment of K5000.00 per month for six months from February, 1992 to August, 1992 and payment of 14000.00 per month in form of perks for six months can not stand in that the first payment under paragraph (4) above since that is the money he would have got had he gone back home earlier Payment in terms of perks can not be allowed because damages arising from the breach of contract such as this one are limited to payment of salary for three months which has been done.

The court then considered the counter claims in respect of accommodation, electricity bills and damaged motor vehicle and expressed inability to make an order because of the conflicting evicence surrounding the issues and expressed the views that if the Defendant wants to pursue the counter-claims it is free to commence separate proceedings.

The appellant submitted and argued about eight grounds. We have considered these grounds and the arguments advanced on behalf of either party and we have come to the conclusion that the question to answer is: who was in breach of this contract?

Mr. George Kunda, the learned Counsel for the appellant argued that it was the Respondent who, by tendering his 3 months notice to resign, resigned from employment on his own accord as provided under clause 8 of the contract of Employment. The Notice of three months was accepted by the appellant. However, the appellant opted to pay three months salary in lieu of notice but allowed the Respondent to hold on to the company car, occupy the company house and enjoyed all the facilities for the notice period. The Respondent gave three months notice voluntarily and through his advocates. In view thereof, it was contradictory on the part of the learned trial Commissioner to hold on one hand that the Respondent was induced to terminate the contract of service and on the other, that the contract of service was terminated by the appellant. The position is that the Respondent had a free hand in the matter and even sought legal advice before he submitted his letter of resignation. The payment of salary and other benefits in lieu of notice was in order. The appellant paid the Respondent in lieu of notice because by law, damages on termination of employment are assessed by reference to the notice period.

We have rehersed the evidence adduced and it is an undisputed fact that on 27th January, 1992 the Respondent found under his door a letter containing Mr. George Kunda's opinion to the appellant suggesting various ways the Respondent's services could be ended and one of the ways suggested was that the Respondent's services could be ended by termination of service. The Respondent reacted by giving three months notice commencing on 1st February, 1992 until 30th April, 1992. The appellant decided to pay the Respondent in lieu of notice. The Respondent argued that in those circumstances it was the appellant who breached the contract because clause 8 of the contract of Employment does not provide for payment in lieu of notice. We have had recourse to clause 8 and it is true that it does not provide payment in lieu of notice but by letter dated 18th March, 1991 the appellant writes to the Respondent:-

> "Dear Mr. Hillman,
>
> Further to our discussions I am pleased to confirm your employment with Vulcanisers of Zambia on the following terms and conditions:-

1. Position: Production Manager.
2. Period: Two years commencing 1st June, 1991.
3. Renumeration:
   (i) Local Salary K6000.00 per month.
   (ii) Travelling allowances K6000.00 per month.
   (iii) Medical allowance K4000-00 per month.
   (iv) Vehicle allowance K4000-00 per month.
   (v) Foreign allowance US$2000 per month - subject approval by Bank of Zambia.
   (vi) Education allowance as required for your daughter to attend one of the private schools in Ndola.
   (vii) At the end of the contract period two return tickets to Denmark shall be provided for you and your daughter.
   (viii) Suitable accommodation provided.
4. Termination: 3 month's written notice served by either Party or payment in lieu thereof, or in the event of extenuating circumstances notice may be waived at the discretion of the employer.
5. Leave: 30 working days per annum.

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Having scructinized and analysed the viva voce and affidavit evidence adduced; the documents submitted; the authorities cited; and arguments made we are of the view that the Respondent was not induced in any way in tendering a letter of resignation giving his intention to quit his services on 30th April, 1992. We come to this view because the Respondent did so on his free will and on the advice of his advocates. The fact that the appellant decided to pay him his salary and other benefits in lieu of notice did not reverse the situation. Besides the letter confirming his employment with the appellant dated 18th March, 1991 put in no uncertain terms payment in lieu of notice. We are therefore satisfied that there was no breach of contract on the part of the

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appellant, if anything, it was the Respondent who was in breach. The finding by the learned Commissioner that the appellant breached the agreement made between the appellant and the Respondent was a serious misdirection which was unsupported by the evidence on record. The appeal based on this ground would be allowed.

Equally unsupported by evidence on record is the finding that the Respondent was entitled to the payment of pro-rata gratuity. The Respondent served from 1st June, 1991 to 30th April, 1992, that is eleven months. He was entitled to gratuity after serving a contract period of two years. He did not serve two years but eleven months. The Respondent, having breached the contract, can not benefit from his own breach. The learned Commissioner erred in finding that the Respondent was entitled to the payment of pro-rata gratuity. This ground of appeal would also succeed.

We turn now to the finding that the Respondent was entitled to the payment of 27½ days leave pay. According to the letter confirming his appointment the Respondent was entitled to 30 days on completion of one year. He did not complete one year but decided to breach his contract. It was wrong for the learned Commissioner to order that the appeallant should pay to the Respondent for 27½ days leave pay because the Respondent did not complete one year upon which 30 days was based. This head of argument would also succeed and it is hereby allowed to succeed.

Although the learned Commissioner did not refer to the two air-tickets released to the Respondent in August, 1992 we feel duty bound to make a few comments. It is not in dispute that according to the terms of the contract the Respondent was entitled to two return air-tickets "at the end of the contract period". The contract period in the instant case was to years. The respondent did not complete two years contract period but served for eleven months. He did not, therefore, qualify to receive travel benefits. The two air tickets were, in our humble opinion, wrongly issued.

We now come to the second ground of appeal which alleged that the learned trial Commissioner erred in law in holding that the Respondent should be paid unpaid part of the inducement Allowance at the rate of US$500 per month in Zambian Kwacha at the Bank ruling rate

for 11 months when there was no agreement for payment of the same between the parties and no approval from the Bank of Zambia. The learned Counsel for the appellant Mr. Kunda, argued that in holding as he did the learned Commissioner overlooked the fact that for eight months, the appellant remitted US$750 to the Respondent's foreign account and paid another US$750 in Zambian Kwacha without any objection to the same from the Respondent. He said the Respondent's contention that he is entitled to inducement allowance of US$2000 per month under contract of service whether or not the same was approved by the Bank of Zambia is a fallacy. The respondent is only entitled to US$1500 per month which he received for 11 months. He said the US$2000 per month could only have been paid to the Respondent under the contract upon approval by the Bank of Zambia. The evidence on record established that the US$2000 Inducement allowance was a foreign allowance which could be remitted to the Respondent's foreign account in Denmark but subject to the Bank of Zambia approval. He said the Bank of Zambia only approved payment US$1500 and not $2000.00. Hence it was illegal to remit that amount. It was illegal for the parties to enter into the contract which is prohibited by law or to perform a contract in a manner prohibited by law.

We have considered this ground of appeal. There can be no dispute that the Bank of Zambia approved US$750 which was remitted to the respondent's foreign account in Denmark and that by agreement US$750 was paid to the Respondent in Kwacha making a total of US$1500.00 which was approved by the Bank of Zambia. The Respondent wants the balance of unpaid US$500 to be paid to him in Kwacha but the appellant argues that it would be illegal to pay him as such is prohibited under Regulations 8, 9 and 10 of the Exchange Control Regulations made under the Exchange Control Act Cap 593 of the Laws of Zambia.

We do not agree with the learned Counsel's view that US$500 can not be paid because there was no approval in respect of that by the Bank of Zambia. What was not approved was the remittance of US$2000 per month to the Respondent's foreign account in Denmark. The appellant remitted US$750 to the Respondents foreign account in Denmark and US$750 in equivalent Kwacha currency to the tune of US$1500 per month. This payment in equivalent Kwacha currency was in our view perfectly in order. The fact that the Respondent did not

demand the immediate payment of the unpaid balance of US$500 in equivalent Kwacha currency does not abrogate his accrued right to demand payment. It is our view that the learned Commissioner was not in error to award payment of the balance of the unpaid US$500 in Kwacha currency. We are unable to allow the second ground of appeal. We would dismiss it as being without merit.

We turn now to the fourth ground which is ground five in the memorandum of appeal which is that the learned trial Commissioner misdirected himself in holding that the Respondent was entitled to unemployment benefits similar to the ones paid in the Respondent's home country, Denmark, especially in view of the fact that standards in Zambia do not allow for the payment of unemployment benefits. Mr. Kunda argued that the learned Commissioner glossed over the fact that the refusal to release airtickets to the Respondent was well explained by the appellant's witnesses, hence the Respondent could not be said to have been forced to stay in Zambia. He said tickets were not issued because there was a dispute as to whether the Respondent was entitled to one ticket or two since his daughter was not based in Zambia but Denmark. The second reason was that before the the expiry of the three month's notice period the Respondent on 21st April, 1992, commenced this action and obtained an injunction from the Court below by which he was to stay in the company house and held on to the appellant's car.

We have carefully considered the arguments advanced on the four grounds and find ourselves unable to add to what we have already said on the issue of tickets. However, to put the matter beyond doubt the contract provided for a contract period of two years and not eleven months or one year to qualify for travel benefits. Having held that the contract was not breached by the appellant but by the Respondent there was no obligations on the part of the appellant to provide to the Respondent airtickets which were dependant upon completion of two years. The respondent did not complete the contract period of two years, hence unqualified to receive the travel benefits in any form. Besides the Respondent remained in Zambia in order to prosecute his claims in pursuance of a Writ dated 21st April, 1992. In these circumstances, it can not be said that he was forced to stay in Zambia. In Zambia we have no provision for payment of unemployment allowance.

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We are satisfied that the Danish unemployment benefits were too remote. The learned trial Commissioner seriously misdirected himself on this point. We would allow the appeal based on this ground also.

This brings us to the counter-claims. It is alleged in ground six which is ground seven in the memorandum of appeal that the trial Commissioner erred in law in refusing to deal with the appellant's counter-claims which were amply supported by evidence on record. The trial Commissioner ruling that the appellant should commence separate proceedings to pursue its counter-claim is bad for duplicity.

On this ground the learned Counsel for the appellant argued that the Respondent's occupation of house No. 14 Nyimba Crescent, Kansenshi, Ndola, after 30th April, 1992 was wrongful. This can be proved from the fact that the Respondent's application for Interim Injunction was dismissed with costs. Thus the appellant is entitled to mesne profits at the rate of K140,000 per month as testified by DW3 until 30th day of November, 1992 the Respondent vacated the house. The total sum he said, in respect of the occupation of the house amounts to K980,000 for the period 1st May, 1992 to 30th November, 1992. The Respondent was also holding on to the appellant's car pursuant to an Interim Injunction which has since been dissolved for lack of merits. Thus the appellant is entitled to damages for loss of use of the car or for its wrongful use and wear and tear for the period 1st May to 30th November, 1992. The Respondent is liable to reimburse the appellant in respect of telephone calls made after 30th April, 1992. The appellants total claim in respect of this is K446,601.28 as testified to by DW3. Mr. Kunda concluded on this ground that the learned trial Commissioner should have dealt with all the issues raised before him including the counter-claim and that failure to do so was a misdirection.

In his Judgment the learned High Court Commissioner in declining to deal with the appellant's counter-claim had this to say:-

> "As regards the Defendant's counter-claims in respect of accommodation, electricity bills and damaged motor vehicle I would say that this court is unable to make an order on these because of the conflicting evidence surrounding the issues. If the Defendant wants to pursue these claims, it is free to commence separate proceedings."

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We do not agree with the reasons given for declining to deal with the counter-claim. If the evidence was conflicting the learned trial Commissioner should have resolved it one way or the other to a person in whose favour the conflict was. In the Supreme Court case of AFRO BUTCHERIES LTD AND EVES LTD (1) we observed:-

> "Section 13 of the High Court Act Cap 50 requires that once the parties are properly in Court all relevant issues between them should be resolved and further new litigation obviated."

The evidence before the Court below was that when the Respondent took up his employment he was provided with house No. 14, Nyimba Crescent, Kansenshi, Ndola which he retained after the injunction was dissolved from 1st May to 30th November, 1993. During that period he incurred some telephone bills. He also held on to the company car. The appellant counter-claimed for ilegal occupation of the house, reinbursement of telephone bills and use, tear and wear of the car.

We repeat what we observed in Afro Butcheries Ltd case that the counter-claim was justified and the issues raised should have been dealt with there and then to avoid duplication of actions. The Respondent did not dispute the fact that he incurred some telephone bills, remained in the house and held on to the car during the period 1st May to 30 November, 1992. We find no conflicting evidence on these issues.

We feel duty bound to order that the appellant should recover the amount of K446,340.00 less what the Respondent had paid for the use of telephone No. 680511 Kansenshi, Ndola. We direct that the Deputy Registrar should assess damages for the occupation of House No. 14, Nyimba Crescent and for the use, tear and wear of the car from 1st May, 1992 to 30th November, 1992. We direct that the interest to be awarded should be the current Commercial Bank rate.

For the foregoing reasons we would allow the appeal to the extent indicated above.

B. K. Bweupe
ACTING CHIEF JUSTICE

E. L. Sakala
SUPREME COURT JUDGE

W. M. Muzyamba
SUPREME COURT JUDGE