

**IN THE SUPREME COURT FOR ZAMBIA**  
**HOLDEN AT NDOLA**

**SCZ APPEAL NO. 76/99**

**(CIVIL JURISDICTION)**

**BETWEEN**

**FOUNDRY AND ENGINEERING LIMITED**

**APPELLANT**

**AND**

**ELIJAH KACENJE (MALE)**

**RESPONDENT**

Coram: Sakala, Chirwa and Chibesakunda, JJS,  
On 8<sup>th</sup> September 1999 and 7<sup>th</sup> December 1999

For the Appellant: Mr J H Adams of J H Adams & Company, Luanshya  
For the Respondent: Mr Nyirenda, of Ezugha, Musonda & Company, Kitwe

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**JUGEMENT**

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Chibesakunda, JS delivered the Judgement of the Court

**Cases referred to:**

1. Contract Haulage Limited V. Kamayoyo (1992) ZR 13
2. Mike Kabwe V. BP Zambia Limited SCZ No. 1 of 1997
3. Central London Trust Limited V. High Trees House Limited (1947) IKB 13

In this appeal Foundry and Engineering Limited (the appellants) are challenging the Judgement of Wanki J, in which he held in favour of Elijah Kacenje, (the respondent)

The facts of the case which were not in dispute were that the respondent was by letter dated 13<sup>th</sup> March 1984, employed by the appellant as a Foundry Metallurgist. He rose up to the rank of Manager. He was employed between 1984 – 1994 (10 years). His conditions of service as per document (1) were as follows:-

**“Conditions**

- a. Basic Salary

Initially K1,200 a month, rising to K1,400 as soon as the laboratory is functioning to the satisfaction of the Foundry Manager. Salary review in December each year.

b. Housing

A three bedroom house to be provided rent free with hard furniture and curtains. Electricity and water to be paid for by the Company.

c. Leave

36 calendar days leave a year

d. Company Car

A company car for business and reasonable personal use.

e. Medical Facilities

Free medical facilities for yourself, your wife and children.

f. Pension Scheme

Membership of the Luanda contributory pension scheme. In addition to pension rights, this scheme provides life assurance cover for 2 ½ times annual basic salary in the event of death from any cause.

g. Notice Period

Employment may be terminated by either party giving not less than 3 months notice in writing."

Five years later management of the appellants decided to offer the respondent a house at No. 9 Ghana Circle, Luanshya. The letter of offer says:-

**"PERSONAL & CONFIDENTIAL**

Mr. Elijah Kacenje,  
Foundry & Engineering Ltd.,  
P.O. Box 90654,  
**LUANSHYA**

20 February 1989

Dear Mr. Kacenje,

**HOUSE AT 9 GHANA CIRCLE, LUANSHYA**

The Company hereby undertakes to transfer the above property to you, or alternatively to pay you a proportion of its current market value, on the following conditions:

- 1) If you continue in the company's employment for the next 8 years up to 28<sup>th</sup> February 1997 the property shall be transferred into your name without payment. Property transfer costs, such as taxes and legal fees, to be borne equally by yourself and the Company.
- 2) If before 28.2.97 you cease to be employed by the Company for any reason, the Company shall within 3 months of severance pay to you or to your heirs, a proportion of the current market value of the property, to be assessed at that time by a professional surveyor appointed by the Company. The proportion shall be one sixteenth of your own accord, and one eighth part if your employment is terminated by the Company.
- 3) In the event of your having earned at least half the value of the house on leaving employment, you would have the option to pay the balance to the Company within 3 months of severance and have ownership transferred to you.
- 4) In the even of your death before 28.2.97, the Company shall transfer the property to your heirs without payment, except for propety transfer costs as in para (a) above.

Yours sincerely,  
For foundry & engineering LTD.

- J4 -

(Signed)  
M.G. Sanderson  
CHAIRMAN

Witnesses by (signed)  
M.D. Lee  
MANAGER"

According to PW2 this house was used as an inducement for the respondent not to leave the parent company at that time as he had been offered a better job with better emoluments elsewhere. There were discussions and subsequently the respondent accepted this offer. He served the appellants up to July 1994, i.e. 10 years.

On 1st July 1994 as per document 91, the appellant for no apparent reasons terminated the respondent's contract. This was done without giving the respondent a chance to be heard and the respondent received no terminal benefits. After termination of the contract, the respondent made several representations to the director of the appellant company asking them to comply with clause 3 of document 12 already quoted. The director refused to comply with this document saying that the document was personal and not binding on the appellants. He also refused to pay him the terminal benefits on the alleged ground that the respondent never paid Pay As You Earn (PAYE), as he worked for the appellants. At the time of terminating the contract with the respondent the house in question was valued.

Before us counsel for the appellants has filed three grounds. On ground 1: The learned counsel for the appellants has argued that the learned trial Judge erred in deciding not to take into account the respondent's liability for income tax payments. On ground 2: He has advanced the argument that the letter in document 12 must be interpreted to constitute a contract of service and as held in Contract Haulage Limited V. Kamayoyo (1), contracts for personal service cannot be specifically enforced by either party. On ground 3: He argued that the respondent as an employee was employed to carrying out duties. According to him the respondent was engaged to serve for a fixed period of time. So when he served the 8 years, he was fulfilling the terms of employment for which he received a salary in the usual way.


Mr. Nyirenda, the learned counsel for the respondent, has argued that the learned trial Judge was on firm ground in deciding not to take into account the respondent's liability for income tax. He cited section 5 Income Tax Cap 323, which defines receipt of income, and argued that the respondent should be deemed to have paid Pay As You Earn (PAYE) as according to him this provides that liability for payment lies on the employer not the employee. On ground 2, he has conceded to the argument that no specific performance can be ordered for contract of personal service but has further argued that in


Mike Kabwe V. BP Zambia Limited (2), this court held that a court has a discretion in certain circumstances to order the reinstatement in a contract of personal service. He argued that although the respondent had an obligation to perform as stated in the contract, the appellant equally had an obligation to remunerate him in accordance with the terms of the agreement which included conditions and terms stipulated in the letter document 12 (quoted supra). He elaborated this point by advancing the argument of the doctrine of estoppel as propounded by Lord D Denning in the case of Central London Trust Limited V. High Trees House Limited (3).

We have looked at all these issues raised by both counsel. We do not have any difficulties in accepting the arguments of the learned counsel for the respondent. We hold that the obligation of making sure that PAYE is paid rests entirely on the employer. The money is deducted at source and therefore the employer has an obligation to remit these to Zambia Revenue Authority (ZRA). We therefore hold that the respondent must be deemed to have paid to ZRA his obligations. Also in this case there was insufficient proof that he owed ZRA the amount stated even if we accepted this argument, which we do not. On ground 2, the learned counsel wishes to interpret document 12 in the way he has submitted. Document 12 is very clear and unambiguous. It has to be construed in our view as an added condition of service to the original conditions of service of the respondent. The added condition is that the respondent would serve for a period of eight years, the obligation then would be on the part of the appellants to transfer to him House No. 9 Ghana Circle, Luanshya. This was a revised binding contract between the respondent and the appellants. His entitlement was not going to be merely the usual salary at the end of the month. His entitlement was to include possession of House No. 9, Ghana Circle, Luanshya. The respondent having fulfilled his side of the bargain the appellants were legally under duty to keep to their side of the bargain. Although we are alive to the fact that specific performance as relief is not generally available to cases of contract of service, in certain circumstances where the court finds that as the only

reasonable relief and taking into account the relevant facts the court does have the power to grant such a relief. We therefore hold that there was no misdirection on the part of the learned Judge. We are only surprised that he did not make the order that the house be surrendered to the respondent in accordance with doc 12 cited supra. So we do order that the house be given to the respondent. If the house has been sold, the value of the house at the current value be given to the respondent, plus interest at the current bank rate from the date of the commencement of these proceedings up to this Judgement and thereafter 6% up to the date of payment. So we confirm the first order of the learned trial Judge and in addition quash the second one and substitute his order with our second order in relation to House No. 9 Ghana Circle, Luanshya. Costs for the respondent.

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**E L Sakala**  
**SUPREME COURT JUDGE**

  
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**D K Chirwa**  
**SUPREME COURT JUDGE**

  
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**L P Chibesakunda**  
**SUPREME COURT JUDGE**