Hon. Justice Mambilima

IN THE SUPREME COURT OF ZAMBIA — SCZ Judgment No. 7 of 2004

HOLDEN AT LUSAKA — APPEAL NO. 104 OF 2001

(Civil Jurisdiction)

B E T W E E N:

MOONJELLY OUSEPH JOSEPH — APPELLANT

AND

RDS INVESTMENTS LIMITED — RESPONDENT

CORAM: Chirwa, Mambilima and Silomba, JJS.

On the 20th March, 2003 and 2nd April, 2004.

For the Appellant: Mr. E. Lungu, Andrea Masiye and Company

For the Respondent: Dr. J. Mulwila, Ituna Partners.

J U D G M E N T

Silomba, JS, delivered the judgment of the court.

Case referred to:-

1. **Nkata and 4 Others -Vs- The Attorney-General (1966) ZR 124.**

In this appeal, the appellant is appealing against part of the judgment of the High Court dated the 23rd of July, 2001 delivered at Lusaka. In an action commenced by specially endorsed writ the appellant claimed certain sums of money from the respondent in form of salary arrears, inducement allowance, gratuity and other benefits due under a contract of employment.

The facts of the case that were before the lower court, were that on the 1st of December, 1989 the appellant was employed by the respondent as group financial controller on a two year contract. The contract was to expire on the 30th of November, 1991. The evidence was that the appellant served the initial two year contract. The further evidence was that before the initial contract expired another one was entered into extending the contract of employment for another one year, terminable on the 30th of November, 1992.

The appellant told the lower court that after the second contract the parties went for a third contract of two years commencing on the 1st of December, 1992 and ending on the 30th of November, 1994. As part of his emoluments the appellant was, in the first year of contract, paid a local salary in the sum of K50,000-00 per annum, plus US $355 per month as normal inducement allowance and US $750 per month as special inducement allowance. In the second year of contract the normal inducement allowance remained at US $355 per month while the special inducement allowance went up to US $1000 per month.

According to the appellant, the total amount of US $1355 per month for normal and special inducement allowances continued to apply in the second and third contracts. Besides, the appellant was entitled to 25% gratuity on the kwacha salary and inducement allowance at the end of the contract. His evidence was that at the end of the first contract US $12,000 was not paid in inducement allowances; that US $20,325 remained outstanding on the second contract while US $40,650 was owing on the third contract.

On the kwacha salary, K304,763 was not paid to the appellant at the end of the first contract and K367,420 at the end of the second contract. When the third and last contract ended on the 30th of November, 1994, K3,236,400-00 was not paid in respect of local salary and allowances, bringing the total to K3,908,583 for the entire period of service stretching from the 1st of December, 1989 to 30th of November, 1994. Besides, there was US $72,935 owing for the same period.

It was his evidence that on 4th of February,1991 he had travelled to India on the instructions of the late Ronald Penza, Chairman of the respondent, for the first time to go and incorporate RDS Exports (India) Pvt. Limited to do export and import business on behalf of the respondent. He was there for five months. In September, 1991 he went back to India and from there the appellant wrote the Chairman of the respondent for payment of his inducement allowances totaling US $18,390-00 up to November, 1991. Back in Zambia, he was told verbally by the late Penza that the amount would be paid. Consequently, in November, 1994 the appellant was paid US $4000 and in December, the same year he was paid US $2,390.

On the 28th of February, 1994 the appellant was appointed Managing Director of RDS Chemists Limited by the board of that company and the notice of appointment was communicated to him in a letter authored by the chairperson of the board, the late Mr. Ronald Penza. The evidence on record confirms that the appellant never worked for RDS Chemists Limited as the company was never operational. The evidence of the appellant seems to confirm that prior to his appointment as Managing Director of RDS Chemists Limited, a subsidiary of the respondent, he had promoted the company in India.

When the appellant was cross-examined he told the lower court that when he left for India on the 4th of February, 1991 to promote RDS Export (India) Pvt. Limited he was still group financial controller even though he had ceased to be paid a salary and inducement allowance. He attributed the non-payment of salary and inducement allowance to the closure of Capital Bank. In an attempt to clarify his position, the appellant indicated to the lower court that since the respondent was not doing well the Chairman of the respondent had assured him that he would be paid at one time. The assurance was verbal. He nonetheless acknowledged that he was paid inducement allowance and special allowance for the first year of his contract, that is, from 1st of December, 1989 to 30th of November, 1990.

The evidence of the respondent did acknowledge the fact that the appellant was an employee of the respondent from the 1st of December, 1989; that he was employed as group finance director and that after 1½ years the respondent thought that there was no

need for a group finance director. Consequently, the appellant was released from employment and he went back to India. He did not stay long there and when he came back the appellant entered into some arrangement with the late Ronald Penza, whereby he was to go back to India to go and organize some exports to this country in which the respondent would trade. The arrangement failed.

Later, the appellant came back to Zambia and proposed to the respondent that together they could form a company and run a pharmacy to promote the sell of herbs. This arrangement also failed. The appellant then approached DW1 (Mrs. Penza), who had taken over the running of the group, for help to obtain a work permit since he was experiencing problems in entering Zambia. To help him get a permit the appellant asked DW1 to issue to him a letter of engagement, which she did, and the appellant was able to get a permit.

DW1 told the lower court that the letter she signed and which was used to get the appellant a second permit was written by the appellant; that the letter actually misled the Immigration Department into issuing a permit as if the appellant was an employee of the respondent, for which DW1 was reprimanded by the Immigration Department.

On the whole the record of appeal does confirm the existence of the first contract from 1st of December, 1989 to 30th of November, 1991. However, from 1st of December, 1991 and onwards DW2, a financial accountant with the respondent, had no record of any contract or appointment letter relating to the appellant. As the man who was in charge of the payroll, he told the lower court that the appellant was removed from the payroll from December, 1990, after being verbally separated due to the difficult times the respondent was going through. On payment of gratuity and inducement allowances DW2's evidence was that the Chairman of the respondent, late Penza, made sure that the appellant was paid up to the end of the first contract i.e. on 30th of November, 1991. This was despite the fact that the appellant never served the full length of the contract.

The evidence adduced from both sides was duly considered by the learned trial Judge who, at the outset, formed the opinion that there were not many issues in dispute. He found as a fact that there was no dispute that the appellant was engaged on a two year

contract from the 1st of December, 1989 to the 30th of November, 1991. He also found that the appellant was written to by the respondent in 1991 extending the contract for one year and also in 1993 when it extended the contract for two years. As to whether the first contract did exist, the learned trial Judge found that it was common cause that it did; the only dispute between the parties was whether it ran its full course.

As for the second and third contracts, the learned trial Judge observed that there was a serious dispute between the parties as to whether they did in fact exist. While the appellant maintained that the two contracts existed the respondent categorically denied their existence, insisting that the first and second contracts were fake as they were intended to mislead the Immigration Department and help the appellant to continue to stay in the country.

To resolve the issue as to whether the first contract ran its full course, the learned Judge looked at the documentation written by the respondent, which showed that the appellant was to be paid normal and special inducement allowance and gratuity up to the end of the first contract on 30th of November, 1991. He said the evidence before him was unambiguous and proceeded to reject the evidence of DW2, which was to the effect that the appellant was supposed to be paid only up to November, 1990 and that he was not entitled to special inducement allowance. He accordingly ordered the payment of all that was due to the appellant for the first two year contract.

On the second and third contracts, the learned trial Judge, while agreeing with counsel for the appellant that there was ample documentary evidence to support the two contracts, was inclined to be persuaded by the evidence of the respondent that the contracts were fake and only intended to allow the appellant to stay in the country. In accepting the respondent's case against the two contracts the learned Judge was persuaded by the evidence that for all those three years covering the two contracts the appellant was never paid a salary and wondered how he had managed to survive. While other employees were receiving their salaries, the appellant was not. On the basis of his findings the learned trial Judge dismissed the appellant's claim in respect of the second and third contracts, hence this appeal.

There are two grounds of appeal that the appellant has argued in this appeal. These are:-

1. *That the learned trial Judge misdirected himself in law and in fact when he held that the second and third contract of employment, that is, extension and renewal, were merely meant to mislead the Immigration Department and were not valid at all.*

2. *That the learned trial Judge misdirected himself when he found as a fact that the appellant's trips to India were personal arrangements with the respondent's Chairman and not because he was an employee of the respondent.*

In support of the two grounds, counsel for the appellant has filed heads of arguments, which were augmented by oral submissions. With regard to ground 1, the counsel referred us to a letter at page 66, written by the respondent and other documents at pages 73, 78 and 79 of the record of appeal and argued that when all these documents are taken and analysed together it was clear that the appellant was an employee of the respondent even after the first contract had expired. Counsel submitted that at no time did the respondent say that the appellant was simply being helped to secure an immigration permit. As far as he was concerned, this only came up during proceedings and was, therefore, an ingenious afterthought.

Counsel implored us to take judicial notice that there are many people who work for long periods without pay. He gave an example of civil servants. It was contended that since the respondent was going through financial difficulties the non-payment of a salary could not negate the existence of a contract validly concluded. It was further contended that when the appellant joined the respondent as group finance director he was paid in arrears in the last part of the first contract. As far as counsel was concerned, this was the style of management obtaining at the respondent.

Counsel submitted that the respondent was a holding company of a number of small subsidiary companies; that during his stay at the respondent the appellant was transferred to go and establish and manage the business of RDS Chemists Limited, a subsidiary of the respondent, as per the resolution of the respondent found at page 78 of

the record of appeal. Since this was a secondment, it was argued that the appellant did not cease to be an employee of the respondent.

From the heads of argument, counsel has argued that the issue raised under this ground was one of fact mixed with law; that the learned trial Judge failed to delve into the evidence to establish whether it was true that the appellant worked for the respondent under the two disputed contracts. According to counsel, the learned trial Judge chose to give weighty attention to the aspect of immigration documents at the expense of other documents and oral evidence given by witnesses, including DW1 and DW2, which showed that the appellant was indeed an employee of the respondent. He invited us to revisit the finding of the lower court and overturn it.

On the second ground of appeal, counsel submitted that there was no evidence pointing to the existence of a personal relationship between the late Penza and the appellant for the lower court to arrive at such a finding. Counsel stated that according to the evidence of the appellant, the late Penza sent him to India to go and set up an export company; the evidence was well grounded and that it remained so even after cross-examination. He accordingly referred us to page 202 of the record of appeal where a farewell cocktail in honour of the appellant's departure to India could not take off as arranged due to the death of a member of the Penza family. Counsel submitted that the memo talked about the appellant going to India to set up RDS Chemists and that he would remain part of the RDS group family. He urged us to dismiss the finding that the appellant was not an employee of the respondent and that his trip to India was a frolic of his own.

In response to the submissions pertaining to ground one, counsel for the respondent submitted that the lower court was on firm ground when it ruled that the 2nd and 3rd contracts were not genuine; that they were intended to mislead Immigration Department to grant the permits. He referred us to the evidence of DW1 who actually got into problems with the Immigration Department, arguing that if the appellant was a genuine employee, DW1 would not have been reprimanded. Counsel could not believe

the argument of the appellant that the system at the respondent allowed him to work and be paid later in arrears. He stated that if the respondent was able to pay all employees on time it could not be the appellant alone to be paid in arrears. He urged us not to interfere with the finding of fact as there was no basis for doing so.

With regard to ground two, counsel quoted from page 13, lines 19 to 24 of the record of appeal (or page 8 of the judgment) and stated that the reasoning of the learned trial Judge was based on the credibility of witnesses, which the appellant was challenging. He has argued that the learned Judge cannot be faulted for choosing to believe the evidence of DW1 against that of the appellant unless special circumstances as envisaged in the case of **Nkata and 4 others -Vs- The Attorney-General** can be discerned from the evidence.

Coming to the personal relationship between the appellant and the Chairman of the respondent, the late Penza, counsel said that there was evidence to that effect at page 261, line 8, of the record of appeal. DW1, as a wife to the late Penza, was privy to what was going on, counsel argued.

In reply counsel for the appellant agreed with the principles upon which this court can interfere with a finding of a lower court as stipulated in the **Nkata** case. In particular, he said that this court can upset a finding where the lower court, in evaluating evidence, has taken into account some matter which it ought not to take into account or has failed to take into account some matter which it ought to have taken into account. He accordingly referred us to the resolution of the respondent at page 78 of the record appointing the appellant as managing director of RDS Chemists. In his view the respondent had held out the appellant to be its employee and the learned trial Judge was in error to ignore this evidence at the expense of what transpired between DW1 and the Immigration Department.

We have analysed the evidence on record, as well as, the heads of argument filed by both sides, which were ably supported by oral submissions of counsel. Our understanding of the two grounds of appeal is that they are related. In the first ground,

the appellant is striving to prove that the learned trial Judge fell into error in holding that the second and third contracts were not valid at all. If we agree with him then his argument in the second ground of appeal, to the extent that he was an employee of the respondent and not just a personal friend of the late Chairman Penza, must be upheld.

At trial the learned Judge was presented with two competing views. The view presented by the appellant was that he continued to be an employee of the respondent under the second and third contracts, which ran for a total period of three years. In the submissions before us, counsel for the appellant has drawn our attention to certain pages in the record of appeal, which in his view, render support to the existence of the two disputed contracts. On the other hand, the view presented by the respondent was that the purported second and third contracts were fake and had nothing to do with the respondent. It was argued before the learned trial Judge that the two disputed contracts were meant to secure an immigration permit for the continued stay in the country of the appellant.

We have examined the documents at pages 66, 73, 78 and 79 of the record of appeal, which counsel found to be in support of the existence of the second and third contracts. Our understanding of these documents is that they have no bearing on the two disputed contracts. They actually relate to the payment of outstanding dues under the first contract (per pages 66, 73 and 79 of the record of appeal). We note that the appellant was appointed Managing Director of RDS Chemists as per the resolution of the respondent at page 78 of the record of appeal. This was on the 28th of February, 1994 when the appellant ought to have been in the final stage of his third and last contract with the respondent. So, as far as he is concerned there was continuity of contracts. This position nonetheless sharply contradicts with what obtained on the ground. The evidence of the respondent, and which the appellant cannot contradict, is that RDS Chemists Limited was just on paper, as the company never became operational. According to DW1 the appointment was intended to help the appellant remain in the country.

We have had occasion to look at the evidence of DW1 and DW2. Contrary to the assertions of counsel for the appellant, there is nowhere in their evidence where the two

witnesses suggest that the appellant was an employee of the respondent. The evidence of DW2 is that, as financial accountant of the respondent as well as the man responsible for the maintenance of the payroll, he did not have the name of the appellant on the payroll; that he could not put the appellant on the payroll because he did not have his letter of appointment extending his contract for the period 1st of December, 1991 to 30th of November, 1994.

According to the evidence of DW1, the appellant was such a bother that he used to go to her office and house and be around her all the time. All he was looking for was assistance from the respondent to enable him obtain a permit from the Immigration Department. And to assist him, DW1 purported to extend the contract and signed a letter to the Immigration Department prepared for her by the appellant. The whole idea was to enable the appellant obtain a permit and because the Immigration Department was misled into issuing a permit she was reprimanded for that.

On the basis of such evidence, the learned trial Judge cannot be faulted for coming to the conclusion that the second and third contracts were merely meant to mislead the Immigration Department and that they were not valid at all. We are surprised by the submission that it was normal for the appellant to go for a long period without a salary because that was what was obtaining at the respondent. We are surprised because while everyone else was getting a salary at the end of the month the appellant was not. The lack of a regular salary can also mean the absence of employment, which we think was the state of affairs in this case.

The position in this country is that under Section 48 of the Employment Act, Chapter 268 of the laws, no one can be employed to work without receiving a wage as per the contract because that would be illegal. On the basis of the statutory and mandatory provisions of the Act we refuse to take judicial notice that workers in this country, including civil servants, of which we form an integral part, go for long periods without pay because such a proposition is not true in reality. We find no merit in ground one. Coming to ground two we have not been able to find evidence, which clearly rebuts

the finding of fact that the appellant's trips to India were as a result of personal arrangements with the Chairman of the respondent, the late Penza.

In the submission of counsel for the appellant the court has been referred to page 202 of the record of appeal, which is a memo addressed to all the staff of the respondent. In this memo the author was informing the staff about the imminent departure of the appellant to India; that while he would be away in India he (the appellant) would continue to be a member of the group family of the respondent. A cocktail party to be held in his honour was, however, cancelled due to a bereavement in the family of the Chairman of the respondent. There are one or two things we would like to say about the memo. First, the memo is dated the 31st of January, 1991. The date on which the appellant was to depart for India is shown as 3rd of February, 1991.

We have said in this judgment, in acknowledging the finding of the learned trial Judge, that the first contract that ran from 1st of December, 1999 to 30th of November, 1991 was valid. It follows that anything done during the subsistence of this contract cannot be declared to be unofficial unless there is clear evidence to show that the act complained of was an unauthorised by the regulations of the respondent or was simply an act of misconduct on the part of the appellant. The memo we have been referred to was issued during the subsistence of the first contract and any trip that was to be undertaken during that contract could be said to have been sanctioned by the respondent.

However, in this judgment we are concerned with the second and third contracts, which we have said, in agreement with the learned trial Judge, that they did not exist. By this reasoning and in reference to the second ground of appeal, we are saying that if there were any trips undertaken by the appellant those could not have been at the behest of the respondent. This ground has also failed to succeed. In conclusion, we wish to say that both grounds of appeal were based on findings of fact and since the learned trial Judge did not misdirect himself in anyway in arriving at those findings we did not find it necessary to invoke any of the principles stated in the **Nkata** case that was cited to us by counsel for the respondent and adopted by the appellant's counsel in reply to suit his case.

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We dismiss the appeal. Costs shall follow the event to be taxed in default of agreement.

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D. K. Chirwa,

SUPREME COURT JUDGE.

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I.C.M. Mambilima,

SUPREME COURT JUDGE.

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S.S. Silomba,

SUPREME COURT JUDGE.