IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 55/2014**
HOLDEN AT NDOLA
(Civil Jurisdiction)

B E T W E E N:

LAFARGE CEMENT ZAMBIA PLC **APPELLANT**

AND

WALLEN HINYAMA **RESPONDENT**

Coram: **Muyovwe, Malila and Kabuka, JJS**

On 6th September, 2016 and 12th September, 2016

For the Appellant: Mrs. Abha Patel SC, Abha Patel and Associates

For the Respondent: No appearance

J U D G M E N T

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Barclays Bank Zambia Limited v. Mando Chola and Ignatius Mubanga (1995-1997) ZR 212*
2. *Matilda Mutale v. Emmanuel Munaile (2007) ZR 118*
3. *Hastings Obrian Gondwe v. BP (Zambia) Limited (1995-1997) ZR 178*
4. *Zambia Railways Limited v. Simumba (1995-1997) ZR 41*

Legislation referred to:

Employment Act chapter 268 of the laws of Zambia

The idiomatic expression 'you cannot have your cake and eat it' perhaps aptly describes the view of the appellant in this appeal regarding the conduct of the respondent.

The respondent enjoyed employment in the appellant company as a Dump Truck Operator since the 4th of August, 2004 and served numerous yearly contracts, renewed for distinctive periods of service under Staff Notices until the last contract expired by effluxion of time on 16th August, 2012. His contract was thereafter not renewed.

The respondent had apparently worked with his employer, the appellant without incident until in March, 2012 when he was charged with the offence of gross negligence of duty following an accident in which he damaged a structure while operating a front end loader. It turned out that he was not competent to operate the said front end loader. It was alleged that his supervisor, who happens to have been the Respondent's Production Manager, had forced him on the day of the accident, to operate the front end loader. Disciplinary proceedings were instituted against the respondent following which he was cleared of the charges of gross negligence. He maintained that his relationship with the

Production Manager, however, was henceforth fractured. The Production Manager reminded the respondent on the 10th August, 2012 that his contract was due to end later in that month. He was given a notice dated 30th July, 2012 indicating that his employment was terminating on the 16th August, 2012 and was expected to leave employment then. We must state that the appellant enjoyed as an incidence of his employment, company housing accommodation.

Feeling that he had been unfairly treated, considering especially that there were no outstanding disciplinary proceedings against him, the respondent lodged a complaint in the Industrial Relations Court seeking the following relief:

(i) compensation for loss of employment;

(ii) payment of one month's salary in lieu of notice;

(iii) repatriation;

(iv) payment of benefits from annual bonuses;

(v) costs, interest and any other dues the court may deem fit.

Contemporaneously with the filing of the complaint in the Industrial Relations Court, the respondent also filed an application for an interlocutory injunction restraining the appellant from

evicting him from the company house until the determination of the matter. The court granted an interim injunction to the respondent on the 30th August, 2012, and heard the application *inter partes* on 25th September, 2012. It thereafter rendered its decision discharging the injunction on the 26th September, 2012. We shall revert to the Ruling of the lower court discharging the injunction and its effect on the appellant's counter-claim, later on in this judgment. Meanwhile, the appellant paid into court on the 24th September 2012, the sum of K1,397,000 being the respondent's repatriation benefits to Chingola, which the appellant regarded as the respondent's place of recruitment.

In answer to the complaint, the appellant denied the respondent's claim, maintaining that the respondent's contract was for a fixed term and it expired at the end of that designated period and required neither notice nor payment in lieu of notice to determine it. Furthermore, the respondent put up a counter-claim for the following relief:

(i) an order to evict the respondent from the company house which he is allegedly occupying;

(ii) damages for inconvenience;

(iii) damages for trespass by refusing to vacate the company house for which he has no licence to occupy;

(iv) interest and all amounts found due;

(v) any other relief that the court deems fit; and

(vi) costs of and incidental to this action.

After hearing the evidence of the various witnesses and the submissions made on behalf of the parties, the Industrial Relations Court found that the one year contract of employment that the respondent was serving under came to an end at the expiry of the agreed contract period and that there was nothing unfair or unlawful about the notification given to the complainant about the impending termination of his employment. The respondent's employment was not terminated for disciplinary reasons and did not require a notice of termination. Accordingly, the respondent was not entitled to payment of any compensation or damages following the termination of his employment.

As regards the claim for repatriation, the lower court found that in terms of clause 3.2 of the contract of employment dated 9th August, 2004 between the appellant and the respondent, the recruitment point of the respondent was Chingola which was also the place of repatriation. The court held further that in terms of

clause 5.5.4 of the terms and conditions of service for non-unionised staff, which applied to the respondent, repatriation benefits would only be released by the employer upon vacation by the employee of the company house. The trial court considered section 13(1) of the Employment Act chapter 268 of the laws of Zambia which provides that:

> **"An employer shall pay the expenses of repatriating the employee to the place from which he was brought."**

It also examined clause 5.5.4 of the appellant's terms and conditions of service for non-unionised staff which was couched in the following terms:

> **"Repatriation benefits, like any other terminal benefits shall only be provided upon vacation of the company house."**

The court was of the view that section 13(1) does not place any condition regarding payment to an employee of repatriation benefits; that the Legislature did not contemplate any delay in repatriating the employee, save where the employee was to blame or chose not to be repatriated. The court held that clause 5.5.4 of the appellant's terms and conditions of service introduces a condition which in effect amounts to contracting out of a statutory provision. This, according to the trial court, is prohibited and is unlawful. The court accordingly held that clause 5.5.4 was of no

effect whatsoever. It also held that in the spirit of section 13(1)(a) and (2)(b) of the Employment Act, the respondent was entitled to the provision of reasonable subsistence expenses or rations from the date of termination of the contract of employment, namely, the 16th August, 2012 to date when the judgment ought to have been delivered, being the 27th December 2012, since the respondent could not take out the money paid into court because of the condition indicated by the appellant for the payment out of court of the money. The court determined that the subsistence expenses and rations for each month shall be equal to the respondent's last earned monthly basic salary for the period stated. The appellant's counter-claim was accordingly dismissed.

The court considered the respondent's claim to a production bonus and found that the respondent did not qualify for it. That claim was dismissed accordingly.

The court also considered the unpleaded claim that the exit medical examination had not been conducted. This the court did on the authority of **Barclays Bank Zambia Limited v. Mando Chola and Ignatius Mubanga**[1]. The court held that the appellant had not after all breached its obligation in that regard.

The upshot of the lower court's holding was that the respondent succeeded on the issue of repatriation. It ordered that the respondent takes out the money paid into court by the appellant as soon as the judgment was served upon him, and thereafter the appellant was entitled to eject the respondent from the house, if need be. The court also awarded interest on the subsistence expenses and rations which it found were due to the respondent at the Bank of Zambia short term deposit rate from the 16th august, 2012 until the 27th December, 2012 which crystallised into the prejudgment sum. The court also awarded interest at the Bank lending rate as determined by the Bank of Zambia on the prejudgment sum from the actual date of judgment until full settlement. The respondent was also awarded costs.

Aggrieved by the lower court's judgment, the appellant launched the present appeal, fronting three grounds structured as follows:

> "1. **The learned honourable trial court below erred in law and in fact when it declared clause 5.5.4 of the appellant's terms and conditions of service to be unlawful and of no effect as there was nothing unlawful about the same and the court's judgment offended against the principle of freedom of contract.**

2. **The learned honourable court in the court below erred in law and in fact when it awarded to the respondent subsistence expenses and rations from that date of termination of the respondent's employment on 16th August, 2012 to 27th December, 2012 at the rate of the respondent's monthly basic salary for the said period as there was completely no justification for the same.**

3. **The learned honourable court in the court below erred in law and in fact when it dismissed the appellant's counter-claim"*(sic!)*.**

At the hearing of the appeal, State Counsel Abha Patel, appeared on behalf of the appellant. There was no appearance on the part of the respondent. Having satisfied ourselves from the affidavit of Charles Chenge filed by the appellant's counsel that personal service was effected of the appeal documents on the respondent on the 21st August, 2016, we proceeded to hear the appeal in the absence of the respondent.

The learned State Counsel for the appellant relied on the heads of argument filed on the 31st March, 2014 which she augmented with oral submissions. The main point taken by the learned State Counsel under ground one was that the trial court was wrong to hold that the appellant and the respondent contracted outside the law when they agreed under clause 5.5.4 of

the terms and conditions of service that repatriation benefits, like other terminal benefits, could only be provided upon vacation of the company house by the employee. Mrs. Patel SC, argued that by section 13(1)(a) of the Employment Act relied upon by the lower court, the Legislature could not have intended to cause an unjust advantage for the employee who opted to continue staying in a company house after the end of his employment and after being paid his repatriation benefits. The learned State Counsel referred us to our judgment in the case of **Matilda Mutale v. Emmanuel Munaile**[2] where we stated that the fundamental rule of construction of Acts of Parliament is that they should be construed according to the words expressed in the Acts themselves. Further, that if a strict interpretation of a statute gives rise to an absurdity and an unjust situation, the court should use its good sense to remedy it by reading words into it. She contended that an injustice has been occasioned to the appellant by the lower court's interpretation of section 13(1)(a) of the Employment Act by reading words into it whose effect is to allow the respondent to remain in the appellant's housing accommodation rent free long after his employment was terminated and repatriation benefits paid into court.

Under ground two of the appeal, Mrs. Patel SC, took issue with the award by the lower court to the respondent of subsistence expenses and rations from the date of termination of the respondent's employment to the 27th December, 2012 at the rate of the respondent's monthly basic salary. According to the learned State Counsel, this award was without legal justification whatsoever.

The learned counsel recalled that on the 26th September, 2012, the lower court had made a ruling regarding the respondent's application for an injunction restraining the appellant from evicting him from the company house. The court rejected the application on grounds that no irreparable injury would be occasioned. The court also acknowledged that the repatriation benefits had, by the time of its ruling, been paid into court.

The learned State Counsel quite rightly observed that at that point the appellant could well have evicted the respondent, but that it did not do so "merely out of courtesy." In these circumstances, according to Mrs. Patel, it was a misdirection for

the court to order an award of subsistence expenses and rations to the respondent.

State Counsel Patel also complained that the lower court awarded the respondent a full salary as opposed to "reasonable subsistence" envisioned in section 13(2) of the Employment Act, if any subsistence expenses were payable at all. The contract of employment in the present case was not unlawfully terminated as the court itself found. It was, therefore, a misdirection for the court to proceed to award the respondent subsistence expenses and rations at the rate of monthly pay as if his employment had been wrongfully terminated. We were urged to uphold ground two of the appeal.

As regards ground three of the appeal, State Counsel Patel attacked the lower court's dismissal of the appellant's counter-claim for an order to evict the respondent from the company house; for damages for inconvenience, and damages for trespass; interest on all amounts found due and any other relief.

We already pointed out earlier in this judgment that the appellant's counter-claim was dismissed principally because, in the view of the court, the respondent was unable to get the

repatriation benefits paid into court by the appellant owing to a condition attached to the payment out of court of the money paid into court.

There is incontrovertible evidence that the respondent did not pay any rentals since his employment terminated and that during the subsistence of his employment he used to pay K60,000 per month for the appellant's medium cost house he occupied. The learned State Counsel cited the case of **Hastings Obrian Gondwe v. BP (Zambia) Limited**[3] to support the submission that perquisites enjoyed as an incidence of one's employment terminate with the termination of employment. She also cited the case of **Zambia Railways Limited v. Simumba**[4] where we held that depriving an employee of a house or a car would not result in irreparable injury which cannot be atoned for in damages. The learned counsel submitted that all circumstances considered, the respondent was a trespasser liable to be evicted. We were urged to uphold the appellant's counter-claim.

The respondent, who was served with the appeal documents, opted not to file any heads of argument and did not, as we have stated earlier, appear at the hearing of the appeal.

We have given very careful consideration of the judgment of the trial court and the submissions of the learned State Counsel for the appellant. The material facts in this matter are common cause. The only issues for determination are whether the lower court's interpretation of section 13(1)(a) of the Employment Act in light of the condition imposed by the appellant to payment out of court of the repatriation benefits it had paid into court, is the correct one; and whether the respondent was entitled to be paid subsistence expenses in the manner ordered by the lower court. These questions invariably require us to ascertain, in the first place, whether clause 5.5.4 violates the spirit and letter of section 13(1) of the Employment Act – in other words, did the appellant and the respondent contract out of the Employment Act when they included clause 5.5.4 in their contractual relationship?

We have already reproduced the provisions of section 13(1) of the Employment Act as well as those of clause 5.5.4 of the terms and conditions of service. To us the provisions of section 13(1) of the Employment Act is clear in its statement and import. An employer must pay the expenses of repatriating the employee to the place from which he was recruited. The question perhaps is when should this happen?

In our view, it is a matter of common sense and ordinary logic that the obligation to pay repatriation benefits only arises after the relationship of employer and employee has terminated. The employer has no obligation and no business to repatriate to the place of recruitment, an employee who is still in employment. To us, that would be inherently contradictory as an employee is only liable to be repatriated after he has ceased to be in employment. Clause 5.5.4 merely adds to what is already a logical imperative. The employee is only to be paid his repatriation benefits after he has vacated the house which he occupies as an incidence of his employment. We could add, for good measure, that he is entitled to be paid his repatriation benefits immediately he ceases to be an employee and he has vacated the housing accommodation provided by the employer.

It does not bear repeating that, as we stated in **Hastings Obrian Gondwe v. BP (Zambia) Limited**[3], perks enjoyed as an incidence of one's employment terminate with the termination of employment. The obligation to pay repatriation benefits on the other hand is only triggered by the termination of employment and such benefits enjoyable only when the employee leaves employment. Vacation of

company housing accommodation is an ordinary and normal precondition.

We do not think, therefore, that the appellant and the respondent contracted out of section 13(1)(a) of the Employment Act when they included clause 5.5.4 in the terms and conditions of employment. It was a misdirection on the part of the trial court to have held, as it did, that clause 5.5.4 of the appellant's terms and conditions of service was unlawful and of no effect. Ground one of the appeal accordingly succeeds.

Given that the trial court awarded the respondent subsistence expenses and rations from the date of the termination of the respondent's employment on the basis that it was unlawful for the appellant to have clause 5.5.4 in the terms and conditions of employment, it follows that ground two of the appeal is bound to succeed also. The termination of the respondent's employment was not unlawful, and neither was clause 5.5.4 of the terms and conditions of employment which imposed a reasonable condition for the respondent to access his repatriation benefits. We entirely agree with State Counsel Patel that there was no justifiable reason for the respondent to have remained in occupation of the

appellant's housing accommodation. He was obliged to vacate such housing accommodation the moment his employment terminated, or upon the discharge by the lower court of the interim order of injunction, and to immediately thereafter access the repatriation benefits that had been paid into court. Additionally, having declined to grant the respondent an interim injunction against being evicted from the appellant's housing accommodation, there was no logical reason whatsoever for the court to have held that the respondent was entitled to subsistence expenses and rations.

It is even more strange to us that the lower court determined that such subsistence expenses and rations should be at the rate of the respondent's monthly basic salary from the date of termination of the respondent's employment to the date the court should have delivered its judgment. Even if any such subsistence expenses and rations were due to the respondent, the amounts determined by the lower court do not, to us, appear reasonable. In this regard we agree with the lucid submission of State Counsel Patel on the point. The bottom line, however, remains that there was no justifiable reason for the respondent to remain in the appellant's house beyond the 16th August, 2012, given that

repatriation benefits were paid into court and could be accessed upon doing what the respondent was already bound to do, namely vacating the appellant's house. Ground two of the appeal equally succeeds.

Turning to the appellant's counter-claim in the lower court the details of which we have set out earlier on in this judgment, we note that the chief claim was for an order to evict the respondent from the company house on account of being a trespasser. All the other claims were incidental to the order for eviction.

We have already observed that after the termination of his employment on the 16th August 2012, the respondent obtained on the 30th August 2012, an *exparte* order of injunction restraining the appellant from evicting him from the company house. Following the *inter parte* hearing on the 25th September 2012, the *exparte* injunction was discharged on the 26th September 2012. Of significance to the appellant's counter-claim is the following passage in the lower court's ruling on the injunction at page R7 (page 122 of the record of appeal).

> **"It is our view that in the particular circumstances of this case there would be no injury occasioned to the Complainant if he is removed from the house of such significance that damages cannot**

suffice. At most he would only be inconvenienced and we do not think that the fact that an action is pending in this court can assist him."

The discharge of the *exparte* injunction by the lower court and given the clear language used in the passage we just quoted, left the respondent without protection against an eviction by the appellant from its house. In our view, an eviction of the respondent at that stage would have effectively addressed the principal claim in the counter-claim and would have rendered the appellant's continued pursuit of the counter-claim unnecessary. The matter could have ended there. The appellant, however, opted not to evict the respondent, but instead continued with its counter-claim for an order of eviction and for an order for damages for inconvenience and for trespass, thus paving way for the lower court to later, in its judgment of 8th January 2014, now subject of this appeal, to dismiss the counter-claim in its entirety.

We must also observe that the lower court had indicated in its judgment, now appealed against, that the respondent was obliged to vacate the appellant's house as soon as he was served with the judgment and that he was then to get the repatriation money paid into court. The court stated at J18 that:

"In view of the money paid into court the Complainant is obliged to take it out as soon as this judgment is served upon him. Thereafter the Respondent shall be entitled to eject the Complainant from the house if need be."

We do not understand why the appellant, as a party that was duty bound to mitigate its damages, did not either at the discharge of the interim injunction or at the passage of the lower court's judgment, carry into effect the order of the court to evict the respondent. Given the ambiguity brought about by the judgment which, in one breath found that the appellant's counter-claim for an order to evict the respondent as a trespasser was without merit, and on the other that the appellant was at liberty to evict the respondent following the judgment, the appellant's misgivings regarding evicting the respondent, is perhaps understandable following the lower court's judgment. That does not, however, answer the question why the respondent was not ejected from the company house when the interim injunction was discharged.

In our view continuation of the counter-claim after the ruling discharging the interim injunction was unnecessary for the reasons we have already given. The appellant was entitled to vacant possession of its property at that the very moment and we do not see any reason why the appellant failed to get it.

Technically, the appellant should have taken vacant possession of its house on the 26th September 2012, when the lower court discharged the interim injunction. To have failed to do so and to allow litigation to go on until 8th January 2014, when the lower court's judgment was passed, is not conduct consistent with a party obliged to mitigate its losses. Furthermore, as we have stated, the lower court in its judgment clearly stated that the appellant was at liberty to evict the respondent. Again, the respondent did not carry into effect the court's order in this regard, waiting instead for this court to make a pronouncement on appeal. The appellant has itself to thank for the respondent's continued occupation of its housing unit without any colour of right. The appellant slept on its rights.

Given what we have stated, although ground three of the appeal nominally succeeds in that the appellant is entitled to vacant possession of its property, the claim for damages cannot succeed for the reasons we have given.

For some inexplicable reason, the respondent has held on to the house and at the same time has not sought payment out of court of his repatriation benefits. We find this conduct on the part

of the respondent plainly despicable. He appears to have been encouraged to hold on to the company house by the erroneous holding of the lower court.

We are mindful that this appeal has its roots in a labour related dispute and was adjudicated upon by a court mandated to dispense substantial justice – to both parties. Ordinarily we would order each party in such cases to bear its own costs. Given the unusual and somewhat peculiar conduct of the respondent to which we have alluded, we order costs against him to be taxed in default of agreement. Such costs to be confined to litigation in the lower court up to the 27th September 2012, when the interim injunction was discharged by the lower court.

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E. C. N. Muyovwe
SUPREME COURT JUDGE

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M. Malila SC
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE