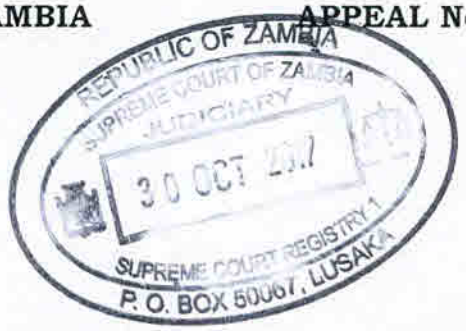
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 51/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ZAMBIA POSTAL SERVICES CORPORATION **APPELLANT**

AND

LIWANGA GIDEON S. YUTHULU **RESPONDENT**

CORAM: Phiri, Kajimanga and Chinyama, JJS

On 3rd October, 2017 and 26th October 2017

FOR THE APPELLANT: Mr. K. L. Kabuka, Messrs J. Kabuka & Co.

FOR THE RESPONDENT: No Appearance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Creswell v Board of Inland Revenue [1984] 2 ALL ER 713**
2. **Harton Ndove v National Educational Company of Zambia (1980) ZR 184**

3. **Zambia State Insurance Corporation Ltd v Dennis Mulikelela (1990 - 1992) Z.R. 18**
4. **Zambia Railways Limited v Joseph Oswell Simumba (1995 - 1997) Z.R. 41**
5. **Turnkey Properties Limited v Lusaka West Development Company Ltd, B. S. K Chiti (Sued as Receiver) and Zambia State Insurance Corporation Ltd (1984) Z.R. 85 (S.C)**
6. **Hastings Obrian Gondwe v BP Zambia Limited (1997) ZR 1 (S.C)**

Works referred to:

1. **Halsbury's Laws of England, 4th Edition (Re-Issue) Volume 24, paragraph 849 and Volume 44, paragraph 807**
2. **Halsbury's Laws of England, 31st Edition, Volume 44(1) paragraph 807**
3. **Chitty on Contracts, 31st Edition Volume 1, paragraph 27-021(Sweet and Maxwell)**

This is an appeal against the decision of the Industrial Relations Court, granting the respondent an interim injunction against the appellant pending the determination of the matter.

The background to this appeal is that the respondent was employed by the appellant on 5th June 1989. By a letter dated 4th June 2008, he was seconded to the National Union of Communications Workers (the 'Union') to work on full time basis for a period of four years commencing on 29th May 2008 while on unpaid leave. His secondment was subsequently extended for a further

period of four years following his election to the office of General Secretary of the Union, whose term was to expire on 30th May 2016. However, on 10th November 2014, the appellant's management served the respondent with a letter notifying him of their decision to retire him with immediate effect.

On 18th November 2014, the respondent issued a notice of complaint against the appellant seeking an order that the retirement was null and void; a declaration that the retirement was in bad faith and therefore unfair; an order for reinstatement with all conditions of service unconditionally; damages for unfair termination of employment; interest and costs.

The respondent also took out a summons for an interim injunction to restrain the appellant from interfering with the appellant's right to occupy the office of General Secretary of the Union and the performance of his duties thereunder, pending full and final determination of the matter or further order of the court.

The respondent's affidavit evidence in support of the application disclosed that while the appellant had the right to retire an employee under clause 11(a)(i) of the Collective Agreement, the decision to

retire him while on secondment was done in bad faith as it was intended to make him ineligible to continue running the office of General Secretary of the Union. That it was an act of victimisation and intimidation to other Union leaders who were there to check the excesses of the appellant's management. The respondent stated that he had never been disciplined nor cautioned for any infraction of organizational rules since he was employed by the appellant and that the just thing for the appellant to have done would have been to wait until the expiry of his secondment to the Union, before retiring him. That he would be prejudiced if an injunction was not granted to enable him to continue running the office of General Secretary and no amount of money could atone for the loss of an elective office.

In response the appellant filed an affidavit in opposition asserting that the respondent had previously been seconded to serve on full time basis with the Union and the appellant had given him all the necessary support. That therefore, the allegation that the respondent was being victimised on account of his Union activities had no basis. The affidavit in opposition also disclosed that the decision to retire the respondent was not on account of any

disciplinary delinquency on his part but simply because he was eligible for such retirement in accordance with the applicable conditions of service. That following his retirement, the respondent was paid all his terminal benefits and, thus, if he had a sustainable and meritorious claim the same could be adequately atoned for in damages. Further, that the appellant was not privy to the conditions pertaining to the respondent's full time employment with the Union as the contractual relationship between him and the Union was separate.

Upon hearing the application, the learned trial judge found that although the respondent appeared to have admitted in his affidavit in support of the application that he was retired in line with the collective agreement, he also seemed to allege that his retirement was premature in that he had not reached the retirement age. That when these two positions were viewed together, they seemed conflicting but raised questions in the court's mind that needed to be resolved at trial. Adopting a somewhat cavalier approach to the application, the learned trial judge found that there were triable issues that needed

resolving at the main hearing. He accordingly granted the application for an interim injunction pending final determination of the matter.

It is against this decision that the appellant has now appealed to this court on three grounds. These are:

1. **The Court below misdirected itself both in law and fact by granting an interlocutory injunction in favour of the Respondent against retirement from employment.**
2. **The Court below applied wrong principles for granting interlocutory injunctions in matters of personal service.**
3. **The learned trial judge failed to exercise his discretion judiciously by rendering the Ruling which had the effect of predetermining the entire substantive cause of action in favour of the Respondent at a preliminary stage on the basis of inconclusive affidavit evidence.**

At the hearing of the appeal, the learned counsel for the appellant indicated that he was relying entirely on the appellant's heads of argument filed on 8th April 2015.

In support of ground one, the learned counsel referred us to the learned authors of **Halsbury's Laws of England, 4th Edition (Re-Issue) Volume 24,** who observe in **paragraph 849** as follows:

> **"The court will not grant an injunction requiring a defendant (1) to perform personal services, (2) to do repairs, (3) to do an act which requires the continuous employment of people..."**

He also referred us to **paragraph 807** in **Halsbury's Laws of**

England, Volume 44(1) which states that:

> **"No court may, whether by way of an order for specific performance of a contract of employment or an injunction restraining a breach or threatened breach of such a contract, compel an employee to do any work..."**

He further referred us to **Chitty on Contracts Volume 1 31st Edition, (Sweet & Maxwell)** where it is stated in **paragraphs 27-021** that:

> **"It has long been settled that a contract of personal service or employment will not, as a general rule, be specifically enforced at the suit of either party."**

And our attention was also drawn to the case of **Creswell v Board of Inland Revenue**[1], where it was held by Walton J. at page 719 that:

> **"Damages and not an injunction is the proper remedy virtually in every case of contract especially one relating to master and servant."**

The learned counsel submitted that in applying the same principles, the High Court in **Harton Ndove v National Educational Company of Zambia**[2] refused an application by the plaintiff for an interlocutory injunction to restrain his erstwhile employer from, inter alia, withdrawing the sponsorship of his BA degree at the University of Zambia; eviction from his flat; and withholding his salary and other

benefits pending the determination of his action for wrongful dismissal.

Counsel contended that in other reported cases that have been litigated before Zambian courts, the applicants for interlocutory injunction do not generally include a prayer to remain in employment while awaiting trial, but rather restrict the interim relief to protection against eviction from the employer's house or repossession of a company car or such similar perquisites. That even in such cases, the courts have been guided by the overriding principle, whether in the circumstances of the case the applicant was likely to be granted an order of reinstatement in the main action. To support this argument, he cited the case of **Zambia State Insurance Corporation Ltd v Dennis Mulikelela**[3], where this court discharged an interim injunction ordered by the lower court in favour of a dismissed employee, restraining his eviction from the company house and repossession of a company car on the ground that reinstatement in the main action was most unlikely going to be granted.

He also called in aid the case of **Zambia Railways Limited v Joseph Oswell Simumba**[4], where an application by a dismissed

managing director for an interim injunction to restrain his eviction from a company house pending trial before the Industrial Relations Court was refused by this court on the overriding principle that the complainant was unlikely to obtain an order for reinstatement in the main action.

Further, we were referred to the case of **Turnkey Properties v Lusaka West Development Company Limited and 2 Others**[5], where this court emphasized that an interlocutory injunction is appropriate only for the preservation of a particular obtaining situation pending trial and should not therefore be employed as a device to create new conditions favourable only to the applicant.

The learned counsel submitted that the respondent's cause of action arose from his retirement from the appellant's employment and that on commencement of the action the respondent applied for an interim injunction, ostensibly to remain in employment and continue drawing a salary pending trial. He contended that on proper appraisal of the legal authorities and settled principles relating to interlocutory injunctions in employment cases, the learned judge in the lower court was bound to refuse granting the respondent the

relief sought. It was his submission that the trial court invariably misdirected itself both in law and fact by granting the interlocutory injunction in the manner it did.

In ground two, the learned counsel submitted that on the affidavit evidence adduced in the court below, the respondent acknowledged that he had been retired in due compliance with the applicable conditions of employment as stipulated in the Collective Agreement. That it was also not in dispute that following his retirement, the respondent had been paid his terminal benefits. It was argued that on the material available to the court below at the hearing of the application for interlocutory injunction, it was evident that the respondent had no real prospect of succeeding at the trial as he had failed to establish a prima facie case of some breach of duty by the appellant to him. As such, it was a misdirection on the part of the lower court to grant an interlocutory injunction in defiance of settled principles.

In arguing ground three, the learned counsel submitted that by ordering the respondent to go back to work after his retirement by way of interlocutory injunction, the learned judge in effect pre-

determined the respondent's entire complaint whereby, his retirement was practically rendered null and void; and restored to the respondent all employment benefits pending trial. He argued that a judicious and proper evaluation of the facts would have found that it was inappropriate to grant an interlocutory injunction in an employment case where reinstatement was unlikely to be ordered after the trial.

It was his further contention that at the time of hearing the application for interlocutory injunction the respondent had been in retirement for about six weeks and had been paid his terminal dues and that the respondent would not be in a position to pay back to his former employers the damages, in the form of salary and other benefits paid to him in aid of the interlocutory injunction, should his main action fail. That the formal order of the court below did not in fact obligate him to make the usual undertaking to pay the damages in this regard.

Further, that had the respondent established a prima facie case, the next consideration of weighing the balance of convenience would have tilted in favour of preservation of the status quo obtaining

at the commencement of the action as guided in the **Turnkey Properties** case by refusing to grant the interlocutory injunction to the respondent who had retired. He, however, argued that by granting the interlocutory injunction in the manner the trial court did, it created entirely new conditions whereby the respondent enjoyed and continues to enjoy employment benefits only favourable to himself, contrary to the settled principles. That for all intents and purposes the court below, by granting the respondent the interlocutory injunction, has in effect nullified his retirement and entered final judgment in favour of the respondent for the entire cause of action; thereby rendering the pending trial irrelevant.

The respondent did not file any heads of argument and neither did he nor his advocates appear at the hearing of the appeal. This is notwithstanding that service of the notice of hearing was duly effected on and acknowledged by the respondent's advocates on 22nd September 2017.

As we see it, all the three grounds of appeal are interrelated. We shall, therefore, deal with them together.

In assailing the decision of the lower court, the appellant has contended, in sum, that according to the cases that have been litigated in our courts, applications for interlocutory injunctions do not generally include a prayer to remain in employment while awaiting trial but they are restricted to protection against eviction from the employer's house or repossession of a company car, or such similar perquisites. That even in such cases, the guiding principle is whether the applicant was likely to be granted an order of reinstatement in the main action. Further, that the respondent's cause of action having arisen from the appellant's employment, his application for an interim injunction was ostensibly to remain in employment pending trial.

The appellant also contends that since the respondent had been retired in accordance with the applicable conditions of employment and paid his terminal benefits, he had no real prospects of succeeding at the trial. That by ordering the respondent to go back to work via an interlocutory injunction, the learned trial judge pre-determined the respondent's entire complaint, thereby rendering his retirement null and void and restoring to him all his employment perquisites pending trial. The appellant has further argued that by

granting the interlocutory injunction, the learned trial judge created entirely new conditions to the extent that the respondent continued to enjoy employment benefits only favourable to himself.

We have considered the issues raised by the appellant in the three grounds. The simple question for determination is whether this is a proper case where injunctive relief can be granted by a court. Authorities abound on the principles governing the grant or refusal to grant injunctive relief in employment cases. They have been identified and well-articulated by the learned counsel for the appellant. We find it otiose to repeat them here.

Among the claims sought by the respondent in his notice of complaint at pages 9 – 10 of the record of appeal is reinstatement. In **Hastings Obrien Gondwe v B. P. Zambia Limited**[6], we stated as following at page178

> **"... in cases where the claim is for reinstatement whether or not the ultimate decision of a trial court would result in the reinstatement of the employee was of vital importance in determining whether the employee would be entitled to an interlocutory injunction."**

In the grounds giving rise to the complaint, the respondent

alleged that the decision to retire him was made in bad faith as he had not yet reached retirement age. In his affidavit in support of the application for an injunction, however, the respondent conceded that the appellant had the right to retire him on the basis of clause 11(a)(i) of the Collective Agreement. This clause states as follows:

> **"11. TERMINATION AND OTHER BENEFITS**
>
> **(a) Normal Retirement**
>
> **(i) Employee shall retire on the last day of the month on which he/she reaches the age of 55. However, employees who will have worked at least 25 years or above of continuous service may be retired at the discretion of management."**

As aptly conceded by the respondent, the appellant had the right to retire him on the basis of clause 11(a)(i) of the Collective Agreement. In the circumstances, the likelihood that the appellant may have been entitled to the relief he was seeking in the main matter is very slim as there is nothing on the facts to suggest that this is an exceptional case where reinstatement was likely to be ordered. We are, therefore, amazed that in the circumstances of this case, the learned trial judge could reason that there were triable issues justifying the grant of an injunction pending final determination of the matter.

It is also trite that an injunction is meant to preserve the *status quo ante.* In the court below the learned counsel for the respondent submitted that the respondent served in the Union by virtue of his employment with the appellant. The record shows that at the time the application for interim injunction was made the respondent had already been retired and paid all his terminal benefits. Accordingly, he was no longer eligible to continue holding the office of General Secretary in the Union. Stated differently, there was no *status quo* to be preserved pending final determination of the matter.

As rightly submitted by the learned counsel for the appellant, the effect of the injunction granted by the lower court was to reinstate the respondent in employment, thereby creating conditions which were favourable only to himself as he continued to enjoy the perquisites of his employment when he had already been paid his retirement benefits. Needless to underscore, the ruling of the lower court offends the principles we set out in the **Turnkey Properties**[5] case where we stated that:

> **"An injunction should not be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of contending interests in such a way**

that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponent's case and strengthen his own."

We further agree with the learned counsel for the appellant that the lower court's ruling also had the effect of pre-empting the decision on the issues which were to be decided on the merits at the trial as the retirement was effectively nullified.

We also note that the lower court did not consider the possibility of damages being an adequate remedy. In the **Turnkey Properties**[5] case, we also held that:

"In applications for interlocutory injunctions, the possibility of damages being an adequate remedy should always be considered."

In our judgment, this is a proper case where the application for an injunction should also have been refused on the ground that the loss to the respondent, if any, could be atoned for in damages.

For the reasons stated above, our inescapable conclusion is that this appeal has merit. We accordingly allow the appeal and set aside the ruling of the lower court. We award costs to the appellant which shall be taxed in default of agreement.

By way of *obiter*, we wish to make this observation. In the main, the respondent sought an interlocutory injunction primarily to enable him complete his term of office as General Secretary of the Union which was to expire in May 2016. The order of interim injunction was granted by the lower court on 23rd December 2014. By the time this appeal came up for hearing on 3rd October 2017, it was more than two years after 30th May, 2016 when the respondent's term of office had expired. It therefore follows that no useful purpose will be served by our decision as this appeal now seems to be an academic exercise.

G. S. PHIRI
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE