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IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 024/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED **APPELLANT**

AND

LINUS CHANDA **RESPONDENT**

CORAM: Mchenga DJP, Chashi and Chishimba JJA
on 13th April and 13th June and 28th July, 2017

For the Appellant: *M.S Kambobe (Mrs.) Principal Legal Officer – In House Counsel*
For the Respondent: *K. Kaunda and A. Matantilo (Ms), Messrs Ellis and Company*

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Consumer Buying Corporation Limited (in Liquidation) and Zambia Privatisation Agency v Robbie Mumba and Others - SCZ Appeal No. 156 of 1997***
2. ***Zimco Limited (in Liquidation) and Zambia Privatisation Agency v Michael Malisawa and 17 Others - SCZ Appeal No. 139 of 2002***
3. ***Hastings O. Gondwe v BP Zambia Limited - SCZ Judgment No. 1 of 1997***
4. ***Robbie Mumba and Others v Zambia Privatisation Agency and Consumer Buying Corporation - Appeal No. 149 of 2001***
5. ***Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines - SCZ Appeal No. 7 of 2000***
6. ***The Rating Valuation Consortium and DW Zyambo & Associates (suing as a firm) v The Lusaka City Council and Zambia National Tender Board (2004) ZR, 109***
7. ***ZESCO Limited v Alexis Mabuku Matale - SCZ Appeal No. 227/2013***

8. ***Philip Mhango v Dorothy Ngulube and Others (1983) ZR, 61***
9. ***Zambia State Insurance Corporation v Serios Farms Limited (1987) ZR, 93***
10. ***Zambia Union of Financial Institutions and Allied Workers v Barclays Bank PLC - SCZ Appeal No. 209/2004***

Legislation referred to:

11. ***The Industrial and Labour Relations Act, Chapter 269 of The Laws of Zambia***

Other works referred to:

12. ***Ewan Mc Kendrisk Contract Law II, 3rd edition***
13. ***Geoff and Jones, the Law of Restitution, 7th edition, Sweet & Maxwell 2007***

This is an appeal from the Judgment of the High Court – Industrial Relations Division, delivered on 13th October, 2016. This followed an action commenced by the Respondent by way of a complaint under Section 85 (4) of ***The Industrial and Labour Relations Act***[11] for the following reliefs:

1. An Order of Injunction restraining the respondent's employees or agents whatsoever from taking possession of the motor vehicle registration No. ALP 8276 until the matter was fully determined.
2. Full contractual and statutory benefits (compensation) less the sum of K122,000.00 which was paid only after the complainant's Advocates threatened litigation.
3. An Order that the complainant is entitled to purchase the motor vehicle herein at the sum already determined by the Respondent.
4. Damages for defamation or injury to reputation arising from comments by people on account of the termination.

5. Damages for shock and inconvenience caused by the respondent's agents who have been trespassing onto the complainant's residence to retrieve or possess the said vehicle.
6. Punitive and exemplary damages.
7. Damages for trespass vicariously committed by the respondent's agents and employees.
8. Interest on the benefits and damages at the current bank lending rate until full settlement.
9. Costs.

The facts that are not in dispute are that the Respondent was employed by the Appellant on 1st May, 2013 as Director – Generation Development on a three year fixed Contract which was to expire on 30th April, 2016. The contract was terminated on 4th March, 2015 pursuant to Clause 5.3 of the Contract of Employment (the Contract).

In his testimony before the lower Court, the Respondent stated in tandem with his complaint and affidavit in support that he wrote a letter on 15th March, 2015 to the Respondent's Company Secretary requesting to be advised the value of the vehicle, which was personal to holder and that he be offered the same on terms and conditions that had been extended to other Directors who had left, such as the former Director of Human Resources and Administration, Morecome Mumba whose contract was terminated in January, 2015. He received a response on 17th March, 2015, that he would be given a

formal offer once a valuation report from the Finance department was availed.

The Respondent went on to testify that on 24th April, 2015, the acting Managing Director wrote to him offering the vehicle at K120,240.00 which offer he accepted and advised that the purchase price should be deducted from his terminal benefits which were yet to be paid. Subsequently on 1st October, 2015, the Director of Human Resources and Administration wrote to him advising that he was not entitled to the vehicle and should immediately hand it over to the Appellant as the offer was made to him by mistake.

The Respondent urged the Court to order that the Appellant be compelled to honour the Contract by selling him the vehicle.

As regards the claim for terminal benefits, it was his testimony that the education and holiday allowances which were part of his entitlements were not included in the calculation of terminal benefits contrary to Clause 12.11 and 8.4.1 of the Contract.

It was the Respondent's further testimony that the Appellant deducted K99,671.00 from his terminal benefits as depreciation of the vehicle since it was in his custody.

As regards the claim for damages for emotional and mental torture, the Respondent stated that the termination affected him mentally as he had left a more lucrative job in Uganda and he was not paid his benefits until after eight months, during which period he went through financial stress as he had obtained loans under the belief that he would be in employment for three years. That during that period, he could also not afford medication as he was hypertensive.

The Respondent also testified in support of his claim for defamation.

According to the Respondent, the Contract provided for conditions for purchase of a motor vehicle as an employee, which did not apply to him as he made an offer to purchase the vehicle as an ex employee of the Appellant who accepted the offer on that basis. He conceded that he was not privy to the contracts of the other Directors, especially Morecome Mumba.

As regards the education and holiday allowance, he asserted that they were off pay slip and were only drawn upon submission of receipts and leave being approved respectively.

The Respondent in addition to his evidence called his wife whose evidence was focused on the trauma the family went through when the security personnel from the Appellant harassed them when they

attempted to get back the vehicle. She also spoke about the anguish and the depression the Respondent went through as a result of losing employment, as they had no financial support.

In response to the complaint, the Appellant filed an answer supported by an affidavit and called one witness, the Director of Human Resources and Administration, Laston Mumba. The witness testified that the delay in paying the benefits was due to an administrative process and verifications in computing the same. Further, the Respondent had written a letter that the benefits should not be paid before the current net value of the vehicle was determined. According to the witness, the offer of the vehicle to the Respondent was done in error and was five months later corrected.

As regards the benefits, it was his testimony that they were calculated in accordance with the Contract which provided for payment of gratuity. That education and holiday allowances were not included in the calculations as the Contract provided for gratuity to be based on the last drawn months pay and only allowances that appear on the last pay slip would be paid. On the amount of K99,671.00 which was deducted for depreciation of the vehicle, the witness failed to justify how it was arrived at.

After considering the evidence on the record and the submissions of Counsel, the learned trial Judge found that the relationship between the parties was governed by the Contract.

On the non inclusion of the education and holiday allowances which were off pay slip allowances, the lower Court held that since they formed part of the Respondent's conditions of service, they ought to have been taken into account when calculating the gratuity. Relying on the case of **Consumer Buying Corporation Limited (in Liquidation) and Zambia Privatisation Agency v Robbie Mumba and Others**[1] and the case of **Zimco Limited (in Liquidation)** and **Zambia Privatisation Agency v Michael Malisawa and 17 Other**[2], the learned trial Judge ordered that both allowances be added to the basic salary in arriving at the true gross salary, gratuity be recomputed and the difference paid to the Respondent.

On the claim for the vehicle the trial Judge was of the view that the Respondent was treated with malice and in bad faith and also that the allegation that the offer was made in error was in bad faith and unfair.

Relying on the principle of equity as statutorily provided for under Section 85 A (d) of ***The Industrial and Labour Relations Act***[11], the

learned trial Judge ordered the Appellant to immediately conclude the sale/purchase of the vehicle to the Respondent.

With regard to the deduction of K99,671.00 as depreciation of the vehicle, the learned trial Judge found it absurd and illogical and unjustified.

The lower Court dismissed the claims for defamation and shock as there was no evidence to substantiate the same.

The lower Court however found that the Respondent was inconvenienced when he was not immediately paid his terminal benefits. That had he been paid on time he would not have gone through a turbulent time and the justification by the Appellant as to the delay was comical and incoherent. In that respect the learned trial Judge ordered that he be paid three months salary as damages for inconvenience.

The lower Court further ordered that the amounts awarded, do attract interest at short-term commercial bank rate from 6th November 2015 until date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia from time to time until full payment.

The Appellant has now appealed to this Court against the Judgment of the lower Court, advancing four grounds of appeal as follows:

1. That the Court below erred in both law and mixed law and fact when it held that the complainant's education and holiday allowances be incorporated into the complainant's salary for the purpose of calculating gratuity contrary to the complainant's Contract and against existing law and precedent.
2. That the Court below erred in both law and mixed law and fact when it held that the respondent should immediately complete the process of purchase/sale of motor vehicle registration No. ALP 8276 to the complainant at the value of K20,596.00 contrary to the provisions of the complainant's Contract and against existing law and precedent.
3. That the Court below erred in both law and mixed law and fact when it held that the claim for inconvenience succeeds and the respondent is ordered to pay the complainant three (3) months salaries as damages when the complainant was paid as though he had served his full Contract.
4. That the Court below erred in both law and mixed law and fact when it held that the complainant is entitled to interest

and costs when the complainant is not entitled to the claims giving rise to interest and costs.

In support of these grounds of appeal, the learned Counsel for the Appellant Mrs. Kambobe filed written heads of argument and list of authorities on which she entirely relied.

On the first ground of appeal, Counsel submitted that the Order by the learned trial Judge to incorporate the education and housing allowances was contrary to Clauses 5.5.1, 8.4, 8.4.1 and 12.11 of the Contract and existing law and precedent. That Clause 5.5.1 of the Contract does not include off pay slip allowances as the computation is restricted to gross salary, which is defined as:

> *"Monthly payments for regular employment determined on a yearly basis".*

That only the basic pay, service, housing and availability allowances as appears on page 375 of the record of appeal were included for computation of gratuity.

According to Counsel, as conceded by the Respondent, education and holiday allowances were not monthly payments.

Counsel went on to argue that holiday allowance was only payable once the holiday was taken upon approval. As for education allowance it was only payable upon submission of invoices from the

school as and when the school fees fell due and would then be paid directly to the school.

Counsel relied on the case of **Hastings O. Gondwe v BP Zambia Limited**[3] where the Court stated that:

> *"There is a distinction between the pre-requisites enjoyed as an incident of employment and conditions and benefits enjoyed after a certain period while in employment or at the end of that employment".*

Although in our view, this case would seem not to be relevant to the issue before this Court.

Further reliance was placed on the case of **Robbie Mumba and Others v Zambia Privatisation Agency and Consumer Buying Corporation**[4] where the Court laid down the principle that in computing terminal benefits of an employee, not all benefits enjoyed by an employee during his period of service must be integrated in the basic salary before computing that employees terminal benefits except where the conditions of service states so. That this was also noted in the case of **Rosemary Ngorima and 10 Others v Zambia Consolidated Copper Mines**[5] where the Court stated that:

> *"It is trite law that in any employer/employee relationship, the parties are bound by whatever terms and conditions they set themselves".*

It was counsel's contention that the Contract was clear on the computation of gratuity and therefore the Order by the learned trial Judge to include education and holiday allowances in the computation of gratuity amounted to importing new terms and conditions into the Contract which were never agreed upon by the parties.

Coming to the second ground of appeal, Counsel submitted that Clause 11.1 of the Contract entitled the Respondent to a personal to holder vehicle and stipulated the conditions to purchase the vehicle. The Respondent admitted that he did not serve under the Contract for three years and further that he had not driven the vehicle for three years. Counsel drew our attention to page 37 of the record of appeal at J26 of the Judgment, where the lower Court said the following:

> *"This was indeed purely a contractual obligation between two contracting legal entities and the contract was duly offered accepted and consideration was to be deducted from the complainant's terminal benefits, which the respondent was owing him".*

Counsel contended that this was not an isolated buying and selling of a vehicle or a commercial transaction, but the sale of a personal to holder vehicle which had to be undertaken within the legally

provided confines of the Contract. That the failure of the Respondent to meet the conditions of Clause 11.2 of the Contract made the offer erroneous and had to be reversed as a correction.

Counsel submitted that the finding of the Court below was completely erroneous, as the offer expressly made reference to the Contract which governed the sale of the vehicle as a consequence of employment. As such, it could not be said to be a separate contractual arrangement.

Counsel further argued that it was a misdirection for the lower Court to have found in such a way as to compel the Appellant to perpetuate an illegality. That it is trite law, that illegal contracts or illegal provisions of contracts are not enforceable. Our attention was drawn to the case of **The Rating Valuation Consortium and DW Zyambo and Associates (suing as a firm) v The Lusaka City Council and Zambia National Tender Board**[6] where the text of ***Ewan Mc Kendrisk Contract Law II, 3rd edition***[12] was cited wherein it was reiterated that:

> *"It is trite law that as a general rule, the Courts will not enforce a contract which is illegal, nor will the Courts permit the recovery of benefits conferred under such a contract".*

Counsel submitted that the Court failed to address Clause 11.2 of the Contract which was the premise for the sale of the vehicle.

With regard to the third ground of appeal, Counsel submitted that the Appellant could have paid the Respondent his terminal benefits soon after termination if it was not for the Respondent himself who requested that the benefits only be paid after the issue of the vehicle was resolved. As such the Appellant had to ensure the aspect was properly dealt with. That in addition the Appellant had to attend to the normal audit verification process to ensure that all payments were done within the law and in accordance with the contractual provisions. That therefore the delay was not deliberate.

Lastly with regard to ground four, it was submitted that the Respondent is not entitled to interest and costs as he is not entitled to the claims giving rise to interest and costs in the first instance. That in any event, where interest is claimed and awarded it is from the date of the Writ of Summons and cannot be claimed to cover the seven months duration.

In response to the first ground of appeal. Learned Counsel, Mr. Kaunda submitted as per the Respondent's heads of argument that the learned trial Judge was on firm ground when he ordered that the education and holiday allowances be incorporated into the Respondent's salary for purposes of calculating the gratuity.

Counsel argued that the education and holiday allowances were part of the Respondent's conditions of service and therefore the learned trial Judge was correct in incorporating them into the salary for the purpose of calculating gratuity.

Reliance in that respect was placed on the **Consumer Buying Corporation Limited[1] case** where the Supreme Court had this to say:

> *"Mr. Mubanga offered a self defeating argument when he pointed out that in the case of one of the Plaintiffs, his previous pay slip had no allowance in respect of lunch and housing because they were provided free. It is precisely because these prerequisites or fringe benefits have a value that when computing the true earning or the true loss of earnings of an employee they have logically and rationally to be taken into account".*

Further, in the **Zimco Limited[2] case** Sakala CJ stated as follows:

> *".....if the Respondents were entitled to club membership and a social tour, whether a one off payment or not, they were still benefits which had to be incorporated into a salary for purposes of calculating terminal benefits. This is so because these fringe benefits have a value. Thus when computing the true earnings or loss of earnings, they have to be taken into account".*

Coming to the second ground of appeal, Counsel contended that the learned trial Judge was on firm ground when he held that the

Appellant should immediately complete the process of purchase/sale of the vehicle.

According to Counsel, the letters appearing at pages 213-216 of the Respondent's Bundle of Documents created a separate agreement between the Appellant and the Respondent. The letters show that there was an offer to sell the vehicle by the Appellant, which the Respondent accepted.

Counsel argued that, although the Appellant's argument was that the offer was made in error, the learned trial Judge was on firm ground when he held that it was unreasonable that the Appellant communicated to the Respondent after six months that the offer was made in error. That that was done in bad faith.

According to Counsel, whilst the Appellant contends that a Director can only purchase a vehicle after having served their full contract, the Appellant's witness, admitted that the current Managing Director did not serve his full contract term and yet bought his personal to holder vehicle. That this therefore confirms the practice to override contractual terms and the existence of Board guidelines on purchase of such vehicles. It further shows that the Appellants communication that the offer was made in error was clearly done in bad faith. That in any event this ground of appeal is redundant as the Appellant has

since after the Judgment issued the Respondent with a letter of sale to facilitate the change of ownership.

Mr. Kaunda, proceeded to argue the third and fourth grounds together as in his view the two are interrelated. It was his submission that the learned trial Judge was on firm ground when he ordered that the Respondent be paid three months salary for inconvenience and costs.

Counsel argued that there was no justifiable reason for the Appellant to have taken seven months to effect payment. The Appellant's evidence that the delay was partially because the Auditors were making verifications was not communicated to the Respondent. That had the Respondent been paid on time, he would not have been inconvenienced in any way as he was subjected to. That the Respondent having showed that he was entitled to his claims, he is also entitled to interest and costs.

On the basis of the above, Counsel urged us to dismiss this appeal with costs.

In reply, Counsel for the Appellant reiterated that the offer of the vehicle was made pursuant to the Contract and not as a separate agreement.

Further that the second ground of appeal as elaborated in the Appellant's heads of argument is not redundant.

Counsel has further argued that the learned trial Judge in rendering his Judgment did not make any reference to the current Managing Director purchasing his personal to holder vehicle or a practice overriding contractual terms and existence of Board guidelines. That it is clear that the learned trial Judge did not endorse the evidence relating to the current Managing Director and the Board guidelines and as such are not the subject of the appeal before this Court.

That this is a ploy by the Respondent to tender evidence before this Court contrary to the rules of the Court.

We have carefully considered the evidence on the record of appeal, the heads of argument filed by Counsel and the Judgment appealed against.

The gist of the argument by Mrs. Kambobe in support of the first ground of appeal is that the lower Court misdirected itself when it failed to consider the provisions of Clauses 5.5.1, 8.4 and 12.11 of the Contract and contrary to the said Clauses and the existing law and precedents held that the education and holiday allowances be incorporated into the Respondent's salary for purposes of calculating the gratuity.

Conversely, Counsel for the Respondent agreed with the learned trial Judge that the gratuity payable under Clause 8.4 of the Contract should include the education and holiday allowances.

We have had the opportunity to peruse the two Supreme Court Judgments the learned trial Judge relied on in arriving at his decision. We note that in the said Judgments, it was held that prerequisites or fringe benefits such as club membership, social tour, lunch and housing allowances, whether a one pay-off payment or not, such benefits have a value that should logically and rationally be taken into account when computing the true earnings or the true loss of earnings of an employee.

However, we agree with Counsel for the Appellant that not all benefits or allowances enjoyed by an employee during his period of employment ought to be integrated in the basic salary in computing terminal benefits except where the conditions of service states so.

In the **Robbie Mumba**[4] case, Mambilima JS, as she then was had this to say on this point at page 17 of the Judgment:

> *"On the argument that current judicial trends emphasizes that all benefits enjoyed by an employee during his period of service should be incorporated into his salary for the purposes of computing terminal benefits, we cannot help but admire Counsel's ingenuity to introduce new elements into*

the law of contract. Employment is basically in the realm of contract governed by ascertainable terms. Employees of ZIMCO and its subsidiaries have had allowances incorporated into their salaries for the purpose of computing their terminal benefits on the basis of a direction from the Ministry of Finance through a letter issued on 28th March 1995. The condition was not created by the Court."

That indeed falls in line with the holding in **Rosemary Ngorima**[5] case, that it is trite law that in any employer/employee relationship, the parties are bound by whatever terms and conditions they themselves set.

The aforestated was reiterated by the Supreme Court in the recent case of **ZESCO Limited v Alexis Mabuku Matale**[7] where one of the issues raised is similar to the one under consideration on this ground of appeal. The Court stated that the resolution of the issue raised depends on the interpretation of Clause 8 and 9 of the Respondent's Contract of employment.

The Supreme Court went on to state that in their view, the terms and conditions of employment applicable to the Respondent, at the time of his dismissal, were those contained in his contract of employment.

In the case in *casu*, the applicable Contract is that which appears at page 52 of the record of appeal, and of interest is Clause 5.1.2 and 5.5.1 of the Contract, which Clauses state as follows:

> *"5.1.2 where, however, the company terminates the contract on other grounds other than those stated in Clause 5.1.1 the company shall pay the employee full gratuity excluding monthly salaries and allowances as if duly served."*
>
> *"5.5 Gratuity payment-*
>
> *5.5.1 Completion of term.*
>
> *The company will pay the employee gratuity at the rate of* ***35% of the gross salary based on the last drawn salary. Tax will be borne by the company****." (emphasis ours).*

Clause 5.5.1 clearly provides for the formula to be used to calculate the Respondent's gratuity; which is ***35% of the last drawn gross salary before tax***.

It is common cause that the Respondent's last drawn gross salary did not include education and holiday allowances.

In the view we have taken, the learned trial Judge misdirected himself when he came to the conclusion that since the education and holiday allowances formed part of the Respondent's conditions of service, they ought to have been taken into account when calculating

the gratuity and ordering that they be added, gratuity be recomputed and the difference paid to the Respondent.

The last drawn salary under Clause 5.5.1 was simply the last salary that was paid to the Respondent, immediately preceding the termination of the Contract. Ground one of the appeal therefore succeeds.

Ground two of the appeal, attacks the learned trial Judge's holding that the Appellant should immediately complete the process of the sale of the vehicle as that was contrary to the provisions of the Contract.

As earlier alluded to, the relationship between the Appellant and the Respondent was governed by the Contract.

It is common cause that Clause 11.1 entitled the Respondent to a personal to holder vehicle. Clause 11.2 stipulated the conditions which were to be fulfilled for the Respondent to purchase the vehicle amongst them was the condition that he should have completed a minimum of three years continuous service and should have been using the vehicle for a minimum of three years.

It is not in dispute that the Respondent did not qualify to purchase the vehicle under Clause 11.2.

We note that the Respondent has advanced the argument that the correspondence relating to the vehicle created a separate agreement between the parties.

We do not agree with that assertion on the basis that the Contract did not make any provision for the parties to contract over the vehicle outside the Contract.

Secondly, the first letter dated 15th March 2015 appearing at page 71 of the record of appeal from the Respondent to the Appellant made it clear that the Respondent was following up the option to purchase the vehicle following the termination of the Contract.

Furthermore, the offer letter from the Appellant dated 24th April 2015 stated that the vehicle was being offered as stipulated under Clause 11.2 of the conditions of service.

We therefore have no doubt and agree with the Appellant that the same was erroneously offered as the Respondent was not entitled to purchase the same and the Appellant had the right to withdraw the offer.

The learned trial Judge therefore misdirected himself in holding that there was a purely contractual obligation between two contracting legal entities.

We also agree with Counsel for the Appellant that the issue of being similarly circumstanced as the current Managing Director and the existence of Board Guidelines was not raised in the Court below and cannot therefore be raised on appeal, as it is being canvassed for the first time on appeal.

We are further of the view that there was not enough evidence from the Respondent to prove that he was similarly circumstanced as Mr. Morecome Mumba. In any case, the learned trial Judge did not base his determination of the issue on that assertion.

The second ground of appeal therefore succeeds.

We note from the arguments that the Appellant after the Judgment of the lower Court issued the Respondent with a letter of sale to facilitate change of ownership.

Relying on the work titled: ***Geoff and Jones, the Law of Restitution, 7th edition***[13], where at page 443, the learned authors stated that where a judgment is overturned on appeal, the appellate Court will Order restoration, the Court has the power to do what is practically just between the parties and by so doing restore them substantially to the status quo by returning them to the position they were in before the transaction.

education and holiday allowances as well as damages for convenience. The relief for allowances and damages having fallen away, as the Appellant has succeeded on the first and third grounds of appeal; the issue of interest automatically falls away.

As regards the costs, grounded on the authority of **Zambia Union of Financial Institutions and Allied Workers v Barclays Bank Plc**[10] each party shall bear its own costs of the appeal and in the Court below.

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C.F.R MCHENGA, SC

DEPUTY JUDGE PRESIDENT

COURT OF APPEAL

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J. CHASHI

COURT OF APPEAL JUDGE

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F. M. CHISHIMBA

COURT OF APPEAL JUDGE