

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 206/2020

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

BRIC BACK LIMITED T/A GAMAMWE RANCHES

APPELLANT

AND

NEIL KIRKPATRICK

RESPONDENT

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**

On 16th and 22nd February, 2021

For the Appellant: *Mrs. S.K. Banda and Mr. M. Mwanza of J & M Advocates*

For the Respondents: *Ms. M. Bwalya and Ms. Z. Maipambe of Mwenye & Mwitwa Advocates and Mr. B. Mulungushi of Milner & Paul Legal Practitioners*

JUDGMENT

MULONGOTI, JA, delivered the Judgment of the Court.

cases referred to:

1. *Wilson Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)*
2. *Zambia Telecommunication company Limited v Mulwanda & Ng'andwe- SCZ Judgment Number 7 of 2012*

3. ***Zambia National Holdings Limited and United National Independent Party v The Attorney General (1994) Selected Judgment No. 22 (SC)***
4. ***N.B Mbazima and others Joint Liquidators of Zimco Limited (In Liquidation) v Reuben Vera- SCZ No. 6 of 2001***
5. ***Vangelatos and Vangelatos v Metro Investment Limited and others-SCZ No. 35 of 2016***
6. ***RE (2019) EWCA CIV.1845***
7. ***Zambia Consolidated Copper Mines Limited v James Matale (1996) SCZ Judgment No. 9 of 1996***
8. ***Minister of Home Affairs and The Attorney General v Lee Habasonda (suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes) 2007 ZR 207***

Legislation and works referred to:

1. ***The Rules of the Supreme Court of England (RSC) White Book 1999 Edition***
2. ***The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia***

1.0 Introduction and Background

1.1 This is an appeal against the extempore ruling of his Lordship Mwansa J, of the Industrial Relations Division (IRD) which essentially dismissed the appellant's Motion to raise a preliminary point of law on the following questions:

- (i) *Whether or not the Industrial Relations Division of the High Court has jurisdiction to deal with claims (i), (iii) and (iv) of the Complaint in view of the fact that the same involve debt*

collections which are the preserve of the Principal Division of the High Court of Zambia:

- (ii) *Whether or not the Industrial Relations Division of the High Court has jurisdiction to deal with claim (v) of the Complaint in view of the fact that the same would involve the interpretation of Constitutional provisions which are the preserve of the Constitutional Court of Zambia;*
- (iii) *Whether or not this Honourable Court has jurisdiction to grant reliefs that are not related to Industrial Relations matters in light of section 85 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia, on account of the fact that there is no predicate claim for breach of any employment law upon which the Court can determine the rights and obligations of the parties in the matter. In the absence of such predicate claim for breach of employment law, the matter is then a simple debt collection matter or breach of contract claim which should be filed in the Principal or Commercial Registry of the High Court; and*
- (iv) *That based on the issues stated above, this matter is before the wrong forum and must be dismissed in its entirety or the offending provisions struck out.*

1.2 On 8th July, 2020 when the parties appeared before the learned Judge for hearing of the application, Mr. Madaika, who appeared for the respondent, (now appellant) sought variation of the hearing date on the premise that he had just taken over the matter and needed to serve the respondent's co-counsel Mr. Katolo (also in attendance with Mr. Mwenye SC for the complainant (now respondent). The Court then stated

thus: "*I have looked at the application and I see only incidents of the employee and employer relationship*" Mr. Madaika then informed the Court that since it had delivered an extempore ruling, he was requesting for a reserved Ruling so he could launch an appeal. Mr. Mwenye SC, submitted that it was not necessary for the Court to do so.

1.3 The Court then stated "***My first sentence is the reason for my decision.***" The appellant was granted leave to appeal.

2.0 **The Appeal**

2.1 The appellant appealed to this Court and raised five grounds of appeal as follows:

1. ***The learned trial Judge erred in law and fact in the manner he conducted the hearing of the appellant's notice of motion to raise preliminary issues and in failing to provide a reasoned Ruling on the issues raised.***
2. ***The learned trial Judge erred in law and fact when he held that the Industrial Relations Division of the High Court has jurisdiction to deal with claims (i), (iii) and (iv) of the respondent's complaint.***
3. ***The learned trial Judge erred in law and fact when he failed to take into consideration the fact that the Complaint, as pleaded, was couched as a debt collection and did not raise any issues under employment or labour law.***
4. ***That the learned trial Judge erred in law and fact when he held that the matter was not before the wrong forum.***

3.0 The Arguments

- 3.1 In support of the grounds of appeal, the appellant filed its heads of argument on 29th October, 2020.
- 3.2 It is argued on ground one that the learned Judge dismissed the appellant's application without addressing the issues raised in the application. No written Ruling was rendered outlining the reasons for dismissing the application. This caused great prejudice to the appellant as it is settled law that an adjudicator must address his mind to all issues raised by the parties in totality as held in a plethora of cases such as **Wilson Zulu v Avondale Housing Project Limited¹** and **Zambia Telecommunications Company Limited v Mulwanda & Ng'andwe²**.
- 3.3 It is contended that the court below should have pronounced itself on the main questions raised in the motion to the requisite standard.
- 3.4 On grounds two and three it is submitted that the following claims in the Notice of Complaint fall under the jurisdiction of the General list and Commercial division of the High Court:

"(i) Payment of all accrued salary and bonus arrears amounting to US\$305,824.00 net of applicable taxes;

(iii) A refund of the sum of US\$3,871 paid by the complainant as health insurance/medical aid for the year 2017;

(iv) Payment of the equivalent of four return flights to the republic of South Africa from Zambia"

3.5 The Supreme Court decision in **Zambia National Holdings Limited and United National Independent Party v the Attorney General**³ was cited in support of the argument that the court below had no jurisdiction to determine these claims. The Supreme Court held thus:

"The term "jurisdiction" should first be understood. In the one sense, it is the authority which the court has to decide matters that are litigated before it; in another sense it is the authority which the court has to take cognizance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation."

3.6 Learned counsel went on to argue that the **Industrial and Labour Relations Act (ILRA)** defines the jurisdiction of the IRD per **section 85A** which is couched thus:

"Where the court finds the complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may-

- (i) *Award the complainant or applicant damages or compensation for loss of employment*
- (ii) *Make an order for reinstatement, re-employment or re-engagement;*
- (iii) *Deem the complainant or applicant as retired, retrenched or redundant;*
- (iv) *Make any order or award as the court may consider fit in the circumstances of the case".*

3.7 Flowing from that section, it is submitted that, it is clear that, the IRD has exclusive jurisdiction to hear and determine matters relating to labour disputes and the remedies provided in the ILRA relate to labour matters. Therefore, the court below erred in law and fact when it held that the respondent's claims were properly before it.

3.8 The case of **N.B Mbazima and others Joint Liquidators of Zimco Limited (In liquidation) v Reuben Vera⁴** was cited wherein the Supreme Court held that the Industrial Relations Court (now IRD) lacks jurisdiction in conveyancing matters as the law only allows the High Court to entertain issues relating to impugning of certificates of title.

3.9 On ground four, it is argued that where the Court decides to hear a matter in which it does not have jurisdiction, the consequential effect is a nullity of any order or determination made as held in **Vangelatos and Vangelatos v Metro Investment Limited and others**⁵.

3.10 The appellant's counsel also directed our attention to **Order 18/19 of the Rules of the Supreme Court** which provides:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious;*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

3.11 It is contended that stemming from the want of jurisdiction to entertain claims (i), (iii) and (iv) of the Complaint and the fact that the debt collection claims are the preserve of the Geranial list and Commercial division of the High Court, the learned Judge fell in error

when he failed to strike out the offending claims or indeed to dismiss the matter in its entirety.

3.12 In response, the respondent filed heads of argument on 27th November 2020. On ground one it is argued that the learned trial Judge addressed his mind to all the documents and considered all the legal arguments in the preliminary issue, when he stated at page 9 lines 10 and 11 of the record of appeal that:

"I have looked at the application and I see only incidents of employee and employer relationship."

Furthermore that, the learned Judge furnished the parties with reasons for his decision when he stated that ***"My first sentence is the reason for my decision."***

3.13 According to the respondent it is cardinal to note that the Judge gave an extempore Ruling. *Extempore* is latin for "***act of the moment***" and as a legal term means "***at the time***" Thus a decision is handed down soon or straight after hearing.

3.14 It was further submitted, relying on **Black's Law Dictionary** that, extempore means "***1. By lapse of time 2. Without any preparation, extemporaneously***". Therefore, an extempore ruling or judgment being one off the cuff

does not entail the same preparation as a reserved decision.

3.15 To buttress, the case of **RE (2019) EWCA CIV.1845⁶** was cited wherein Peter Jackson LJ said:

"We do not overlook the reality. Judges are encouraged to give extempore judgments where possible and appeal will not succeed simply because matters might be better expressed with the luxury of extra hours of preparation or because judgments may contain imperfections . . . what matters is that the parties know the outcome and the reasons for it. Where the essential evidence has been considered and the decision has been adequately justified that will do."

3.16 In *casu* the trial court communicated to the parties the outcome of the extempore Ruling and the reason for arriving at the decision was justified.

3.17 Grounds two and three were argued on the basis that **section 85(1) of the ILRA** provides that the IRD has original and exclusive jurisdiction over disputes relating to employment contracts.

3.18 The Supreme Court's decision in the case of **Zambia Consolidated Copper Mines Limited v James Matale⁷** was cited which holds that:

"The general jurisdiction of the Industrial Relations Court and the expansive extent of it, is manifest in

section 85 under various subsections which cumulatively, confer a sufficient jurisdiction unrestrained by technicalities under which real justice can be dispensed. Subsection 4 of section 85 for example confers jurisdiction to hear any dispute between employers and employees even if not connected with group rights or grievances. The subsection reads:

"The Court shall have jurisdiction to hear and determine any dispute between any employer and an employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter".

3.19. All the respondent's claims which the appellant contends the IRD has no jurisdiction, emanate from the employment contract. The learned trial Judge was therefore on firm ground when he held that all the claims were properly before him. The claims relate to the rights and privileges enjoyed by the respondent arising from the contract of employment.

3.20 The claims cannot be said to be simply a debt collection as argued by the appellant but are arrears or monies being claimed as the respondent's entitlement under the contract of employment to which the trial court has jurisdiction.

3.21 In addition the respondent submits that **section 85 (9)**

(c) of the ILRA gives clarity as to what constitutes industrial relations matters as follows:

"Industrial relations matters shall include issues relating to general inquiries into, and adjudication on any matter affecting the rights, obligations and privileges of employees, employers and their representative bodies".

3.22 All the claims in *casu* are captioned by that subsection.

The case of **N.B Mbazima and others Joint Liquidators of Zimco Limited (In liquidation) v Reuben Vera⁴** is therefore distinguishable. Accordingly, grounds two and three be dismissed for lack of merit.

3.23 On ground four, the respondent maintained that the IRD is the correct forum to hear and determine claims (i), (iii) and (iv).

3.24 The appellant's counsel filed heads of arguments in reply to the respondent's heads of argument. It is argued that contrary to the respondent's submissions that the appellant takes issue with the manner in which the decision was arrived at, the appellant takes issue with the fact that the ruling was not rendered on the merits and prejudiced it. The Supreme Court

decision in **Zambia Telecommunications Company Limited v Mulwanda & Ng'andwe**² was referred to as authority on what constitutes a Judgment per Mwanamwambwa JS as he then was, as follows:

"A Judgment comprises of the following elements:-

- 1. An introductory section*
- 2. A setting out of the facts*
- 3. The law and the issues*
- 4. Applying the law to the facts*
- 5. The relief; and*
- 6. The Order of the Court*

On the 5th and 6th elements he observed as follows:-

- 5. The Relief... The next and penultimate stage is to determine the relief the parties are entitled to, including orders as to costs. This depends upon the findings of law and fact and the conduct of the proceedings generally... Consequently this must be carefully scrutinized in the determination of the relief to be granted...*
- 6. The Order of the Court: This must be carefully drafted in light of the findings as to the relief to be granted".*

3.25 The ruling subject of this appeal did not meet these standards. Whether the decision is extempore or otherwise, the standards have to be met.

3.26 Thus, the phrase "**my first sentence is the reason for my decision**" is not sufficient reason for arriving at a decision to dismiss the pertinent questions of law

raised by the appellant. Citing the case of **RE (2019) EWCA CIV.1845⁶**, also referred to by the respondent, learned counsel argued that even an extempore decision must clearly demonstrate that the essential evidence has been considered and the decision adequately justified. In *casu*, the record does not indicate the manner in which the learned Judge evaluated or considered the evidence nor does it indicate adequately the justification for finding the way he did. The Judge therefore, failed to address all the issues raised before him.

3.27 With regard to grounds two and three, the appellant reiterated that the court below does not have jurisdiction to hear and determine claims (i), (iii) and (iv).

3.28 Placing reliance on **section 85A of the ILRA** learned counsel contends that in order for the court below to have jurisdiction to award any relief under the ILRA, the claim must primarily relate to breach of labour laws. The said breach must be pleaded in the Complaint and it is from there that the Court

draws its jurisdiction to make awards if it finds that there was breach of some labour law.

3.29 Therefore, the court below erred in law and fact when it found that the respondent's claims were properly before it as no breach of the labour laws is alleged by the respondent.

3.30 On ground four, the appellant maintains that the action is before the wrong forum and would render the proceedings a nullity should the court below hear and determine the three claims.

We were urged to strike out the offending claims or dismiss the matter in accordance with **Order 18 rule 19 of the Rules of the Supreme Court.**

The hearing

3.31 At the hearing, Mrs. Banda, who appeared for the appellant relied on the appellant's heads of argument in support and in reply. In augmenting she submitted that the extempore ruling falls short of the requirements of rulings and judgments set by the Supreme Court in the case of **Ministry of Home Affairs and The Attorney General v Lee**

Habasonda (suing on his behalf and on behalf of Southern African Centre for the Constructive Resolution of Disputes)⁸. And, that the case is applicable even to an extempore ruling. Learned counsel reiterated her arguments in the appellant's heads of argument in support and in reply.

3.32 Ms. Mwape, who appeared for the respondent equally relied on the respondent's heads of argument. In elaboration, she submitted that by its nature an extempore ruling ought not to have extensive reasoning. It is an off the cuff ruling. In *casu*, the Court addressed its mind when it stated "**I have looked at the application...**" and then it gave reasons for its decision.

3.33 In relation to grounds two, three and four, learned counsel submitted that the claims fall within the jurisdiction of the IRD as provided in **section 85 of the ILRA**.

3.34 In reply, Mrs. Banda submitted that **section 85** should not be read in isolation but together with **section 85A**.

4.0 Issues on Appeal

- 4.1 We are of the considered view that the following issues arise for our determination:
- 4.2 Whether the Judge in the court below erred in law and fact in delivering the extempore ruling in the manner that he did.
- 4.3 Whether the court below has jurisdiction to hear and determine the respondent's claims (i), (iii) and (iv) as pleaded in the Notice of Complaint.

5.0 Considerations and Decision

- 5.1 We have noted the appellant's spirited arguments on ground one that the learned Judge did not consider the questions raised in its preliminary issue and failed to give a reasoned ruling in line with the cases of **Zambia Telecommunications Company Limited v Mulwanda & Ng'andwe²** and **Ministry of Home Affairs and The Attorney General v Lee Habasonda (suing on his behalf and on behalf of Southern African Centre for the Constructive Resolution of Disputes)⁸**.

- 5.2 We note as well the rival arguments by the respondent that the learned Judge delivered an extempore ruling and he gave reasons for the ruling, which was sufficient.
- 5.3 We cannot agree more with the respondent's position on ground one. An extempore ruling is a legal and proper way by which a court can determine an application or matter before it. It can be followed by a written ruling if the Court so desires or it can end there as an off the cuff determination.
- 5.4 The respondent's counsel is therefore on firm ground as submitted in paragraphs 3.12 to 3.16 of this Judgment. The Judge surmised that all the respondent's claims including (i), (iii) and (iv) are emanating from the contractual relationship of employer and employee. This he indicated when he stated at page 213 line 16 to 18 of the record of appeal ***that "I have looked at the application and I see only incidents of the employee and employer relationships."*** The reason for his decision is

contained in that sentence which is clear and succinct. As aforesated it is not always desirable to render a written reasoned ruling. We must add that the IRD is a fast track division which is required to hear and determine a complaint within 100 days of its filing. The Judge considered the appellant's application and found no merit in the preliminary issue. We cannot fault him for the approach he took. We therefore find no merit in ground one.

- 5.5 Turning to grounds two, three and four, the issue as we see it is, whether the IRD has jurisdiction to hear and determine the respondent's claims (i), (iii) and (iv).
- 5.6 To answer this question we perused the enabling Act which is the ILRA. Of particular importance is **section 85** which provides for the jurisdiction of the IRD as canvassed by both counsel. We are of the considered view that **section 85 (9) (c) and 85A (iv)** in particular gives the IRD jurisdiction to hear and determine the claims in (i), (iii) and (iv) as argued

by the respondent's counsel. **Section 85 (9) (c)** defines industrial relations matters to include any matter affecting the requirements, obligations and privileges of employees, employers and their representative bodies. **Section 85A (iv)** empowers the IRD to make any order or award as the Court may consider fit in the circumstances of the case.

It is clear to us that the dispute between the parties herein is amenable in the IRD via the ILRA.

- 5.7 In his affidavit in support of the complaint, the respondent exhibited his contracts of employment dated 15th October, 2006 and 15th April, 2007 per "NK1" and "NK2" clauses 12 and 13 respectively.

The contracts provided for medical aid with MARS Diamond Medical cover for the respondent and his son. We opine claim (iii) is stemming from these clauses. As to whether the sum of US\$3,871.00 claimed as a refund of medical aid is due, it will be resolved at trial. Thus, the claim is a debt flowing from the employment contracts and is properly before the IRD.

5.8 As regards claim (i) on bonuses, the contract of employment dated 15th April, 2007 provided for "***bonuses reviewed every six months***". The emails exhibits (NK3 and NK4) from the appellant to the respondent reveal some of the amounts due as bonuses. The respondent in claim (i) is alleging that he is owed bonuses for the years 2007 and 2008 in the amounts of US\$20,000.00 and US\$40,000.00 respectively based on the emails "NK3" and "NK4". The respondent also alleges that he was underpaid his salary and bonuses and in the sum of US\$305,824.00.

5.9 In its Answer the appellant avers that the respondent is only entitled to US\$105,000.00 for bonuses for the years 2009, 2010, 2011, 2012 and 2013. In addition that it overpaid him by US\$78,332.00 which is counterclaimed. That the emails "NK6" and "NK7" of the respondent's affidavit in support, clearly show that there are no outstanding bonuses for the years 2006, 2007 and 2008.

5.10 It is patent that there is a dispute over how much is due as bonuses and that the dispute is emanating from the contracts and emails exchanged between the parties as employer and employee. We opine the IRD has jurisdiction to hear these claims.

5.11 As for claim (iv) the contract of 15th April, 2007 provided per clause 8(c) that the appellant would pay for two flights every six months to South Africa. Again the claim flows from the contract of employment. It will be an issue to be resolved at trial. We are of the considered view that the IRD has jurisdiction to hear and determine the claim. In view of the foregoing grounds two, three and four are dismissed.

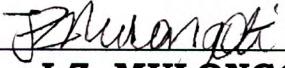
5.12 Consequently, having found no merit in all the four grounds of appeal, it is dismissed. Each party to bear own costs.



F.M. CHISANGA
JUDGE PRESIDENT



M.J. SIAVWAPA
COURT OF APPEAL JUDGE


J.Z. MULONGOTI
COURT OF APPEAL JUDGE