IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 68 OF 2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
COURT OF APPEAL
27 FEB 2020
REGISTRY
P. O. BOX 50067, LUSAKA

BETWEEN:

DR EBEDY SADOKI **APPELLANT**

AND

ST JOHNS MEDICAL CENTRE LIMITED **RESPONDENT**

CORAM: Chashi, Mulongoti and Lengalenga, JJA

ON: 18th and 27th February, 2020

For the Appellant: *K. Mwale, Messrs K. Mwale and Company*

For the Respondent: *N/A*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Benedetti v Sawiris and Others (2013) UKSC 50**

Legislation referred to:

1. **The Employment Act Chapter 268 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgement of Honourable Mrs. Justice M. Mapani-Kawimbe, delivered on 10th December, 2018, in which the learned Judge granted the Plaintiff, now the Respondent, all the claims and dismissed the Appellant's counter claim.

2.0 BACKGROUND

2.1 The evidence which was before the court below is that, the Appellant was an employee of the Respondent, having been employed under a three (3) year contract.

2.2 As part of his entitlement, the Respondent arranged for lease financing of a motor vehicle, a Ford Ranger (the vehicle) from Vehicle Centre Zambia.

2.3 The arrangement was that, Investment Bank (the Bank) would finance the purchase of the vehicle and then lease

it to the Respondent under a lease finance agreement. The Respondent in turn, under the amortization schedule of thirty-six (36) months would be paying the Bank between K16,000.00 to K20,000.00 per month.

2.4 In turn, the Respondent was supposed to be recovering the equivalent amount from the Appellant, who at all material times had possession and use of the vehicle.

2.5 However, arising out of the Appellant's protestations, the Respondent was only able to deduct between K5,000.00 to K6,000.00 per month which made the Appellant default and fall in arrears on the payments.

2.6 After one year into the contract of employment, the Appellant resigned. At the time, she was in arrears of K246,932.61 which she failed to settle. As a result, the Respondent withheld her last month's salary and credited it to the loan account.

2.7 When the parties failed to reach an agreement regarding the arrears of K246,932.69, the Appellant handed over the

vehicle to the Respondent, who then commenced an action in the court below seeking the following reliefs:

(1) Payment of the outstanding sum of K246,931.69 for servicing of the lease agreement on behalf of the Appellant.

(2) Interest and any other relief the Court may deem fit.

(3) Costs.

2.8 When the Appellant settled her defence, she counter claimed payment of the outstanding salary of K20,000.00 and damages for breach of contract.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the submissions by the parties, the court below found that the parties had a valid agreement which they were bound to follow. That by failing to pay the agreed monthly installments, the Appellant breached the agreement.

3.2 The court below found in favour of the Respondent and ordered the Appellant to pay the outstanding amount with interest and costs. The counter claim was dismissed.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court, advancing three grounds of appeal couched as follows:

4.1.1 The High Court misdirected itself both in law and fact when it found that, the Appellant has an obligation to pay the Respondent the sum of K246,931.69 even after returning the vehicle to the Respondent.

4.1.2 The High Court misdirected itself both in law and fact when it found that the obligation to pay the loan amount of K246,931.69 does not amount to unjust enrichment but rather a fulfilment of the contractual obligation, which she freely and willingly accepted.

4.1.3 The High Court misdirected itself both in law and fact when it found that the Respondent was justified in

withholding the salary of the Appellant to offset her loan without the Appellant's consent thereby dismissing the Appellant's counter claim.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The first and second grounds of appeal were argued together. According to Mr. Mwale, Counsel for the Appellant, the argument arises both in law and equity under the principle of unjust enrichment, in that the Respondent has gained financially from the Appellant in circumstances where the Respondent has not suffered any loss arising from a breach of contract on the part of the Appellant. Counsel relied on the case of **Benedetti v Sawiris and Others**[1] in which the Court in the United Kingdom set out the principle to inform and guide a Court in the determination of unjust enrichment.

5.1.2 In advancing the argument further, Counsel submitted that, the vehicle has now been leased to Dr. Mwanafumu who has now assumed the rights and obligations under a new lease agreement at the price of K300,000.00 which

sum is sufficient to amortize the debt owed by the Appellant.

5.1.3 Counsel submitted that the implication of the foregoing is that, if the lease agreement is completed by Dr. Mwanafumu, the total sum received from both the Appellant and Dr. Mwanafumu would amount to K546,767.00, when the total loan sum due on the loan facility to be recovered from the Appellant amounted to K355,644.21. That as such, the award of K246,767.00 in light of the new lease agreement would, without a shadow amount to unjust enrichment.

5.1.4 Counsel contends that, the Respondent has been unjustly enriched in that the Appellant surrendered the vehicle to the Respondent, whose market value exceeds the sum owed by the Appellant. That, if therefore, the Respondent were to sell the vehicle, at the market price, the Respondent would recover in excess of what the Appellant owes it.

5.2 As regards the third ground of appeal, Counsel submitted that the court below agreed with the Appellant that it was unlawful to deduct the Appellant's wages without her consent, but justified its decision from a common sense point of view due to the excess sum owed by the Appellant to the Respondent.

5.2.1 It was Counsel's submission that, the court below erred in relying on common sense to justify its decision to depart from the express provisions of **The Employment Act**[1], in particular Section 45 of The Act, which sets out instances, when an employer may deduct monies due to it by an employee.

5.2.2 According to Counsel, the unilateral deduction of the remainder of the net pay due to the Appellant is a breach of statutory law on the part of the Respondent entitling the Appellant to damages.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 The Respondent addressed the three grounds of appeal separately.

6.1.1 In response to the first ground of appeal, it was submitted that, the Respondent agreed to service the loan on behalf of the Appellant, which meant that, the Appellant would be indebted to the Respondent and would continue owing the Respondent even after the lease to the Bank was paid as the Appellant was not paying the Respondent the equivalent amount it was paying to the Bank.

6.1.2 According to the Respondent, at the date the Appellant resigned, the Appellant was owing K246,931.69 to the Respondent and K300,000.00 to the Bank. It is the Respondent's submission that, the court below was on firm ground in its finding because the money that the Respondent was seeking was not the balance on the lease but the amount paid to the Bank by the Respondent on behalf of the Appellant.

6.2 In response to the second ground of appeal, Counsel submitted that the Appellant has conveniently forgotten that, there was still money outstanding to the Bank while

at the same time the Appellant owed the Respondent the amount of money which was paid on her behalf. That there was therefore no unjust enrichment.

6.3 In response to the third ground of appeal, it was submitted that the counter claim could not stand because the Court had already established that the Appellant owed the Respondent an amount that was way over the Appellant's claim.

6.3.1 It was further submitted that, it is customary in employment matters that an employer deducts any sums owed before final payment is made to the employee. That therefore, the Respondent had the right to withhold the last salary and apply it towards payment of the debt.

7.0 DECISION OF THE COURT

7.1 We have considered the record, the Judgement being impugned and the arguments by the parties. We shall consider the first and second grounds of appeal together as they are entwined.

7.1.1 The issues they raise are twofold. Firstly, whether the court below was correct in awarding the sum of K246,931.69. Secondly, whether the award amounts to undue enrichment on the part of the Respondent.

7.1.2 It is not in dispute that the Respondent entered into a lease finance agreement with the Bank on behalf of the Appellant in respect to the vehicle. It is also not in dispute that the Appellant defaulted in her payments in that she was paying far much less in monthly installments in comparison to what the Respondent was paying on her behalf. This is in fact what created the arrears which were outstanding at the time of the Appellant's resignation.

7.1.3 From the tone of the Appellant's submission, the Appellant concedes that she was in breach of the agreement she had with the Respondent and hence owed the outstanding amount. The only contention the Appellant is raising is that, having returned the vehicle, the Appellant is no longer indebted to the Respondent, if anything, if they were to sell the vehicle at the market

price, they would recover in excess of what the Appellant owes.

7.1.4 In our view, the Appellant seems to have a very dim understanding of how a lease finance agreement operates. Under the said agreement, the vehicle belongs to the Bank as the absolute owner and not the Respondent. The Respondent would only assume ownership after all the amounts due to the Bank under the amortization schedule are paid and ownership is transferred by the Bank to the Respondent. Therefore, the issue of the Respondent selling the vehicle does not arise.

7.1.5 Furthermore, despite the Appellant returning the vehicle, the lease agreement continued to operate until all the amounts under the schedule are paid. Therefore, the act of the Appellant returning the vehicle cannot be said, nor can it amount to unjust enrichment as is being alleged by the Appellant.

7.1.6 As earlier alluded to, the Appellant had at all material times possession and use of the vehicle whilst paying a far

much less amount than she was supposed to be paying. The Appellant is therefore, supposed to reimburse the Respondent what was paid on her behalf whilst she had use of the vehicle and was underpaying.

7.1.7 On the basis of the aforestated, we find no basis to fault the court below in awarding the Respondent the relief it sought. At the same time, we see no unjust enrichment on the part of the Respondent who has continued servicing the remaining part of the lease agreement on behalf of Dr. Mwanafumu who now has use of the vehicle. Grounds one and two are unsuccessful.

7.2 We now turn to the third ground of appeal. This ground attacks the learned Judge's dismissal of the counter claim and finding that the Respondent was justified in withholding the salary and offsetting it against the loan.

7.2.1 In pursuing this ground, Counsel for the Appellant drew our attention to Section 45 of **The Employment Act**[1]. A perusal of that provision of the law reveals that it relates to an employee who is in active employment and not one

who has ceased to be, as was the case in this matter where the Appellant had resigned. Section 45 of the Act is inapplicable to this matter.

7.2.2 Having resigned, and at the said time having been owing the Respondent a higher amount than the net month salary, the finding by the court below that the Respondent was justified in withholding the salary and offsetting it against the loan cannot be faulted.

8.0 CONCLUSION

8.1 All the three grounds of appeal having failed for lack of merit, the appeal is accordingly dismissed. Costs to the Respondent, here and below. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE