Selected Judgment No. 25 of 2017
P.871

IN THE SUPREME COURT OF ZAMBIA **Appeal No.181/2014**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

G4S SECURE SOLUTIONS ZAMBIA LIMITED **APPELLANT**

AND

ANTHONY KAPEMBA **RESPONDENT**

Coram: **Mwanamwambwa, DCJ, Kajimanga and Kabuka JJS**
On the 6th of June 2017 and 13th of June 2017

FOR THE APPELLANT: Mr. M. Sakala and Mr. N. Siamoondo, Messrs Corpus Legal Practitioners

FOR THE RESPONDENT: Mrs K. M. Chileshe, Messrs Mweemba Chashi & Partners

---

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Nkongolo Farm Limited v Zambia National Commercial Bank Limited,**

Kent Choice Limited (in Receivership) and Charles Haruperi [2005] ZR 78

2. **Mersey Docks & Harbour v Coggins & Griffith limited [1947] AC.1**
3. **Performing Rights Society v Mitchell and Booker [1924] 1 KB. 762**
4. **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB. 497**
5. **Fitton v City of Edinburgh Council United Kingdom Employment Appeal Tribual (UKEAT) S/0001/07**
6. **Bank of Zambia v Kasonde [1995-1997] ZR.28 SC**

Legislation referred to:

1. **Employment Act, Chapter 268 of the Laws of Zambia, Section 36(1)**
2. **English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia**

Works referred to:

1. **Black's Law Dictionary with Pronunciations (6th Ed), 1990.**
2. **D. J. Lockton, Employment Law, 2003.**
3. **E. Slade, Tolley's Employment Law Handbook (18th Ed), 2004.**
4. **W.S. Mwenda, Employment Law in Zambia: Cases and Materials (Revised Edition), 2011.**

This is an appeal against the judgment of the Industrial Relations Court, delivered on 16th July 2014 which upheld the respondent's claim against the appellant and dismissed the

appellant's counterclaim against the respondent.

The history of this case is that the respondent was employed on 1st November, 2006 by the appellant (2nd respondent in the court below) on contract. Following his employment, the respondent served the appellant in various capacities, the last position being that of General Manager-Bank Support Services for the Southern Region.

Subsequently, the respondent entered into a fixed contract of employment with G4S Security Services (Uganda) Limited (G4S Uganda) for the period 27th July 2008 to 30th June 2009. It was a term of the contract that the respondent would serve G4S Uganda as an expatriate employee in the position of Regional Cash Services Manager.

On 4th November 2009, the respondent entered into a contract of employment with G4S International Employment Services Limited (1st respondent in the court below) (G4S International). Pursuant to the said contract and a letter dated 4th November 2009 from G4S International to the respondent, appearing on page 120 of the record

of appeal, the respondent was assigned to Uganda to work for G4S Uganda, as General Manager Cash Services, on secondment.

There was evidence from the respondent that on 23rd April 2012, a Mr. Gouws, who was the Human Resource Regional Director for G4S International based in South Africa, went to Uganda and verbally charged him with having violated company confidentiality and connived with others to block work permits for expatriates of the G4S Uganda office. On 25th April 2012, the respondent was taken to South Africa where he was interrogated by Mr. Gouws and one Mr. Boucher, in relation to the same allegations. The respondent testified that he denied the allegations. However, he was later formally charged with breaching his conditions of employment. On 6th June 2012, a disciplinary hearing was conducted to consider the charges levelled against the respondent and by a letter dated 13th June 2012, his services were terminated.

The respondent then took out an action against G4S International and the appellant in the court below. By an amended

notice of complaint dated 7th March 2014, the respondent claimed the following as against G4S International:

1. A declaration that the termination of the respondent's employment was unlawful and unfair.
2. Payment of terminal benefits.
3. Damages.
4. Any further or alternative relief that the court may deem fit.

In relation to the appellant, the respondent claimed the following:

1. A declaration that the respondent's secondment to Uganda was a continuation of his employment with the appellant.
2. Payment of terminal and retirement benefits. Damages for breach of contract.
3. Costs of and incidental to this suit.
4. Any further or alternative relief that the court may deem fit.

In an answer to the complaint, G4S International stated that

the respondent was precluded from instituting the matter before the court below as the contract of employment between it and the respondent was governed by the laws of Jersey. Further, it was argued that with effect from 1st November 2009, the respondent was an employee of G4S International, by virtue of the contract of employment executed between him and G4S International on 4th November 2009 on the basis of which the respondent was subsequently seconded to G4S Uganda where he served as an expatriate employee.

The appellant's position regarding the respondent's complaint was that his contract of employment with the appellant dated 1st November 2006 terminated when he signed the contract of employment with G4S International on 4th November 2009. The appellant asserted that the respondent voluntarily repudiated and terminated his contract with the appellant when he accepted the offer of employment from G4S International, consequent upon which he became an employee of G4S International only and ceased to have any contractual relationship with the appellant.

It was further asserted by the appellant that the respondent breached his contract with the appellant by repudiating or terminating the same without giving it the contractual three months' notice prior to terminating the same. The appellant, therefore, counterclaimed for an order that the respondent pays the said appellant an amount equivalent to three months of his salary as damages for breach of contract.

Upon hearing the matter, the trial court dismissed the respondent's claim against G4S International on account that the contract of employment executed by them in Uganda was subject to the laws of Jersey and that in the absence of any pleading as to the position of this foreign law, the case was not properly before the court below.

In relation to the contract of employment between the respondent and the appellant, the trial court stated that there was no evidence to show that the same had been terminated by either party. The trial court found that the respondent's services to G4S

International and his subsequent relocation to Uganda was a secondment from the appellant to G4S International and, therefore, a continuation of his employment with the appellant.

The trial court opined that since the respondent's employment contract with G4S International was for purposes of secondment, the same could not be held to have repudiated the respondent's contract with the appellant by reason of the fact that G4S International themselves put it clear to the respondent in their letter dated 4th November 2009 that the respondent was on secondment.

The trial court also found that G4S International was not party to the contract of employment between the respondent and the appellant and, therefore, it was wrongful for G4S International to have terminated the contract of a seconded officer. Further, G4S International having undertaken this wrongful act could not then deny the respondent his rights by seeking solace in the laws of Jersey.

The trial court noted that the appellant, being the actual

employer of the respondent, did not recall the respondent or institute their own disciplinary proceedings and, therefore, they acquiescenced themselves to the wrongful act of G4S International, who were none parties to the contract of employment.

Ultimately, the trial court declared that the respondent's secondment to Uganda was a continuation of his employment with the appellant and found that the termination of the respondent's employment was wrongful. The trial court accordingly ordered that the appellant pays the respondent six months salary as damages for breach of contract, any unpaid leave days and long service bonus for the period of his employment from 2006 to 2012. Further, the appellant was ordered to pay the respondent repatriation from Uganda to Zambia.

Dissatisfied with this decision, the appellant has now appealed to this Court advancing two grounds of appeal, namely:-

1. **That the Court below erred in law and fact when it held that the respondent's employment with the appellant had continued when there was no evidence that the respondent was an employee of the appellant or that there was a contract of employment subsisting;**

P.880

2. **That the Court below erred in law and fact when it held that there was wrongful dismissal by the appellant when it was G4S International Employment Services Limited that had terminated the respondent's employment.**

On 21st November 2014, the appellant's advocates filed written heads of argument in support of the appeal. In support of ground one, counsel for the appellant contended that the employment relationship in respect of which the disciplinary hearing was held and which ultimately led to the dismissal of the respondent relates to the contract between the respondent and G4S International. Further, that the issues dealing with the disciplinary hearing as to the Respondent's discharge of his duties and the consequent termination of employment did not in any way involve the appellant, which played no role at all in the respondent's termination of employment.

It was the learned counsel's submission that the finding by the court below that the respondent's employment with the appellant was continuing and that the contract of employment between the two parties was subsisting was flawed both in law and fact, for the

following reasons:

a) The respondent was not controlled or remunerated by the appellant whilst in employment with G4S Uganda and after being seconded there by G4S International as evidenced by the contracts of employment on pages 24 and 38 of the record of appeal; and

b) The respondent executed an in-country expatriate agreement with G4S Uganda to the exclusion of the appellant and an employment contract with G4S International incorporating his contract with G4S Uganda (on secondment terms), which contract was later terminated by G4S International in accordance with the terms of the contract.

The learned counsel submitted that, that was a proper misdirection in which this Court can reverse perverse findings of fact. He referred us to the case of **Nkongolo Farm Limited vs Zambia National Commercial bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi**[1], where we stated as follows:

"As a general rule an appellate court rarely interferes with the finding

of facts by the lower court, unless such findings are not supported by evidence on record or the lower court erred in assessing and evaluating the evidence by taking into account some matters which ought not to have been taken into account or mistakenly, the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence."

The learned counsel accordingly submitted that this Court should reverse the findings of fact by the court below, which were not supported by any evidence and for the failure by the court to properly evaluate the facts that were before it.

It was also the learned counsel's contention that the court below erroneously appeared to have accepted the respondent's argument that he was seconded by the appellant to work with G4S International and G4S Uganda. To support this argument he referred us to page 7 of the judgment of the trial court appearing at page 14 of the record of appeal.

The learned counsel submitted that while the Employment Act Chapter 268 of the Laws of Zambia does not specifically regulate the

status of an employer-employee relationship in the event of a secondment under an existing contract of employment, the determination of such relationship can be made in accordance with the terms of the actual contract of employment or common law principles which apply to Zambia by virtue of English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia. According to the learned counsel, under the English Common law, the test of control or the multiple test is usually employed in determining an employer-employee relationship or secondment arrangement to determine who the employer of the relevant employee is or was at the relevant time.

We were referred to the **D. J. Lockton**, **Employment Law, 2003**, where the learned author states at page 25 as follows:

> **"The courts have over the years devised a series of tests to apply to employment relationships in order to determine the status of the parties involved."**

The learned counsel, therefore, submitted that the court below ought to have employed the tests that have been developed by the Courts to determine the existence of an employer-employee relationship

P.884

between the appellant and the respondent in fact and law. He referred us to the case of **Mersey Docks & Harbour v Coggins & Griffith Limited**[2], where the House of Lords provided guidance on the control test in cases of an employee who discharged his functions in connection with a second employer when it held that:

> **"A primary employer is vicariously liable for an employee's operation of a crane whilst carrying out work for a second employer to whom he had been lent as a driver on account of the fact that the crane driver remains the employee of the primary employer and as such under his control."**

We were also referred to the case of **Performing Rights Society v Mitchell and Booker**[3], where the Court in elaborating the context of the control test in relation to a contract of employment, stated that:

> **"If there was to be a final test and the test to be generally applied in determining an employer-employee relation-ship, the test lies in the nature and degree of detailed control over the person alleged to be the servant."**

On the strength of the foregoing authorities the learned counsel submitted that the respondent was controlled by G4S International and G4S Uganda whilst serving in Uganda, as he was controlled and remunerated by the said entities to the exclusion of the appellant.

P.885

Further, the circumstances that led to the challenge of the respondent's dismissal from employment relate to functions discharged pursuant to the respondent's employment terms with G4S International.

We were also referred to the case of **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance**[4], where it was stated that the following three conditions must be present for a relationship to be one of employment:

> **"(a) Employee's agreement to provide his skill in consideration of a wage**
> **(b) Exercise of control by the employer; and**
> **(c) Provisions of the contract of employment being consistent with that of a contract of service."**

The learned counsel submitted that based on the evidence that was before the court below, the respondent's agreement to provide his skills to the appellant in consideration of wages had lapsed when he took up employment with G4S International and G4S Uganda. Further, that the terms of his contract of employment relating to the provision of a service, in line with ordinary terms of contracts of

service, were to G4S International and G4S Uganda, to the exclusion of the appellant. In addition, the exercise of control in relation to the respondent's employment in Uganda in respect of which the dismissal arose, was the sole preserve of G4S International and G4S Uganda, and not the appellant.

It was, therefore, the learned counsel's submission that the court below erred when it wrongfully concluded that the respondent's employment with the appellant had continued and subsisted at the time, as going by the control and multiple tests devised by the courts, the respondent was no longer an employee of the appellant when he was dismissed from employment by G4S International. Further, that the respondent did not receive any remuneration from the appellant after July 2008.

On the question of the termination of the respondent's employment with the appellant, the learned counsel submitted that, under section 36 (1) of the Employment Act, employment contracts

are terminable in the following ways:

> **"A written contract of service shall be terminated-**
>
> **(a) by the expiry of the term for which it is expressed to be made; or**
>
> **(b) by the death of the employee before such expiry; or**
>
> **(c) in any other manner in which a contract of service may be lawfully terminated or deemed to be terminated whether under the provisions of this Act or otherwise."**

According to the learned counsel, the employment contract between the appellant and respondent terminated by repudiation. It was submitted further and in the alternative, that failure by the respondent to continue discharging his duties in accordance with the then existing contract of employment amounted to a repudiatory breach of the respondent's contract of employment with the appellant when he took up employment with G4S International and G4S Uganda, without giving the required notice period under his contract of employment with the appellant.

By way of inference to an employer's acceptance of an employee's breach of contract, we were referred to **E. Slade, Tolley's**

P.888

Employment Handbook (18th Edition) 2004 which states at pages 923 to 924 as follows:

> **"Where one party commits a repudiatory breach of contract, it is normally necessary for that breach to be accepted by the innocent party before the contract can be brought to an end because the innocent party may instead choose to keep the contract in existence and simply sue for damages if the breach of contract has caused him a loss...there is no doubt that the normal rule applies to a contract of employment where the employer's breach of contract consists of some act or omission falling short of a purported dismissal ... however some doubts as to the normal rule application remains where the employer purports to dismiss an employee in breach of contract ... it has been said in such situations that the contract of employment differs from the normal contract as the act of wrongful dismissal brings the contract of employment to an end without any need for acceptance of the breach by the employee...nonetheless it is clear that in the employment context acceptance of a repudiatory breach will readily be inferred from the employee's words or conduct."**

The learned counsel submitted that the respondent's failure to give the requisite notice under his employment contract when he took up employment with G4S Uganda and G4S International amounted to a breach of his employment contract with the appellant and the appellant can be said to have consequently accepted the respondent's

P.889

breach of the contract of employment by inference from its conduct to pay him all the outstanding salaries and accrued benefits under his contract of employment when he took up employment in Uganda. Further, the appellant never took any steps that would suggest that it sought to keep the contract in existence with the option to sue for damages.

It was the learned counsel's contention that the court below erred when it found that the respondent's employment with G4S International was for purposes of secondment and that the secondment per se could not have repudiated the respondent's contract of employment with the appellant. It was contended that there was no evidence adduced in the court below of a secondment arrangement that allowed the respondent to take up employment with either G4S Uganda or G4S International, where he continued to work up to the time his employment was terminated by G4S International.

We were referred to the case of **Fitton v City of Edinburgh**

P.890

Council[5], where the respondent's counsel in submission to the Employment Appeal Tribunal adopted a description of secondment in Capita Health Solutions v BBC & Another UKEATS/0034/07/MT where it was stated at page 44 as follows:

> **"...secondment in its proper sense.... connotes a temporary assignation regarded, at least at its outset, as being on the basis that the employee will return to work directly for the seconding employer."**

The learned counsel, accordingly, submitted that when the respondent took up employment with G4S Uganda and G4S International, the appellant had no secondment arrangement with the respondent and his taking up of employment was not a temporary assignment at the insistence of the appellant accompanied by a requirement to return and work for the appellant.

As regards the respondent's employment with G4S Uganda and G4S International, it was submitted that the court below erred when it did not take into account the fact that in the absence of any secondment arrangement between the appellant and the respondent,

P.891

the respondent entered into an independent contract of employment with G4S International and G4S Uganda for the discharge of services as Cash Services Manager in Uganda.

The learned counsel submitted that a perusal of the contracts of employment between the respondent and the aforementioned entities appearing at pages 24 [25] and 36 of the record of appeal do not make mention of the appellant as the primary employer or as having any role or connection to the respondent's obligations and rights under the said contract. That the court below ought to have noted that the appellant's non-involvement in both contracts weighed against a construction as to the continuation or subsistence of the previously existing contract of employment between the appellant and respondent.

It was further submitted that on the totality of the evidence presented before the court below, the court could not reasonably have held that the contract of employment between the appellant and respondent was still subsisting or continuing as the respondent had

in fact entered into a different contract of employment with a different entity all together.

The learned counsel drew our attention to page 12 of the transcript of proceedings appearing at page 238 of the record of appeal where the respondent did not deny the fact that he had ceased working for the respondent and taken up employment with the G4S International and G4S Uganda. Counsel also referred us to page 13 of the transcript of the proceedings appearing at page 239 of the record of appeal and the exhibits to the affidavit sworn by the respondent, appearing at pages 25 to 41 of the record of appeal, where the respondent on several occasions admitted to being employed by G4S International and produced documents to confirm such a position. In view of the foregoing, the learned counsel submitted that the finding of the court below was flawed and lacked merit. He prayed for the court to allow the first ground of appeal.

In support of ground two, the learned counsel submitted that wrongful dismissal in accordance with the Zambian employment law

authorities is said to take place where an employer does not comply with the procedure set out under the Employment Act, contract of employment or applicable disciplinary or grievance procedure existing between the employee and employer. He referred us again to **Tolley's Employment Handbook**, where the learned author states at page 921 as follows:

> **"a wrongful dismissal occurs when an employer dismisses an employee in a way that is in breach of the employee's contract of employment. Wrongful dismissal is a common law cause of action based upon a breach of contract...and the wrongful termination of a normal contract of employment gives rise to an action for wrongful dismissal."**

For guidance, as to the construction of some key terms in an employment contract, we were referred to the **Black's Law Dictionary**, which defines the terms "Employer, Employee and Employed" at page 525 as follows:

> **"Employer means one who employs the services of others or one for whom employees work and who pays their wages and salaries."**

> **"Employee means a person in the service of another under any contract of hire, express or implied, oral or written, where the**

P.894

employer has the right to control and direct the employee in the material details of how the work is to be performed."

"Employed means performing work under an employer- employee relationship."

The learned counsel submitted that the finding of the court below that the appellant wrongfully dismissed the respondent when it was G4S International that had terminated the respondent's employment was flawed both in law and fact on the following basis:

a) at the time the respondent's employment contract with G4S International was terminated by G4S International, he was no longer employed by the appellant; and

b) the appellant did not take any active steps in relation to the disciplinary process and dismissal of the respondent, which hinged on the discharge of his duties and obligations under the G4S International contract.

The learned counsel contended that since the respondent was no longer in the employ of the appellant, the court below should have

taken such a fact into account in construing the capacity of the appellant to terminate the respondent's contract. It was the learned counsel's submission that a reasonable construction of all the relevant surrounding circumstances and evidence before it established the lack of the appellant's capacity to terminate the respondent's contract with G4S International so as to result in wrongful dismissal of employment.

According to the learned counsel, the termination of the respondent's employment, which led to a challenge by the respondent in the court below, related to the employment contract between G4S International and the respondent. It was his submission that the court below erred when it held that the appellant had wrongfully dismissed the respondent in relation to a dismissal effected pursuant to a contract of employment to which the appellant was neither a contracting nor interested party, substantively or procedurally.

He referred us to W. S. Mwenda, **Employment Law in Zambia: Cases and Materials (Revised Edition) 2011,** where the learned

author states at page 105 as follows:

> **"That a consideration of whether a particular dismissal was wrongful or not looks to the form of the dismissal rather than the merits of the dismissal to be examined vis-a-vis the terms of the respondent's employment with popular incidences involving an employer's failure to give notice or payment in lieu thereof and legal challenges on the basis of procedural error."**

We were also referred to the case of **Bank of Zambia v Kasonde**[6] where we stated as follows:

> **"On the basis of the evidence that was presented to the court below, the finding of wrongful dismissal could not be faulted as the allegations against the employee had not been proved and the details of the disciplinary process followed by the employer had not been provided thus in essence amounting to a failure by the employer to follow the disciplinary code."**

The learned counsel submitted that the court below erred in its finding as it failed to establish the foundation upon which the respondent's claim for wrongful dismissal against the appellant could stand despite the evidence before the court clearly showing that the claim for wrongful dismissal related to a different contract of employment between the respondent and G4S International.

It was also submitted that the lower court's finding of the appellant having wrongfully dismissed the respondent was a misdirection and contrary to the established principles of wrongful dismissal as no employer-employee relationship existed between the appellant and the respondent during the employment period from which the respondent's claim could have arisen whilst in Uganda. Further, the appellant neither terminated the respondent's employment nor instructed G4S International to terminate his employment, to warrant the respondent's claims for wrongful dismissal. It was accordingly prayed that we should allow this appeal with costs to the appellant.

At the hearing Mr. Sakala, the learned counsel for the appellant informed us that they were relying on the appellant's written heads of argument filed on 21st November, 2014 and that Mr. Siamoondo, would augment one point.

For the respondent, Mrs. Chileshe applied for leave to file the respondent's heads of argument out of time pursuant to rule 12 of

the Supreme Court rules, Supreme Court Act Chapter 25 of the Laws of Zambia. We refused to grant the application on the ground that the delay was inordinate.

Mr. Siamoondo referred us to the lower court's judgment at page 14, line 3 of the record of appeal, where it made a finding that the respondent was on secondment from the appellant company to G4S Uganda on the basis of a letter at page 36 of the record of appeal. The learned counsel contended that, that letter was not written by the appellant but by G4S International. He submitted that the respondent was not on secondment because his contract of employment with G4S International at page 25 of the record of appeal, particularly clause 2.1, shows that his employment would continue until terminated by either party giving not less than one month's notice. According to counsel, a secondment contract cannot continue indefinitely. Lastly, our attention was drawn to page 239, line 11 of the record of appeal where the respondent admitted in evidence that the appellant was not his employer. Counsel submitted

that the court below therefore erred when it held that the respondent was seconded to G4S Uganda by the appellant.

In opposing Mr. Siamoondo's submissions, Mrs. Chileshe first referred us to page 105, lines 5 – 15 of the record of appeal. She then submitted that the appellant is a company within the G4S group of companies and further, that by signing a contract with G4S International, the respondent was being seconded to G4S Uganda by the appellant.

In reply, Mr. Siamoondo referred us to page 238, lines 14 – 19 of the record of appeal as further proof that the respondent was not an employee of the appellant company. Counsel accordingly urged us to allow this appeal.

We have considered the record of appeal, the judgment appealed against, the appellant's written heads of argument and the oral submissions of the respective counsel for both parties.

Ground one assails the lower court's holding that the

P.900

respondent's employment with the appellant had continued when there was no evidence that the respondent was the appellant's employee or that there was a subsisting contract of employment. It was contended on behalf of the appellant, that the employment relationship in respect of which the disciplinary hearing was held and subsequently leading to the respondent's dismissal relates to the contract between the respondent and G4S International. That the issues dealing with the disciplinary hearing as to the respondent's discharge of duties and the consequent termination of his employment neither involved the appellant nor did it play any role in his termination of employment. That the respondent was neither controlled nor remunerated by the appellant when he worked for G4S Uganda and after being seconded there by G4S International. That the respondent executed an in-country expatriate agreement with G4S Uganda as well as an employment contract with G4S International to the exclusion of the appellant.

The learned counsel for the appellant also submitted that the respondent's agreement to provide his skills to the appellant in

consideration of wages had lapsed when he took up employment with G4S International and G4S Uganda as the respondent did not receive any remuneration from the appellant after July 2008. That it was a repudiatory breach of the respondent's contract of employment with the appellant when he took up employment with G4S International and G4S Uganda. That no evidence was adduced in the court below of a secondment arrangement allowing the respondent to take up employment with either G4S Uganda or G4S International, accompanied by a requirement to return and work for the appellant. That the respondent was not on secondment from the appellant company because clause 2.1 of his contract of employment with G4S International provides that the contract would continue indefinitely. A secondment contract, according to counsel, cannot continue indefinitely. That the respondent admitted in evidence that the appellant was not his employer.

In supporting the finding of the lower court, the learned counsel for the respondent submitted that the appellant being a member of the G4S group of companies, the signing of an employment contract

P.902

by the respondent with G4S International meant that the respondent was being seconded to G4S Uganda by the appellant.

The record of appeal shows that on 1st November, 2006 the respondent was employed by the appellant as General Manager – Bank Support Services Southern Region. The contract to that effect is at pages 96 – 99 of the record of appeal. Between 27th July, 2008 and 30th June, 2009 the respondent was employed by G4S Uganda as Regional Manager for Uganda. This contract of employment is at pages 66 – 69 of the record of appeal. Subsequently, on 4th November, 2009 the respondent was employed by G4S International with effect from 1st November, 2009. This is evidenced by the contract of employment at pages 105 – 115 of the record of appeal. Clause 2 of the said contract provided as follows:

> **"2. TERM**
>
> **2.1 Your employment with the company will commence on 1st November 2009 (the "Commencement Date") and continue indefinitely unless terminated sooner by either party under clause 2.2.**
>
> **2.2 Your employment under this agreement will continue, subject to the provisions of this agreement, until terminated by either party**

giving not less than one (1) month's notice in writing." (Emphasis added)

It is quite clear from clause 2.1 of the respondent's contract of employment with G4S International that his employment was indefinite, unless otherwise terminated by either party. As aptly argued by the learned counsel for the appellant, a secondment contract cannot be of indefinite duration. Furthermore, our perusal of this contract and the respondent's employment contract with G4S Uganda does not disclose, expressly or impliedly, that the respondent was being seconded to the two entities by the appellant. Neither was there evidence adduced in the court below that the respondent was seconded to G4S Uganda, when he started working for the said G4S Uganda on 27th July, 2008. Our opinion is fortified by the letter from G4S International to the respondent dated 4th November, 2009 (the secondment letter) whose subject is **"International Secondment – Uganda"**. Paragraph one of the said letter reads in relevant part that:

"I am writing to confirm the terms which apply to your secondment to Uganda..."

P.904

And paragraph two reads in part that:

"Term of Secondment

The secondment will commence on 1st November, 2009 although we reserve the right to reassign you at any time if the needs of the business dictate."

And paragraph three states in part that:

"Position

For the duration of the secondment your role will be General Manager – Cash Services with G4S Security Services (Uganda) Limited..."

From the secondment letter, it is as clear as crystal that the respondent was being seconded to G4S Uganda by G4S International pursuant to the employment contract between G4S International and the respondent. The point should also be made that neither the secondment letter nor the employment contract between G4S International and the respondent make mention of the appellant's role or involvement in the respondent's secondment to G4S Uganda by G4S International, or that the appellant was the primary employer and retained control over the respondent, in the context of the

guidelines set out in the **Mersey Docks & Harbour** and **Performing Rights Society** cases cited by the learned counsel for the appellant. The same can be said of the respondent's earlier employment contract with G4S Uganda of 27th July 2008 to 30th June, 2009.

It was contended by the respondent's learned counsel that the respondent should be considered to have been seconded by the appellant because the appellant company is a member of the G4S group of companies. We do not agree because no evidence was adduced in the court below that at the time the respondent joined G4S Uganda, he was still an employee of the appellant. In fact, the argument by counsel for the respondent flies in the teeth of the respondent's own evidence which, as demonstrated below, shows that he was no longer an employee of the appellant at the time he joined G4S Uganda and G4S International.

At page 236 lines 15 – 16 of the record of appeal, the respondent's evidence was as follows:

"**Manager – Armaguard Security Services G4S** [appellant] **was my**

P.906

employer from 1996 – 2008."

At page 237, line 5 of the record of appeal the respondent's evidence was that **"I was later recruited by the 1st respondent** (G4S International) **in 2008."**

Further at pages 238 – 239 of the record of appeal, the respondent testified that:

> **"I worked for the 2nd respondent** [appellant] **up to July 2008. Before I signed a contract with** [the] **1st respondent** [G4S International] **there was an interim contract between me and G4S Uganda. That was signed on 27th July, 2008. As of 27th July 2008 my employer was G4S Uganda. I moved on transfer from** [the] **1st respondent to G4S Uganda. ...** [The] **2nd respondent never wrote to me to say they transferred me to G4S Uganda. (was already with G4S Uganda. i. e. moved from** [the] **2nd respondent to G4S Uganda then to 1st respondent). Page 13 of my notice to produce has not [no] provision for secondment. I did not give notice when I left** [the] **2nd respondent after G4S Uganda I signed a contract with** [the] **1st respondent. I signed it in Uganda.** [The] **1st respondent is based in Jersey. Clause 21 of my notice to produce shows that the contract with** [the] **1st respondent was under the laws of Jersey. I am not familiar with the laws of Jersey.** [The] **2nd respondent is not mentioned in my contract with** [the] **1st respondent. I have no evidence to show that** [the] **2nd respondent is a subsidiary of** [the] **1st respondent. The contract with**

P.907

[the] 1st **respondent was only in relation to my work with** [the] 1st **respondent.**" (Emphasis added)

From the foregoing excerpt of the respondent's evidence, it is plain that the respondent ceased to be an employee of the appellant company when he was employed by G4S Uganda on 27th July, 2008. Since the respondent did not give notice terminating his employment, he must be considered to have deserted or repudiated his contract of employment with the appellant. Accordingly, we agree with the appellant that the lower court's finding that the respondent's employment with the appellant had continued during his employment with G4S Uganda and G4S International was a misdirection. We are certain that there was absolutely no evidence before the lower court that could have led to such a finding.

Authorities abound, including the **Nkongolo Farm Limited** case cited by counsel for the appellant, where we have stated that an appellate court would only interfere with the findings of a trial court if such findings are not supported by evidence on the record. We have since concluded that there was no evidence before the trial court

that could have led to a finding that the respondent's employment with the appellant had continued during his employment with G4S Uganda and G4S International. In the circumstances, we are satisfied that this is a proper case where we have no choice but to interfere with the said finding of the lower court. We accordingly find merit in ground one.

The appellant's grievance in ground two is that the lower court was wrong to hold that there was wrongful dismissal of the respondent by the appellant when it was G4S International that had terminated the respondent's employment. In the appellant's written heads of argument, it was submitted that at the time G4S International terminated the respondent's contract of employment, the respondent was no longer an employee of the appellant. That the appellant was not involved in the disciplinary process and dismissal of the respondent. That the termination of the respondent's employment giving rise to the proceedings in the court below related to the employment contract between G4S International and the respondent. Further, that the appellant neither terminated the

respondent's employment nor instructed G4S International to terminate his employment to warrant his claims for wrongful dismissal against the appellant.

The learned counsel for the appellant did not augment this ground orally at the hearing. Consequently, the learned counsel for the respondent could also not make any oral submissions in opposition.

Although the minutes at pages 159 – 176 of the record of appeal show that the venue for the disciplinary hearing was the appellant's offices in Zambia, no evidence was adduced in the court below to the effect that the appellant was involved in the disciplinary process that culminated in the respondent's dismissal. To be specific, the letter notifying the respondent of the formal disciplinary hearing dated 23rd May, 2012 was authored by Cassie van der Merwe, Acting Country Manager G4S Uganda. And the letter to the respondent dated 13th June, 2012 confirming the termination of the respondent's

P.910

employment at pages 45 – 46 of the record of appeal was authored by Catherine Bohea, for G4S International.

The evidence adduced by the respondent in the court below, at pages 237 – 238 of the record of appeal, was that on 23rd April 2012, a Mr. Gouws, Human Resource Regional Director in South Africa came to Uganda. He alleged that the respondent was liaising with Leon Jacobs and Basie Lubser and passing company information to them which was being used against the company. Further, that the respondent was liaising with Leon Jacobs to block work permits for other expatriates to Uganda, which allegations the respondent denied. The respondent further testified that on 25th April, 2012 he was taken to South Africa for further interrogations by Mr. Boucher and Mr. Gouws. On 6th June, 2012 he attended a disciplinary hearing and on 13th June, 2012 his services with G4S International were terminated.

We have since concluded under ground one, that the respondent was no longer an employee of the appellant when he

started working for G4S Uganda and G4S International. This is further confirmed by the fact that the disciplinary action culminating in the respondent's dismissal was driven not by the appellant but G4S Uganda and G4S International. As again, aptly submitted by the learned counsel for the appellant, the respondent's dismissal related to his employment contract with G4S International. For obvious reasons, the appellant was not involved in the disciplinary process leading to the respondent's termination of employment. Under these circumstances, the finding by the lower court attributing the termination of the respondent to the appellant has come to us with a sense of shock. As there was no evidence on which it could stand, we equally interfere with this finding for being perverse. Ground two also has merit.

Both grounds of appeal having succeeded, we have no hesitation in allowing this appeal. The judgment of the court below is accordingly set aside. Given the nature of this case, we order that

the parties shall bear their own costs.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE