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IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 11/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

WORKER'S COMPENSATION FUND CONTROL BOARD — **APPELLANT**

AND

CHAPLIN SAWONO — **RESPONDENT**

CORAM : Chisanga JP, Chishimba and Sichinga, JJA
On 11th April, 2017 and 24th July 2017 and 14th September 2017

For the Appellant : Mr. E. C. Banda S.C. of Messrs ECB Legal Practitioners.

For the Respondent: Mr. K. Mukonka of Messrs. Caristo Mukonka Legal Practitioners.

J U D G M E N T

Chishimba, JA, delivered Judgment of the Court

Cases referred to:

1. **Christopher Lubasi Mundia V Sentor Motors Limited (1982) ZR 66 (H.C).**
2. **Zambia Consolidated Copper Mines Investments Holding V Woodgate Holdings Limited (2011) Volume 3 110**
3. **K.B Davies and Company (Zambia) Limited V Musunu No. 181 of 2006**
4. **Kearney and Company Vs Agip Zambia Limited 1985 ZR 7 (S.C)**
5. **Augustine Kapembwa V Danny Maimbolwa and Attorney-General (1981) ZR 127 (S.C)**
6. **Anderson Kambela Mazola and Others Vs Levy Patrick Mwanawwasa and Others (2005) ZR 138 (S.C).**
7. **Kleinwort Benson Limited Vs Lincoln Council (1998) 4 ALL ER 570**

Other works referred to

1. **Black's Law Dictionary 7th Edition, 1999 page 1536**

This appeal arises from the Judgment of the High Court awarding the Respondent's claims for refund of money deducted from his salary for the liquidation of a car loan, payment of repatriation allowance, payment of sum retained, underpayment of tax on gratuity and damages for loss of use of the motor vehicle.

The facts before the Learned Trial Court not in dispute are that; the Respondent was employed by the Appellant as Head of Audit and Risk Services on 20th August 2009 for a period of three years subject to renewal. There was in place a self-liquidating Motor Vehicle Policy offered by the Appellant to its employees aimed at providing motor vehicles to Directors on similar lines with the personal to holder Vehicle Scheme. The Respondent being eligible to purchase a Motor Vehicle under the Policy obtained a self-liquidating car loan from the Appellant. The modus operanda of the policy was that the entitlement amount was treated as an advance to be liquidated in equal monthly instalments over a period of four years. At the end of the contract, an employee would be entitled to purchase the vehicle at book value.

In line with his entitlement of US$ 80,000 the Respondent purchased a Range Rover Motor Vehicle. The vehicle was purchased duty free and registered in the Appellant's name.

On the 16th of March 2012, the Respondent was advised to stay away from work until the expiry of his contract on 19th August 2012. The Appellant proceeded to calculate the Respondent's benefits and deducted the balance of the book value of the motor vehicle. When the Respondent attempted to effect change of ownership of the vehicle into his name, he encountered difficulties with Zambia Revenue Authority (ZRA) who demanded that the applicable tax duties be paid in respect of the vehicle.

The Appellant in its defence averred that though it acquired the vehicle duty free, the tax duty liability thereon was payable by the Respondent before change of ownership could be effected.

The Appellant's defence was essentially that the Respondent bore the responsibility to pay the applicable tax duty because the price of the vehicle plus value added tax (VAT) exceeded the Respondent's entitlement of US$ 80,000.

The Learned Trial Judge held that the Respondent was entitled to a refund of the money paid towards the self-liquidating car loan made to the Appellant as he had exercised the option not to purchase the vehicle. It was further held that it was the employer's responsibility to pay the tax duty for the vehicle registered in its name. The Learned Trial Judge further up-held

the claims for repatriation allowance, retention allowance and gratuity underpayment in the sum of K15, 362.86.

The Appellant raised nine grounds of appeal namely that;

(i) ***The Learned Trial Judge erred in law and fact when he held that the claim for repatriation succeeds as there was no evidence to support this claim as the contract in question was not before the Court and further that the same was not specifically pleaded in the Writ of Summons and Statement of Claim.***

(ii) ***That the Learned Trial Judge erred in law and fact when he held that the retention allowance was illegal and amounts to effecting a lien against a portion of an employee's terminal benefits whilst at the same time holding that the same be paid subject to deduction of permissible expenses incurred by the Defendant.***

(iii) ***That the Learned Trial Judge erred in law and fact when he held that the Defendant made a mistake in its initial computation of the Plaintiff's terminal benefits resulting in an over payment of tax to ZRA as there was no evidence to support this finding.***

(iv) ***The Learned Trial Judge erred in law and fact when he held that the Plaintiff was only a potential beneficiary of any tax exemption and the problem relating to the taxes was a problem between the Defendant and the ZRA.***

(v) ***That the Learned Trial Judge erred in law and fact when he held that the tax on the vehicle should be paid by the Defendant and the fact that it was not paid meant that the Plaintiff ended up with a vehicle valued way above his entitlement.***

(vi) ***That the Learned Trial Judge erred in law and fact when he held that this is one of the instances where the Plaintiff could opt to exercise his option not to buy the vehicle at the end of the contract when he had earlier found that it was clearly not the intention of the parties that an option to buy or not to buy the vehicles would be exercised by the employees at the end of their contracts.***

(vii) ***That the Learned Trial Judge erred in law and fact when he held it would amount to unjust enrichment to allow the Defendant to keep both the car and the monies deducted towards paying for it when there was no evidence on record that***

the Defendant was in possession of the car or that the Plaintiff had surrendered the car.

(viii) That the Learned Trial Judge erred in law and fact when he held that the Defendant should refund the monies that the Plaintiff paid towards the settlement of his own Car Loan as there was no evidence on record to support such a finding and was not in conformity with the car loan/motor vehicle policy as contained in the Plaintiff's Conditions of Service or Contract of Employment.

(ix) That the Learned Trial Judge erred in law and fact when he held that the Defendant should have provided a relief vehicle to the Plaintiff for him to use up to the end of the contract as there was no evidence on record to support such finding and the same was not provided for in the contract of employment and the Plaintiff still had and has possession of the vehicle todate.

The Appellant relied upon the Heads of arguments filed into Court and at the hearing of the appeal, augmented the arguments.

In ground one, the Appellant's contention is twofold, that the claim for repatriation was not specifically pleaded by the Respondent and that there was no evidence adduced to support the claim as the contract in question was not before Court. In respect to the issue of pleadings, it was submitted that it is trite that a party who wishes to rely upon a claim must plead the issue. As authority, the Appellant cited the case of ***Christopher Lubasi Mundia Vs Sentor Motors Limited*** [1]. The Appellant argued that the issue of repatriation was not pleaded by the Respondent, therefore the Learned Trial Judge misdirected himself when he

failed to produce the contract of employment pursuant to which he was claiming repatriation. The alleged repatriation arose from his previous contract not before court.

In ground two, Counsel for the Appellant submitted that the claim for retention allowance was not equally pleaded nor was evidence led in that respect as to the amount retained or the contract of employment providing for the sum retained. The Appellant argued that it retained the retention allowance to cover subsequent contingencies or bills that might arise until all ties with the Respondent were severed. No lien was created on the Respondent's benefits which were paid in full. The Appellant's gist of the argument is that though the Learned Trial Judge understood the working of retention allowance, he misdirected himself at law by awarding the retention allowance.

In support of ground three, it is contended that the Judge erred in law and fact by holding that the Appellant had made a mistake in its initial computation of the benefits resulting in an overpayment to Zambia Revenue Authority (hereinafter referred to as ZRA). It is argued that there was no evidence to support this finding. The Appellant in the second instance argues that the issue of over payment to ZRA was not pleaded. Further that

the Respondent had failed to prove the claim and was not entitled to the award. Our attention was drawn to the cases of ***Zambia Consolidated Copper Mines Investments Holdings Vs Woodgate Holdings Limited*** [2] ***and K.B Davies and Company (Zambia) Limited Vs Musunu*** [3] on the effect of a failed defence and lacuna in the evidence. Namely that it must be resolved in favour of a party not responsible for the lacuna.

Grounds 4 to 9 relating to the issue of the liability of the tax duty applicable on the motor vehicle were argued as one. Counsel submitted that the issue revolves around the motor vehicle and the treatment of the tax. The Appellant argued that the Respondent obtained a loan of US$ 80,000 to purchase the vehicle. The Respondent travelled to Lusaka to seek rebate of tax on the vehicle as the tax component would have exceeded his entitlement. The Appellant submitted that the bone of contention arises from the Learned Trial Judge's finding on the issue of tax, that the Respondent did not negotiate the tax exemption in his personal capacity and was only a potential beneficiary of any tax exemption. On the contrary it was the Respondent who championed the exemption as he opted to purchase a vehicle close to his entitlement and he could only do so by seeking a tax exemption under the Appellant's line Ministry. The Appellant

argued that since the Respondent opted to purchase a motor vehicle which with the tax component exceeded his entitlement, the burden to pay taxes imposed by ZRA falls upon him. In any event even if the Appellant paid the tax, it would be recoverable from the Respondent.

The gist of the Appellant's argument is that the money advanced to the Respondent for purchase of the vehicle was a loan repayable by way of deductions. The vehicle belonged to the Respondent. The Learned Trial Judge erred by holding that the Respondent had an option to exercise vis a vie whether to purchase the vehicle or not.

In fact the Respondent retained possession of the car until it was confiscated by the task force. It was argued that the Learned Trial Judge misdirected himself by holding that the monies paid for purchase of the car be refunded to the Respondent. Doing so would amount to unjust enrichment of the Respondent who had enjoyed the use and possession of the vehicle at no consideration. The gist of the Appellant's contention is that the Appellant never retained possession of the vehicle. The vehicle was retained by the Respondent. It would be unjust enrichment on the part of the Respondent because he had obtained a loan,

utilized it for his own use and after depreciation, the vehicle goes back to the Appellant whilst the Respondent gets back the money he paid. In addition to compensating him for loss of use of the vehicle, the Appellant submitted that though the Respondent contended that the vehicle was registered in its name, a white book/red book is not a certificate of title. It speaks to what to consider when investigating title. As authority the case of ***Kearney and Company Vs Agip Zambia Limited*** [4] was cited.

As regards the holding by the Lower Court granting damages for loss of use of motor vehicle, it was submitted that a claim for loss of use can only be made or is enforceable by persons who have ownership of a property or who can claim under some right incidental to ownership. As authority the case of ***Augustine Kapembwa Vs Danny Maimbolwa and Attorney-General*** [5] was cited, in which the Supreme Court stated that a man deprived of use of his property by the wrongful act of another has recourse to a claim for damages.

In response to ground one Counsel for the Respondent submitted that the claim of repatriation was pleaded and evidence was led. The sought sum of K70.1 million included the claim for repatriation allowance. We were referred to pages 408,409 and 84

and page 427 of the Record of Appeal in respect of evidence led in relation to the repatriation claim. In any event, the evidence therein was not objected to during trial.

In response to ground two, the Respondent submitted that Retention was not allowance contrary to the Appellant's arguments. It was money withheld at the time of payment of terminal benefits in anticipation of deductions not taken into account. The Learned Trial Judge was on firm ground in granting the release of the retention amount as the Appellant was not justified in holding the amount appearing at page 80 of the Record of Appeal.

The Respondent in response to grounds 4 to 10 submitted that the Learned Trial Judge was on firm ground when he held that the Respondent was a potential beneficiary of any tax exemption and that the tax due on the vehicle was payable by the Appellant. The Respondent made references to clause 20.1 of the Conditions of Service at page 118 of the Record of appeal and to the letter dated 5th April 2012 addressed to the task force regarding the ownership of the vehicle as owned by the Appellant. In addition, reference was made to the letter from ZRA at page 334 of the record requesting the Appellant to pay the tax for the vehicle. It

was argued that on the documentary evidence adduced, the Respondent, could not bear the burden of tax as the vehicle was never registered in his name. Therefore, grounds four and five lack merit.

In response to ground 6, it was contended that there was an option to purchase by use of the words **"the employee may purchase it".** This option according to the Respondent was reaffirmed by the Appellant to ZRA in the letter. Further, that a Mr. Sichinga upon the termination of his contract was not allowed to purchase the vehicle.

In response to grounds 7 and 8, the Respondent contended that it would amount to unjust enrichment as held by the lower court to allow the Appellant keep both the purchase price as well as the vehicle. That it was not in dispute that the car was registered in the Appellant's name and monies were deducted towards payment of the vehicle.

Counsel's contention in respect to ground 9 is that, since the contract of employment was to end on 19th of August 2012 and the Respondent was told to stay away from work on 15th March, 2012, he was still an employee until the contract came to an end. Therefore, he was entitled to all the benefits under the Conditions

of Service such as personal to holder vehicle. That the Learned Trial Judge was on firm ground by awarding damages for loss of use.

As regards the money used to purchase the motor vehicle, Counsel for the Respondent submitted that it was never a loan per-se to him. The Respondent was not advanced any money to buy a car. The vehicle was purchased by the Appellant. We were referred to pages 170-173 as well as 191 of the Record of Appeal. Further, that the Respondent went in his capacity as an employee to the Ministry negotiating the issue of the duty free vehicle.

We have considered the appeal, the Judgment of the lower Court, the Heads of arguments and authorities cited.

In ground one the issues raised are as follows; whether the claim for repatriation was pleaded and whether evidence to support the claim was adduced to warrant the award by the Learned High Court Judge.

It is trite that the function of pleadings is to give fair notice of the case which has to be met and to define the issues upon which the court will adjudicate in order to determine the matters in

from consideration unless let in evidence and not objected to by the opponent. We refer to the Supreme Court decision in ***Anderson Kambela Mazoka and Others Vs Levy Patrick Mwanawasa and Others***[6]

We have perused the pleadings particularly the Statement of Claim at pages 42-43 of the record. Under paragraph 10(E) the Respondent sought the sum of K70.1 million being underpayments. There was evidence adduced in the lower court appearing at pages 408-409 by the Respondent that the sum of K70.1 million included the amount of K6, 000 in respect of repatriation not paid under his earlier contract.

We are of the view that this amount was pleaded. The only issue is whether evidence was adduced to prove the entitlement. The Appellant contended that no evidence was adduced particularly of the contract of employment pursuant to which he was claiming repatriation.

We are of the view that there was evidence adduced upon which the Learned Trial Judge based his award of the repatriation claim. Page 130 of the record of appeal is the contract of employment dated 20th August, 2009 between the parties which provided under clause 25(1) that **"at the end of the contract,**

the Employee shall be paid K6, 000,000.00 net as repatriation." Therefore, the Learned Trial Judge was on firm ground in awarding the claim in respect of repatriation. We find no merit in ground one and dismiss it accordingly.

In ground two, the issue is whether the claim for payment of the retention sum withheld by the Appellant was pleaded and evidence led in that respect.

In our view, the claim in respect of the sum of ZMW 5,000 retained by the Appellant was pleaded by the Respondent. It is part of the sum of K70.1 million claimed as underpayments. The evidence at page 410 of the record of appeal by the Respondent that the sum of K5, 000,000.00 was deducted to cover for any subsequent liabilities was not disputed. The Appellant admitted having retained the sum to cover any contingency arising. This is even acknowledged in the Heads of arguments by the Appellant. Therefore, the learned trial Judge was on firm ground when he granted the claim for payment of retention sum withheld by the Appellant.

In ground three, the issue for determination is whether the Learned Trial Judge erred in law and fact when he held that the Appellant had made a mistake in its initial computation of the

Respondent's terminal benefits resulting in an overpayment of tax to ZRA and awarding the claim for underpayment of tax on gratuity. The Appellant argued that this claim was not pleaded nor was evidence led in that regard.

The evidence by the Appellant in respect of overpayment of tax on gratuity to ZRA, was to the effect that, tax already paid was not deducted hence his claim. The Appellant itself at 307 of the record of appeal admits that the Respondent is entitled to claim the sum of K15, 362.86 albeit from ZRA as a refund. This claim was pleaded and evidence adduced. We refer to the memo appearing at page 228 of the Record, from the Appellant to the Respondent advising of the recalculation of gratuity for the contract period which resulted in overpayment of Pay As You Earn (PAYE) in the sum of K15, 362.86. We are therefore of the view that the Learned Trial Court was on firm ground in awarding this claim. The error having been occasioned by the Appellant, liability lay with it to refund the sum and then in turn seek a refund from Z.R.A. We are of the view that ground three is devoid of merit

Grounds four to ten were argued as one as they relate to the issue of the motor vehicle. The Learned Trial Judge ordered the

refund of the sum of ZMW 383,600 to the Respondent being money deducted under the Self Liquidation Loan. We will deal with the grounds as one because the issues raised are similar and all relate to the motor vehicle. It is not in issue that the vehicle was brought into the country duty free and that the Red book shows the Appellant as absolute owner.

Clause 20.1(a) under the Self Liquidating Motor Vehicle Policy stipulated as follows;

> **(a) "The policy is aimed at providing a motor vehicle to the Commissioner and Directors on similar lines with the personal-to-holder Motor Vehicle Scheme.**
>
> **Under the scheme, instead of providing personal-to-holder vehicle and what is popularly known as retiring with the vehicle, the Board will prescribe maximum entitlement to purchase a vehicle of his choice, which amount will be treated as an advance to be liquidated in equal monthly instalments over a period of four years. At the expiry of contract, the vehicle will have a book value at which the employee may purchase it. In the event of staff separation within the contract period, the employee will be entitled to purchase the vehicle at book value".**

On the 16th March 2012 the Respondent was told to stay away from work until the expiry of his contract on 19th August 2012. The book value balance of the vehicle was deducted from his dues. The Respondent contended that he had exercised the option not to purchase the vehicle and that the amount advanced

under the Motor Vehicle Policy was not a loan. Further that the tax liability due to ZRA was payable by the Appellant as owner of the vehicle.

The first issue for determination is whether the advanced sum of US$ 79,084 was a loan to the Respondent.

We have perused clause 20.1 of Self Liquidating Motor Vehicle Policy which refers to the entitlement being treated as an advance. Further at page 174 of the record of appeal is an application form by the Respondent for the sum of US$ 79,084. The form indicated the recovery amount to be debited by the accounts department monthly. In addition, the Respondent's pay Advice slip appearing at page 167 of the record of appeal shows a deduction of K10,432,406.13 (unrebased) in respect of the self-liquidating loan.

We are of the view that the amount availed to the Respondent for purchase of a motor vehicle was a loan. A loan is defined as the act of giving money or property or other material goods to another party in exchange for future repayment of the principal amount. The Appellant had advanced the sum to the Respondent for the stated purpose, who in turn was effecting monthly repayments. Upon the purchase of the motor vehicle, the Appellant paid an

allowance to the Respondent itemized as a self-paying loan in the sum of ZMW16, 049.85 from which monthly recoveries were made. We refer to pages 167 -169 of the record namely the Pay Advice slips for the period December 2011 to February 2012 showing the above amount given to the Respondent as an allowance. The pay advice slips further show the monthly deductions of the sum of ZMW 10,432.40 in respect the self-paying loan. The Respondent in his evidence appearing at page 411 of the Record, testified that the scheme operated like any other personal to holder scheme, *"the only exception was that to enable you buy the vehicle at a due time, the company gave you an allowance which enabled you to pay for the vehicle"*

We are of the view that the Respondent would not have been entitled to the allowance of the sum of ZMW 16, 049.85 if a vehicle had not been purchased for him. The Respondent therefore, only become entitled to that amount by virtue of the vehicle purchased for him. He was availed a self- liquidating loan. The recoveries were not made from his monthly earnings. Rather they were effected from an allowance that became payable because he had purchased a motor vehicle under the scheme. Clearly this was a self liquidating loan advanced to the Respondent

The Respondent argued that the vehicle purchased duty free was owned by the Appellant and as such he was not liable for payment of the imposed tax. We are of the view that the vehicle was for the Respondent despite the title showing that it belonged to the Appellant. The Appellant only remained absolute owner of the vehicle until the advance was fully paid off as provided for in the scheme. We refer to page 175 of the application form. It is not in dispute that the Appellant deducted the book value outstanding at the expiry of the contract from the Respondent's benefits. There is further evidence that the Respondent was responsible for and did insure the vehicle comprehensively. The Respondent only purportedly declined to purchase the vehicle upon encountering the duty imposed by ZRA duty on the vehicle which subsequently led to the seizure.

The Learned Trial Judge in our view misdirected himself in law and fact by holding that the tax should be paid by the Appellant. The Respondent was liable to pay the tax due on his vehicle. Had the Respondent purchased a vehicle inclusive of taxes within the limit of his entitlement, the issue of tax would not have arisen. There was in fact evidence adduced on record that other Directors and employees who had purchased vehicles under the Scheme, paid residual taxes demanded by ZRA before change of

ownership was effected. In addition, that they purchased vehicles within their entitlement inclusive of duty.

We are further of the view that the Learned Trial Judge erred by holding that the Respondent could opt to exercise his option to purchase or not purchase the vehicle at the end of the contract. The vehicle was purchased for the Respondent in his personal capacity and not for the Appellant. The Respondent had already exercised the option to purchase hence the deduction of the book balance value of the motor vehicle.

As to the holding that the vehicle was in possession of the Appellant, the Learned Trial Judge erred in fact. The undisputed evidence was that the vehicle was in the Respondent's possession who testified that the car was taken away from him by the Police after he had been told to stop going for work. In addition, DW1 had testified that the vehicle had remained in the Respondent's possession. The vehicle was confiscated by the task force. We refer to page 94 of the record of appeal namely a Handing/Seizure over Certificate certifying that on 29th of March 2012, the Land Rover was seized from the Respondent, Chaplin Sawono.

Having determined that the amount advanced for the purchase of the motor vehicle was a loan, we are of the view that it was a misdirection on the part of the Learned Trial Judge to have awarded the refund of the sum of ZMW 383,600=00 that the Respondent had paid towards the settlement of the Car Loan. The award would amount to unjust enrichment in that the Respondent has had use of the motor vehicle, and at the same time would be refunded the loan obtained at the expense of the Appellant at no consideration by the Respondent. Unjust enrichment is defined by Black's Law Dictionary 7th Edition, 1999 page 1536 as;

> **"The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected."**

The House of Lords in **Kleinwort Benson Limited Vs Lincoln City Council** (7) explained the principle of unjust enrichment in the following terms;

> **"The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive. This has been the basis for the law of unjust enrichment."**

We therefore set aside the award and hold that the Respondent is not entitled to the refund of the sum of K383, 600=00.

Ground 9 assails the Learned Trial Court's holding that the Appellant should have provided a relief vehicle to the Plaintiff for use up to the end of Contract and awarding damages for loss of use of the vehicle.

It is not in dispute that the Respondent was told to stay away from work on the 15th of March 2012 before the expiry of his contract of employment on the 19th of August 2012.

We are of the view that having found that the Respondent was in possession of the vehicle up to the time when it was impounded he is not entitled to an award for damages for loss of use. It goes without stating the obvious that the Respondent was not deprived of the use of the vehicle by the Appellant. The vehicle was impounded by the task force on account of non-payment of duty imposed by ZRA. We therefore set aside the award of damages for loss of use of the motor vehicle.

In respect of grounds one, two and three, we find no merit and uphold the decision of the Learned Trial Judge.

We accordingly find merit in grounds 4, 5, 6, 7 and 9 and overturn the Learned Trial Judge's decision and set aside the award of the refund of the sum of ZMW 383,600.00.

We award costs to the Appellant, to be taxed in default of agreement.

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F. M. Chisanga
JUDGE PRESIDENT
COURT OF APPEAL

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F.M. Chishimba
COURT OF APPEAL JUDGE

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D.Y Sichinga, SC
COURT OF APPEAL JUDGE