IT

SELECTED JUDGEMENT NO. 26 OF 2018

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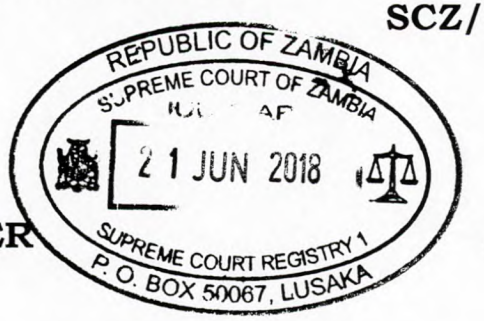
IN THE SUPREME COURT OF ZAMBIA **Appeal No.149/2015**
HOLDEN AT LUSAKA **SCZ/8/228/2015**
(Civil Jurisdiction)



BETWEEN:

HERMANN JOSEF KIBLER **APPELLANT**

AND

APOLLO AGRICULTURAL HOLDINGS LIMITED **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Kaoma, JJS.**
On 15th May, 2018 and on 21st June, 2018

For the Appellant: **Ms. K.N. Kaunda of Mmes KN Kaunda Advocates.**

For the Respondent: **Mr. M.M. Mundashi, S.C. and Mr. C. Salati of Mulenga Mundashi and Kasonde Legal Practitioners**

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Hillary Bernard Mukosa v Michael Ronaldson (1993-4) Z.R. 85**
2. **Ahmed Abed v Turning and Metal Limited (1987) Z.R. 86**
3. **Zambia State Insurance Corporation Limited v Dennis Mulope Mulikelela (1990-1992) ZR 18**
4. **Zambia Railways Limited v Simumba (1995-1997) Z.R. 41**
5. **Shell and B.P. Zambia Limited v Conidaris and others (1975) Z.R. 174**
6. **American Cyanamid Company v Ethicon Limited (1975) 2 WLR 316**

7. **Turnkey Properties v Lusaka West Development Company Limited, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporation Limited (1984) Z.R. 86**
8. **Peony Zambia Limited v Shalom Bus Services Limited and Attorney General – Appeal No. 103/2015**

Legislation and other works referred to:

1. **Immigration and Deportation Act, No. 18 of 2010, section 28 (8)**
2. **White Book (1999 edition), Order 29/1A/30**
3. **High Court Rules, Chapter 27, Orders 3 and 40 (6) section 52 of**
4. **Legal Practitioners Act, Cap 30, sections 52 (b) and 53**
5. **Legal Practitioners' Rules, 2002, rule 32 (2)**

This appeal challenges a ruling of the High Court dismissing the appellant's application for an interlocutory injunction.

The undisputed facts in the court below were that the appellant, a New Zealand national was employed by the respondent from Jacksonville, Florida in the United States of America. The contract of employment, which was in writing, was for 2 years. It was also governed by Conditions of Expatriate Service. In terms of clause 9 of the contract, the respondent was to provide furnished and serviced accommodation to the appellant. Under clause 6 of the contract, the appellant was entitled to participate in an equity participation arrangement. Paragraph 3.0 of the e-mail at page 63 of the record of appeal explains what this entailed as follows:

> **"3.0 Offering you an opportunity to accrue 20% of the farm to be paid for by profit accruing from the start of your contract, which**

20% will be deducted annually as dividend from profits made during the year BUT with the binding condition that the entire dividend accruing to you will be paid to majority shareholders on a pro-rata basis for the portion of shares they will be selling to you. This to continue until your equity is fully paid. There will also be the possibility of acquiring a further stake at a later time by mutual agreement with shareholders, until you may become the sole shareholder".

The intention to enter into an Equity Participation Agreement (EPA) was made clear to the appellant, for instance in the letter at page 67 dated 17th May, 2014. Some conditions precedent to entering into an EPA, were also explained in the letter. However, the EPA was never executed.

On 14th February, 2015 the respondent terminated the appellant's employment pursuant to clause 3(c) of the Conditions of Expatriate Service which stipulated that:

> **"3. Unless the offer of employment expressly states otherwise, the employment under this contract may be terminated by-**
>
> **(c) the company or the employee giving the other not less than 30 days' notice in writing and pay such salary and other emoluments calculated up to the expiration of 30 days after giving such notice, in which event, the employment will terminate on the date stipulated in such notice."**

The appellant was also advised that he may remain in the company house for thirty days from date of termination after which he was expected to hand over vacant possession with all furnishings, fixtures and fittings.

Unhappy with the termination of his contract of employment, the appellant issued a writ of summons claiming, inter alia:

i. **An injunction restraining the respondent from evicting him from the company house until full determination of the matter by the court;**
ii. **Damages for breach of the contract of employment in refusing to execute the Equity Participation Agreement;**
iii. **Damages for wrongful and for unfair termination of the contract of employment;**
iv. **An order valuing the respondent's entire undertaking and that he be paid 20% of the said value;**
v. **An order that the respondent's undertaking be audited by expert external auditors to ascertain the profits made during the period the appellant rendered his services to the company;**
vi. **An order that the respondent accounts for the profits made during the period he served the company and that 20% of the said profits be deemed to be the consideration for the 20% of the shares in the company;**
vii. **Fair compensation for all the basic and fundamental changes to the farm operations tending to improve productivity and profitability of the respondent's undertaking;**
viii. **An order that the respondent provides for his repatriation together with his spouse and family;**
ix. **In the alternative to the enforcement of the Equity Participation Agreement, an order for a fair and reasonable remuneration at the market value of a person possessing his qualifications, skill and expertise estimated at a monthly US$25, 000 including; and**
x. **Fair compensation for all the basic and fundamental changes to the farm operations tending to improve productivity and profitability of the respondent's undertaking.**

The appellant also filed an application seeking an interim injunction to restrain the respondent from evicting him from the company house. An *ex parte* order of injunction was granted by Lady Justice Makungu on 10th March, 2015. However, the

summons for interlocutory injunction was made returnable before Lady Justice Maka-Phiri who heard the application on 12th May, 2015 and on 14th August, 2015 delivered the ruling appealed against, refusing to grant an interlocutory injunction.

In determining whether the appellant had established a good arguable claim to the right he sought to protect, the trial Judge made reference to the case of **Hillary Bernard Mukosa v Michael Ronaldson**[1] in which this Court held that:

> **"An injunction will be granted only to a plaintiff who establishes that he has a good arguable claim to the right he seeks to protect. The plaintiff must further show that if he is not granted the interlocutory injunction, he will suffer irreparable injury; that is injury that cannot be atoned by damages."**

The Judge also relied on the cases of **Ahmed Abed v Turning and Metal Limited**[2] and **Zambia State Insurance Corporation Limited v Dennis Mulope Mulikelela**[3], where we held that:

> **"A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury, mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot reasonably be repaired."**

Furthermore, the Judge looked at the endorsement on the writ and the termination clause in the contract of employment and

determined that the appellant's employment was terminated in accordance with the termination clause in the contract of employment and that he was given thirty days therefrom to vacate the company house. Therefore, in respect of the claims for wrongful and unfair termination of employment, the Judge found that the appellant had no clear right to the relief he sought to protect and that his prospect of success on the two claims was dim.

On the claims arising from the opportunity the appellant had to participate in the EPA, the Judge found that the appellant had a good arguable claim because his decision to accept the offer of employment was influenced by the respondent's pre-contractual discussions and emphasis that he was to acquire 20% shares in the company through an EPA and that the respondent also gave him an assurance that the job was a permanent position with possibility of earning equity in the business but the EPA was not signed until his employment was terminated.

Nonetheless, the Judge found that the appellant would not suffer irreparable injury if he moved out of the respondent's accommodation as his entitlement to accommodation arose from

his contract of employment and that the respondent, as a former employer, had no obligation to meet the logistical requirements of the appellant in his pursuit of legal redress following the termination of employment. In that regard, the Judge relied on the case of **Zambia Railways Limited v Simumba**[4] where we held that:

> **"The depriving of the respondent of his house is not an irreparable injury which cannot be adequately remedied or atoned for by damages as held in the case of Shell and BP v Connidaris and others (1975) Z.R. 174[5] (SC)."**

The Judge came to a conclusion that the appellant had not shown that he would suffer irreparable damage if not granted the injunction. Consequently, she dismissed the application with costs and discharged the interim order of injunction granted earlier on.

Aggrieved by the decision, the appellant filed this appeal advancing three grounds namely:

1. **The court below erred in law and fact when it found that the appellant will not suffer irreparable injury if the respondent is not restrained from evicting the appellant from the house at Plot No. 53, Musenga, without paying due regard to the peculiar circumstances surrounding him being a foreign national who came to Zambia solely on the basis of the respondent's representations.**

2. **The Court below erred in law and fact when it failed to consider the balance of convenience between the parties in arriving at the ruling refusing to grant the interlocutory injunction to the appellant.**

3. **The Court below erred in law and fact when it discharged the injunction with costs when it had found that the appellant had high**

chances of success at trial on claims relating to the Equity Participation Agreement.

To support the appeal, Ms. Kaunda, counsel for the appellant, filed heads of argument on which she said she would rely entirely. The respondent also filed heads of argument in response. But because of the position we have taken in this appeal, we shall not recite the arguments in much detail.

In ground 1, Ms. Kaunda has predicated her arguments on **section 28 (8)** of the **Immigration and Deportation Act, No. 18 of 2010** which provides as follows:

> **"An employer shall on termination of the employment contract of, or the resignation or dismissal of, a foreign employee who is a holder of the employment permit issued under subsection (1), be responsible for the repatriation of the former employee and other costs associated with the deportation of that former employee if that former employee fails to leave Zambia when no longer in employment." (Underlining provided)**

It was contended, that the appellant came into Zambia solely on account of the respondent's representation offering to permanently settle him here with the execution of the EPA and he remained here after employment mainly because of the respondent's failure to honour the agreement on the EPA. That until his claims in court are heard and determined, the respondent has

the legal duty, on the basis of **section 28**, to meet all his costs, including the provision of accommodation and any departure from that mandatory duty, which has the potential of making the appellant lose the very right to be heard by the court on his claims (that have prospects of success), amounts to irreparable injury.

Counsel submitted that it is not clear how the court would assess damages in an impending destitution situation and that no amount of damages would be adequate, thus the continued responsibility of the employer under **section 28**. It was further argued that the Judge was under a duty to distinguish the appellant from Zambian employees who are at liberty to engage in gainful employment without much difficulty and that the case of **Zambia Railways Limited**[4] does not apply to the appellant.

In response, learned State Counsel, Mr. Mundashi submitted, that there was no obligation that the EPA should be executed at the same time as the contract of employment and that the claim for an injunction should be considered in the context of the reliefs sought in the court below, which were mainly for damages. Further, that there would be no irreparable injury the appellant would suffer if he

was not allowed to stay in the company house as he continued to pursue his claims in court.

State Counsel contended that the fact that an employer is required to ensure the repatriation of an employee on termination of employment under the provisions of the **Immigration and Deportation Act** does not change matters as seems to be suggested by the appellant. He buttressed his argument by citing the cases of **Ahmed Abed v Turning and Metal Limited**[2] and **Zambia State Insurance Corporation Limited v Dennis Mulope Mulikelela**[3] which were referred to by the trial Judge in her ruling.

We have considered the above arguments. We hasten to state that **section 28 of the Immigration and Deportation Act**, upon which Ms. Kaunda has so heavily relied, has been misconstrued by counsel. This section does not, by any stretch of the imagination; say, as is being startlingly advocated by Ms. Kaunda, that the employer has the legal duty to meet all of the former employee's costs of litigation, including the provision of accommodation, if the former employee had been accommodated as an incidence of his employment. **Section 28** puts responsibility on the employer for

repatriation of the former employee and for other costs associated with the deportation of that former employee if the former employee fails to leave Zambia when no longer in employment.

In truth, we are shocked by Ms. Kaunda's argument that the pronouncement on provision of accommodation after employment in the **Zambia Railways Limited**[4] case does not apply to the appellant as he is a non-Zambian with no alternative accommodation, suggesting that there should be different laws for Zambians and for non-Zambians.

Anyhow, we were told at the hearing of the appeal that the appellant vacated the company house in December, 2015 after an *ex parte* interim injunction pending appeal to this Court granted by Justice Katanekwa was discharged by Justice Maka-Phiri. However, Ms. Kaunda did not disclose how the appellant has survived destitution ever since, if he is still in Zambia. What is more, she told us that the appellant does not want, at this point, to go back into the house except that at that time, the court below should have maintained the status quo by granting an interlocutory injunction.

It is apparent from this exchange that this appeal has become a mere academic exercise, on which we should not be expending valuable judicial time. If the appellant left the house, almost two and half years ago and he does not wish to get back in, what does he want by prosecuting the appeal other than wasting our time?

It is also obvious from the appellant's written and oral arguments that what he would suffer if he was not allowed to continue staying in the company house would be mere inconvenience, which is not enough. We agree entirely with the trial Judge and with State Counsel that even if the appellant's claims founded on non-execution of the EPA could have prospects of success, he would not suffer irreparable injury especially that there is no nexus between the house and his claims. The Judge was on firm ground when she held that this case was not suitable for the grant of an interlocutory injunction. Ground 1 fails for lack of merit.

The failure of ground 1 spells the doom of ground 2. The gist of Ms. Kaunda's arguments is that if the court was in doubt as to whether the fact of success at trial was enough to maintain the status quo, it should have considered the balance of convenience,

which in this case, lay in favour of the appellant who had the full support of the law in terms of the Immigration and Deportation Act as he sought to access justice against the employer.

The response by State Counsel was simple. It was that the appellant had not demonstrated any balance of convenience that would require him to continue staying in the company house and prevent the respondent from exercising its right to use the house particularly that the respondent had not refused to repatriate him in line with the Immigration and Deportation Act but he had chosen to remain in Zambia for purposes of prosecuting his claims.

Indeed, in the case of **American Cynamid Company v Ethicon Limited**[6], Lord Diplock set clear guidelines regarding the order of consideration of the applicable principles in granting and refusing to grant interlocutory injunctions. In this case, we do not agree with Ms. Kaunda that the non-consideration of the balance of convenience between the parties was a serious misdirection on the part of the trial Judge. In the case of **Shell and B.P. Zambia Limited v Conidaris and others**[5], we held, inter alia, that:

"(vii) Where any doubt exists as to the plaintiff's rights or if the violation of an admitted right is denied, the court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the plaintiff."

In the current case, the appellant has not raised issue with the finding by the trial Judge that he had no clear right to the relief he sought to protect in relation to the claims for wrongful and unfair termination of employment or that his prospect of success on the two claims was dim.

In addition, as we have already said, on the claims concerning the EPA, the Judge found that the appellant had a good arguable claim. She expressed no doubt as to the existence of the appellant's rights in that respect. However, the Judge found that the appellant would not suffer irreparable damage if he left the house, as monetary compensation would suffice. In these circumstances, it was unnecessary for the court to engage in a futile exercise of considering the balance of convenience particularly that the respondent had no legal duty to meet the appellant's legal costs.

In ground 3, Ms. Kaunda relied heavily on **Order 29/1A/30 of the White Book (1999 edition)** which provides as follows:

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> **"It has for many years, been the normal practice in the Chancery Division for a successful plaintiff granted an interlocutory injunction to be granted his costs in the cause and for a successful defendant to be granted his costs in the cause."**

According to counsel, the court below gave no reason for departing from this normal practice in the courts of equity especially that it had found that the appellant had chances of success at trial on the claims relating to the EPA.

In response, State Counsel repeated that the appellant's occupation of the company arose as an incidence of his employment and not as a result of the EPA. Citing the case of **Turnkey Properties v Lusaka West Development Company Limited, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporation Limited**[7], he argued that even if the court found that there was a possibility of succeeding on the EPA, letting the appellant take possession of the house by injunction to enable him pursue his claim in respect of the EPA would simply be putting him in an advantageous position and creating a situation that had not previously existed.

We have considered the above arguments. Firstly, ground 3 of this appeal is misconceived in so far as it alleges that the court

discharged the interim injunction with costs. The court below did nothing of the sort. In contrast, the court dismissed the application for injunction with costs having determined that the case was not appropriate for the grant of an interlocutory injunction.

Secondly, as regards **Order 29/1A/30 of the White Book**, we agree with Ms. Kaunda that the normal practice in a court of equity is for a successful party in an application for an interlocutory injunction to be granted costs in the cause. However, there is doubt as to the rationale of that practice and Courts have shown a greater willingness to depart from it (See **Order 29/1A/30**).

In our case, we have **Order 40 (6) of the High Court Rules** which clearly states that the award of costs is in the discretion of the court. This principle has been restated in various cases and recently in **Peony Zambia Limited v Shalom Bus Services Limited and Attorney General**[8] where we also discussed the meaning of the phrase '**costs in the cause**'. We stated as follows:

> **"... in terms of Order 40 Rule 6 of the High Court Rules, the costs of every suit or matter and of each particular proceeding therein are in the discretion of the Court. Further, it is trite that an award of costs will generally flow with the result of litigation; the successful party being entitled to an order for costs against the unsuccessful party. This is the**

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> **meaning of the phrase "costs follow the event" ... The phrase "costs in the cause" means an award of costs of an interlocutory proceeding to a named party in the cause; e.g., "costs to the plaintiff in the cause" means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to the costs of the interlocutory proceedings in issue." (Underlining ours for emphasis)**

On the particular facts of this case, the application for an injunction was unjustified and unmeritorious as it is trite law that an applicant in the position of the appellant cannot be entitled to an interlocutory injunction. Equity follows the law, meaning here that a court of equity cannot, by avowing that there is a right but no remedy, create a remedy in violation of law, nor can equity create a remedy where there is no legal liability unless extraordinary circumstances or countervailing equities call for relief, which was not the case in the present matter.

The application having failed, there was nothing to stop the court from awarding costs to the respondent as an award of costs will generally flow with the result of litigation; the successful party being entitled to an order for costs against the unsuccessful party.

In fact, we are taken aback that the appellant, ably represented by counsel, could appeal a matter of this nature, and

insist on a legal right to remain in occupation of the company house, when he had lost that right following the termination of his employment. Ground 3 must equally fail as it lacks merit.

Now, we are compelled to consider the issue raised by State Counsel, who is seeking guidance, concerning the conduct of Ms. Kaunda in obtaining an *ex parte* interim order of injunction pending appeal to this Court from Justice Katanekwa after Justice Maka-Phiri refused to grant an interlocutory injunction and filing a second appeal to this Court on the same issues following Justice Maka-Phiri's discharge of the second interim injunction.

Although Ms. Kaunda was adamant, the record shows that on 19th August, 2015 upon her application, Judge Katanekwa stayed, subject to confirmation by the trial Judge who was said to have gone on leave the ruling of 14th August, 2015 in which Justice Maka-Phiri had refused to grant an interlocutory injunction. When asked by this Court as to whether a negative order can be stayed, counsel replied in the negative and added that she withdrew the application within twenty-four hours even before service and that

perhaps she had not paid much attention to the application she had filed.

Clearly, the record shows that the order for stay was only vacated on 27th August, 2015 at the time Justice Katanekwa granted the *ex parte* interim injunction. The record also shows that Ms. Kaunda applied *ex parte* for an interim injunction pending appeal on 24th August, 2015 even as the stay was in effect. Although Justice Katanekwa adjourned the matter to 23rd September, 2015 for interpartes hearing by the trial Judge, the record of appeal is silent as to what transpired on that date.

It was only State Counsel, who courteously revealed that the second interim order of injunction was discharged by Justice Maka-Phiri in December, 2015 and that the appellant filed the second appeal on the same issues. For her own reasons, Ms. Kaunda chose not to include the order discharging the second interim injunction on this record of appeal. We were truly baffled by these events.

Whilst we are not determining the second appeal because it is not yet before us, we are compelled to consider the issues at play in this case. It is very clear to us, that Ms. Kaunda, either out of

ignorance of the law, or inattention (as stated by her), or lack of seriousness, obtained a stay of the ruling of Justice Maka-Phiri refusing to grant an interlocutory injunction when she was well aware that such order was incapable of being enforced.

Worse still, having obtained an order for stay, counsel proceeded to apply *ex parte* under **Order 3** of the **High Court Rules** for an interim injunction pending appeal and obtained an *ex parte* order, when an interlocutory injunction had already been rejected by Justice Maka-Phiri on sound reasons and counsel had properly filed an appeal. Counsel was simply pitting one Judge against another. She misled the court, and obtained favourable orders, when she ought to have known that this was wrong and improper.

In our view, counsel's conduct of the matter might well amount to abuse of court process. It also contravenes **section 52 (b) of the Legal Practitioners Act, Cap 30** which provides that:

> "**No practitioner shall mislead or allow any court to be misled, so that such court makes an order which such practitioner knows to be wrong or improper**".

Counsel's conduct of the matter further contravenes **rule 32 (2) of The Legal Practitioners' Rules, 2002** which stipulates that:

"A practitioner has a duty to the court to ensure that the proper and efficient administration of justice is achieved".

In terms of **section 53 of the Legal Practitioners Act**, **a practitioner who contravenes any of the provisions of section 52 of the Act shall be deemed to be guilty of professional misconduct, and the Court may, in its discretion, either admonish such practitioner, or suspend him from practice, or cause his name to be struck off the Roll pursuant to section 28**.

In this case, we have decided, in our discretion, to only admonish counsel for her unprofessional conduct of the matter.

All in all, this appeal fails and is dismissed with costs to be taxed if not agreed. Since the record speaks for itself, regarding the wrong and improper conduct of the matter by Ms. Kaunda, we order that she personally bears the costs of this appeal.

I.C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE