

**IN THE COURT OF APPEAL OF ZAMBIA**

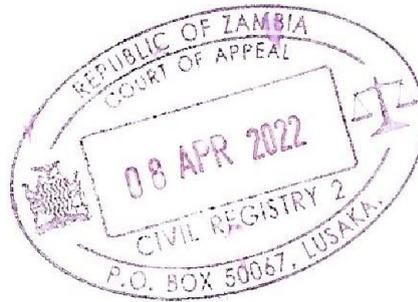
**APPEAL NO. 106/2020**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

**JAMES MATALIRO**



**APPELLANT**

**AND**

**OCCUPATIONAL HEALTH AND SAFETY INSTITUTE      RESPONDENT**

**CORAM:    KONDOLO SC, MAJULA AND NGULUBE, JJA.**

*On 19<sup>th</sup> January, 2022 and 8<sup>th</sup> April, 2022.*

***For the Appellant:***      *Mr. M. Mwachilenga appearing with Mr. M. Benwa, of Messrs. James & Doris Legal Practitioners.*

***For the Respondent:***      *Mr. M. Phiri, of Messrs. Mwansa Phiri Shilimi and Theu Legal Practitioners, Acting as Agents of Messrs. Kitwe Chambers.*

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## **J U D G M E N T**

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**NGULUBE, JA,** delivered the Judgment of the Court.

**Cases referred to:**

1. *Colgate Palmolive (Z) Inc vs. Abel Shemu Chika and 110 Others, Appeal No. 181 of 2005.*
2. *Mohamed S. Itowala vs Variety Bureau De Change, SCZ Judgment No. 15 of 2001.*
3. *St. John Shipping Corporation vs Joseph Rank Limited (1956) 2 ALL ER 683.*

4. *Jalpa Pradeepbhai Desai vs Bar Council of India and 2 Others, SP/CIV/APP/No. 19743 of 2015.*
5. *Satish Kumar Sharma vs The Bar Council of Himachal Pradesh, Appeal (Civil) 5395 of 1997.*
6. *Anderson K. Mazoka vs Levy Mwanawasa (2005) ZR 138.*
7. *Samuel Miyanda vs Raymond Handahu, SCZ Judgment No. 6 of 1994.*
8. *Seafood Court Estates Limited vs Asher (1949) 2 KB 481.*
9. *Edman Banda vs Charles Lungu, SCZ Selected Judgment No. 22 of 2017.*
10. *D. P. Services Limited vs Municipality of Kabwe (1976) ZR 110.*
11. *Neighbours City Estates Limited vs Mark Mushili, Appeal No. 47/2013.*
12. *Zambia Extracts Oils and Colourant Limited & Enviro Oils and Colourant Limited vs Zambia State Insurance Pension Trust Fund Board of Trustees, Selected Judgment No. 31 of 2016.*
13. *Gideon Mundanda vs Timothy Mulwani and the Agricultural Finance Co. Ltd and S. S. S. Mwiinga (1987) ZR 29.*

**Legislation referred to:**

1. *The Legal Practitioners' Practice Rules, Statutory Instrument No. 51 of 2002.*

**Other works referred to:**

1. *American Bar Association Canons of Professional Ethics.*
2. *Halsbury's Laws of England, Volume 3, 4<sup>th</sup> Edition.*
3. *Chitty on Contracts, Volume 1, 29<sup>th</sup> Edition.*

**INTRODUCTION**

1. This appeal is against a Judgment of the High Court delivered by Mulenga J at Solwezi, dismissing both the appellant's action and the respondent's counter-claim, on the ground that the contract they were seeking to enforce is tainted with illegality.

## **BACKGROUND**

2. The brief background to this appeal is that the appellant was employed as a Board Secretary by the respondent, on a fixed term contract of three years which was renewed for a further term of three years on the same terms and conditions. By way of a letter of offer dated 23<sup>rd</sup> May, 2014, the respondent had originally offered the appellant employment on a contract which required the appellant to work for eight (8) hours from Monday to Friday, from 08:00hrs to 17:00 hours, excluding holidays. The appellant only signed the contract on 4<sup>th</sup> June, 2014, after the respondent had varied Clause 5 of the contract which related to his work schedule. Following the variation, the appellant was not required to be at the respondent's office for eight (8) hours a day from Monday to Friday:
3. A dispute arose between the parties regarding payment of gratuity to the appellant and a motor vehicle loan. The appellant took out a complaint against the respondent in the Industrial Relations Division of the High Court on 11<sup>th</sup> February, 2019, claiming that he had been treated differently and unfairly by the respondent; compared to the Director, Deputy Director and Finance Manager who were similarly circumstanced with him, as regards payment

of gratuity and the motor vehicle loan. He accused the respondent of breaching the contract by failing to pay him the accrued gratuity and to buy him a motor vehicle and pay the corresponding allowances in accordance with the Self-Liquidating Motor Vehicle Loan Policy, which were all part of his conditions of service.

4. The appellant was therefore seeking the following reliefs, among others: damages for breach of contract; payment of accrued gratuity; an order that the respondent buys a motor vehicle for him under the Loan Policy; and an order that the respondent pays him the capital allowance under the Loan Policy in arrears from the time he was employed. As an alternative to the claim for capital allowance, the appellant sought an order that the respondent pays him damages for loss of opportunity to earn allowances under the Loan Policy and that the respondent replaces his personal motor vehicle that he has been using during the course of his employment. He further sought interest and costs.
5. The complaint was opposed by the respondent which filed an answer and a counter-claim. The respondent countered the allegation that it had breached the contract by failing to pay the

appellant gratuity and buy him a motor vehicle, contending that the matter had been referred to the Office of the Attorney General. It also took issue with the fact that the appellant had not been working for eight hours a day as required by his contract.

6. The respondent further argued that the contract was varied by its Board Chairperson without regard to the laid down procedure and accused the appellant of being negligent by not advising the Board Chairperson regarding the fact that the variation was contrary to procedure. For this reason, the respondent made a counter-claim seeking an order that the appellant's terms and conditions as a full-time employee be changed to that of a part-time employee when his contract was varied. It was further seeking a re-assessment of the appellant's gratuity as a part-time employee.
7. The appellant filed a reply in which he stated that he had negotiated for the variation of Clause 5 of the contract, which was mutually agreed upon. He further stated that he could not have advised the respondent on the variation of the contract as he was not an employee of the respondent at the time of the variation.

#### **DECISION OF THE HIGH COURT**

8. After evaluating the evidence on record, the trial Judge considered the doctrine of freedom of contract as espoused by the Supreme

Court in the case of **Colgate Palmolive Zambia Limited vs Chuuka**<sup>1</sup>.

The Judge stated in this regard, that where a party seeks to protect his rights under a contract, generally the duty of the court is to enforce that which the parties agreed upon or intended. The Judge however noted that the court also has a duty to ensure that the contract being enforced is legal and enforceable at law.

9. The learned trial Judge pointed out that the appellant is a legal practitioner who appeared before court on a number of occasions presenting himself as an advocate from Messrs. Mumba Malila and Partners. He then addressed his mind to the question of whether an advocate in private practice can at the same time be employed by a legal entity or person either on a full-time or part-time basis.
10. The learned Judge in pondering on this issue had recourse to **Rule 24(2) of the Legal Practitioners' Practice Rules**, which states that a practitioner who is an employee of a non-practitioner or an unqualified person, shall not, as part of employment, do for any person other than the employer, work which is or could be done by a practitioner acting as such, in any way in breach of the rules. He also turned to **Rule 27 of the Legal Practitioners' Practice Rules**, which provides that a practitioner shall practice as an advocate

only where the following conditions are met: (a) the practitioner holds a current practicing certificate; (b) the practitioner is appearing either on behalf of his or her employer, or under the terms of Rule 30; and the practitioner shall not act for any employee or client of the employer.

11. He went on to refer to the case of **Mohamed S. Itowala vs Variety Bureau De Change<sup>2</sup>**, where the Supreme Court held that a party cannot sue upon a contract if both parties knew that the purpose, the manner of performance and participation in the performance of the contract necessarily involved the commission of an act which to their knowledge is legally objectionable. He further cited the case of **St. John Shipping Corporation vs Joseph Rank Limited<sup>3</sup>**, where it was held that the court will not enforce a contract which is expressly or impliedly prohibited by statute.
12. The learned trial judge then considered whether the contract between the parties was illegal. In determining this question, the Judge found solace in the Indian case of **Jalpa Pradeepbhai Desai vs Bar Council of India and 2 Others<sup>4</sup>**, where the Supreme Court of India applied **Rule 49 of Chapter II, Part 6 of the Bar Council of India Rules**, which provides that:

***“An advocate shall not be a full-time salaried employee of any person, government, firm or corporation or concern, so long as he continues to practice and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.”***

13. The learned trial judge further cited another Indian case of ***Satish Kumar Sharma vs The Bar Council of Himachal Pradesh***<sup>5</sup>, in which the Court made observations on the rationale of Rule 49 and emphasized the nobility of the legal profession. The trial Judge opined that this is not any different from the legal profession in Zambia. He opined that in Zambia like other Commonwealth jurisdictions, particularly in light of ***Rule 24(2) of the Legal Practitioners' Practice Rules***, an advocate who is in private practice cannot at the same time work as a full-time salaried employee of a company or institution.
14. The trial Judge held that the contract between the parties was tainted with illegality and the enforcement of its performance would be contrary to the ***Legal Practitioners' Practice Rules***. He stated that the contract could not be enforced and accordingly dismissed both the appellant's claim and the respondent's counter-claim.

## **THE APPEAL TO THIS COURT**

15. Dissatisfied with the Judgment of the lower court, the appellant appealed to this Court advancing the following grounds of appeal-

1. *That the learned trial judge erred in law in the manner he interpreted Rule 24(2) and 27 of the Legal Practitioners' Practice Rules S.I. No. 51 of 2002;*
2. *That the learned trial judge erred in law and in fact when he held that the contract entered into between the appellant and the respondent was tainted with illegality and enforcement of performance of such a contract would be contrary to the Legal Practitioners' Practice Rules; and*
3. *That in the alternative to grounds one and two, the learned trial judge erred in law and in fact when he failed to address his mind to the principle of quantum meruit.*

16. The appellant's advocates filed heads of argument in support of this appeal and the respondent opposed the appeal by way of heads of argument in opposition filed by their advocates. When this matter came up for hearing, counsel for both parties relied entirely on their heads of argument.

## **THE APPELLANTS' CONTENTIONS**

17. On ground one, Mr. Mwachilenga on behalf of the appellants submitted that the trial judge misdirected himself in the manner he interpreted *Rules 24(2) and 27 of the Legal Practitioners' Practice Rules*. He cited *Rule 24* which provides that:

- “24. (1) This Part applies to a practitioner employed by a non-practitioner employer in the course of the Practitioner’s employment with such a non-practitioner employer but –**
- (a) does not apply to any private practice of such practitioner;**
  - (b) does not apply to a practitioner employed by the government.**
- (2) A practitioner who is an employee of a non-practitioner or an unqualified person, shall not, as part of employment, do for any person other than the employer, work which is or could be done by a practitioner acting as such, in any way in breach of these Rules.”**

18. He further referred to **Rule 27**, which provides that-

- “27. An employed practitioner shall practice as an advocate or practitioner only where the following conditions are met:**
- (a) the practitioner holds a current practicing certificate;**
  - (b) the practitioner is appearing either on behalf of his or her employer, or under the terms of rule 30; and the practitioner shall not act for any employee or client of the employer; and**
  - (c) the practitioner has practiced as a practitioner for at a least three years.”**

19. The argument by counsel was that **Rules 24 and 27** do not support the position of the trial judge that a legal practitioner cannot be employed by a non-legal practitioner and at the same time be in private practice. According to Mr. Mwachilenga, the two provisions

do allow such conduct. Our attention was drawn to **Rule 24(1)(a)** which refers to "*any private practice of such practitioner*", which counsel said means that a practitioner who is subject of that part of the law may have a private practice but that part of the law shall not apply to such private practice of this practitioner.

20. Mr. Mwachilenga also drew our attention to **Rule 24(2)** and submitted that the key words the trial judge failed to consider in interpreting this rule are "*as part of his employment*". He stated that **Rule 24(2)** only proscribes an employed legal practitioner from doing work for any other person other than his employer as part of his employment. According to him, the mischief that the rule was trying to avoid is where non-practitioners employ legal practitioners so that they may offer legal services to the public for a profit.

21. Counsel went on to submit that the **Legal Practitioners' Practice Rules** were largely inspired by the **American Bar Association Canons of Professional Ethics**, which according to him do not prohibit an advocate from being an in-house advocate and at the same time be in private practice. He maintained that the Rules only prohibit an advocate from doing work for an employee or client of that particular employer as part of his employment.

22. Mr. Mwachilenga was of the view that the trial judge would not have fallen into error if he had reminded himself of the principle in the case of *Anderson K. Mazoka vs Levy Mwanawasa*<sup>6</sup>, where it was held that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. The court stated that it is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation. He further referred to the case of *Samuel Miyanda vs Raymond Handahu*<sup>7</sup>, to advance the contention that the plain and simple language used in *Rules 24 and 27* do not support the trial judge's decision.
23. The other argument by counsel was that the trial judge misled himself when he relied on the Indian case of *Jalpa Pradeepbhai Desai vs Bar Council of India and 2 Others (supra)*, which interpreted the *Indian Bar Council Rules* that are not applicable to Zambia and are totally different from our own rules.
24. Our attention was further drawn to the words of Lord Denning in the case of *Seafood Court Estates Limited vs Asher*<sup>8</sup>, that a judge must not alter that of which a statute is woven, but he can and should iron out the creases. Counsel accused the trial judge of

altering our own rules by importing from the *Indian Bar Council Rules* which he said resulted into an injustice.

25. On the second ground, Mr. Mwachilenga submitted that there was no illegality in the contract between the parties. He also contended that a mere finding of illegality does not automatically result in a contract being unenforceable. We were referred to **Paragraph 16-141** of the learned authors of *Chitty on Contracts, Volume 1, 29<sup>th</sup> Edition, at Page 1020*, which says that unenforceability by statute arises where a statute by itself on its true construction deprives one or both of the parties of their civil remedies under the contract in addition to, or instead of, imposing a penalty upon them.
26. Counsel further cited a number of cases to buttress the argument that illegality does not automatically result in a contract being unenforceable. One such case is *Edman Banda vs Charles Lungu*<sup>9</sup>, where it was held that the mere fact of proof of illegality having tainted a contract would not always render such a contract void and unenforceable. The court stated that an otherwise illegal contract would be enforced by a court of law where factors of consideration exist which militate against refusal to enforce.

27. It was Mr. Mwachilenga's further argument that the **Legal Practitioners' Practice Rules** already provide a sanction for their breach and therefore, contracts made in breach of those rules are not necessarily unenforceable. Otherwise, that would result in double punishment on the part of the advocate as well as unpaid labour and unjust enrichment. Counsel craves that this court orders the respondent to honour its obligations under the contract, as it has already benefited from the appellant's services.
28. On ground three, Mr. Mwachilenga submitted in the alternative that if the contract between the parties is indeed unenforceable, the court is bound to consider the doctrine of quantum meruit; considering that there was a service that was already offered to the respondent and it would amount to unpaid labour and unjust enrichment if the respondent does not pay for the services. To support this proposition, counsel referred to **Paragraph 1147 of Chitty on Contracts, 25<sup>th</sup> Edition, at Page 180**, which states that courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party who has not performed his part of the bargain but who has benefited from the performance of the other party.

29. He also referred us to **Paragraph 390 of Halsbury's Laws of England, Volume 8**, which says that if services are rendered and accepted in pursuance of an agreement which is unenforceable, remuneration is payable on the basis of a quantum meruit. There were also a number of cases cited on the same principle, including the case of **D. P. Services Limited vs Municipality of Kabwe<sup>10</sup>**. The argument being put forward by counsel was that even if this court finds that the agreement was illegal, services were rendered to the respondent for which the appellant ought to be paid and the motor vehicle must be purchased as agreed.
30. We were implored to uphold this appeal in its entirety and to award the appellant costs of this appeal.
31. On behalf of the respondent, Mr. Phiri opposed ground one and supported the manner in which the lower court interpreted **Rules 24(2) and 27**. He began by citing **Rule 3(1) of the Legal Practitioners' Practice Rules**, which provides that:

**"3. (1) These rules shall have effect in relation to the practice of a practitioner whether as a principal in private practice, or in the employment of a practitioner or of a non-practitioner or in any other form of practice, and whether on a regular or on occasional basis."**

32. On the strength of the above cited Rule, Mr. Phiri submitted that the **Legal Practitioners' Rules** apply to the appellant in relation to his practice as a practitioner. He further cited that **Rule 24(1) and (2)** and submitted its literal interpretation is that **Part V**, which covers **Rules 24 to 28**, does not apply to any private practice of a practitioner and a practitioner employed by the government. He further stated that **Part V** applies to a practitioner employed by a non-practitioner employer in the course of the practitioner's employment with such a non-practitioner employer. It was his contention that the appellant is an advocate covered by **Part V** in the course of his employment as an employee of the respondent.
33. According to Mr. Phiri, the words "*any private practice of such practitioner*" referred to in **Rule 24(1)(a)** is the private practice of a firm as regulated by the Law Association of Zambia and other laws. He argued that a practitioner may only carry-on private practice from a firm as regulated by the Law Association and there are qualifications to be satisfied before one can carry on private practice as a principal or in the employment of a practitioner.
34. Our attention was drawn to the definition of a "firm" under **Rule 2** being a "*business concern for the practice of the profession as a*

*legal practitioner and includes a sole practitioner*". Counsel argued that the appellant was not employed as a firm by the respondent.

35. It was his submission that the appellant was mandated not to do any work in breach of the Rules. He referred us to **Rule 27 of the Legal Practitioners' Rules** and submitted that the appellant was to practice as an advocate under **Part V** upon meeting the mandatory conditions spelt out in that Rule. Counsel pointed out that the appellant would not practice as an advocate under **Part V** if he did not hold a current practicing certificate. He was also required to have practiced as an advocate for at least 3 years. Further, the appellant was to practice as an advocate under **Part V** by appearing on behalf of either the respondent or under **Rule 30** which provides for separate non-legal business.

36. Mr. Phiri contended that the appellant was employed by the respondent as an advocate at his own request in breach of **Rule 24(2) and Rule 27**. According to him, to allow practitioners to practice under **Part V** in breach of **Rule 27(b) and Rule 24(2)** would lead to advocates representing third parties instead of their employers. Employed advocates would also practice from the streets as opposed to law firms and this would lead to chaos in the legal profession and the regulation of legal practitioners.

37. The respondent's counsel further argued that there was no evidence that the **Legal Practitioners' Practice Rules** were largely inspired by the **American Bar Association Canons of Professional Ethics**. His view was that our Rules were actually inspired by the practice and procedure in England and other Commonwealth countries. He stated that Zambia's legal system is moulded in the shape of the English system and the Commonwealth. As such the court below was on firm ground when it applied the Indian case of **Satish Kumar Sharma vs The Bar Council of Himachal Pradesh** (*supra*).

38. He submitted that the learned authors of **Halsbury's Laws of England** provide certain guidelines as the position of practice relating to barristers which can be compared to the position of a legal practitioner in Zambia. He stated that legal practitioners in Zambia are regulated by their professional body, the Law Association of Zambia particularly, the Legal Practitioners' Committee. He stated that the guidelines and rulings of the Disciplinary Committee and/or the Legal Practitioners Committee is binding on all Legal Practitioners seeking to practice as such.

39. Mr. Phiri contended that the appellant knew or at least ought to have known that over the years, the Legal Practitioners'

Committee have made rulings to the effect that legal practitioners in private practice must manage and be available in their firms 24/7 to care for their clients. According to him, the said ruling are based on **Rule 13 of the Legal Practitioners' Practice Rules** and the seriousness of the requirement that a legal practitioner must be available to attend to a client is demonstrated by **Rule 13(5)**.

40. We were further referred to **Rule 32(1)(b) of the Legal Practitioners' Practice Rules**, which provides that:

***“A practitioner shall not engage directly or indirectly in any occupation if the engagement of association with that occupation may adversely affect the reputation of a practitioner or prejudice the ability of a practitioner to attend properly to the interests of a client.”***

41. It was his argument that the appellant taking up employment with the respondent was in breach of the fundamental ethics of his profession. He emphasized that the employment prejudiced the ability of the appellant to attend properly to the interest of his clients and he did so without the authority of the Legal Practitioners' Committee. Counsel said just like the position in England, advocates must not take up employment which is inconsistent with the practice. It was his argument that holding a full-time job as a Company Secretary for the respondent was

inconsistent with a practitioner's practice as it is contrary to the ***Legal Practitioners' Practice Rules***.

42. On the second ground, Mr. Phiri submitted that the court below properly and elaborately addressed its mind to the legal effect of the contract entered into by the parties in this case. He cited the case of ***Mohamed S. Itowala vs Variety Bureau De Change (supra)***, to support his argument. He argued that the appellant knew and is presumed to have known that his contract with the respondent was formed in breach of ***Rules 27(b) and Rule 24(2)*** and its performance would lead to encouraging professional misconduct or unprofessional conduct by advocates.
43. He further cited the case of ***St. John Shipping Corporation vs Joseph Rank Limited (supra)***, to make the argument that the appellant was not supposed to practice as an advocate for third parties other than appearing on behalf of the respondent or his own separate non-legal business. He also referred to the case of ***Neighbours City Estates Limited vs Mark Mushili<sup>11</sup>***, and argued that that it is illegal to practice as an advocate under ***Part V*** in breach of ***Rule 27(b) and Rule 24(2)***.

44. The other cases that were referred to by Mr. Phiri are the case of *Zambia Extracts Oils and Colourant Limited & Enviro Oils and Colourant Limited vs Zambia State Insurance Pension Trust Fund Board of Trustees*<sup>12</sup>, and the case of *Edman Banda vs Charles Lungu (supra)*. Counsel argued that the enforcement of the contract between the parties would violate **Rules 24 and 27**. He also pointed out that the court below did not find any factors that existed to mitigate against the refusal to enforce the contract.
45. On ground three, Mr. Phiri submitted that the lower court was on firm ground in not addressing its mind to the principal of quantum meruit. He cited the case of *Gideon Mundanda vs Timothy Mulwani and the Agricultural Finance Co. Ltd and S. S. S. Mwiinga*<sup>13</sup> where the Supreme Court said that courts will never in any circumstances condone the flouting of the law. He argued that the enforcement of a contract formed in contravention of **Rule 27(b) and Rule 24(2)** would lead to the courts encouraging professional misconduct and/or unprofessional conduct by advocates employed under **Part V** and rewarding such misconduct.

46. Mr. Phiri submitted that this appeal should be dismissed with costs against the appellant for being frivolous, vexatious and without merit.
47. Mr. Mwachilenga filed heads of argument in reply in which counsel essentially repeated his main arguments. We were urged to uphold the appeal and award costs to the appellant.

#### **CONSIDERATION OF THE MOTION BY THIS COURT AND VERDICT**

48. We have considered this appeal, the heads of arguments filed by counsel for the parties and the authorities to which we were referred. The issue raised under the first ground of appeal is a pure question of law revolving around the interpretation of **Rules 24(2) and 27 of the Legal Practitioners' Practice Rules**. It arises from the fact that the appellant was an advocate in private practice at Messrs. Mumba Malila and Partners, but was at the same time employed by the respondent as Corporate Secretary. We therefore have to decide whether an advocate employed as in-house counsel is permitted to engage in private practice.
49. The view of the lower court, after considering **Rules 24(2) and 27**, was that an advocate in private practice cannot at the same time work as a full-time salaried employee of an institution or

company. The appellant in ground one is challenging the manner in which the lower court interpreted **Rules 24(2) and 27**, but the respondent contends that the lower court was on firm ground. Both **Rules 24(2) and 27** fall under **Part V of the Legal Practitioners Practice Rules** which relates to employed legal practitioners. **Rule 24(2)** provides that:

***“A practitioner who is an employee of a non-practitioner or an unqualified person, shall not, as part of employment, do for any person other than the employer, work which is or could be done by a practitioner acting as such, in any way in breach of these Rules.”***

50. In our view, this rule prohibits a non-legal practitioner from employing a legal practitioners to do legal work for 3<sup>rd</sup> parties for the benefit of the non-legal practitioner (his employer). We therefore agree with the appellant that **Rule 24(2)** was intended to avoid a situation where non-legal practitioners employ legal practitioners for purposes of offering legal services to third parties or the public. In our view, **Rule 24(2)** does not stop an advocate in private practice to also work for another institution or company either on a full-time or part-time basis.

51. Similarly, **Rule 27** does not prohibit a legal practitioner employed as in-house counsel from engaging in private practice. It says that:

***“27. An employed practitioner shall practice as an advocate or practitioner only where the following conditions are met:***

***(d) the practitioner holds a current practicing certificate;***

***(e) the practitioner is appearing either on behalf of his or her employer, or under the terms of rule 30; and the practitioner shall not act for any employee or client of the employer; and***

***(f) the practitioner has practiced as a practitioner for at a least three years.”***

52. This rule sets out the conditions that an employed legal practitioner must meet in order to practice as an advocate. The first condition is that the legal practitioner must hold a current practicing certificate. The second condition is that the legal practitioner appears on behalf of his or her employer, or under the terms of Rule 30 relating separate business. Separate business has been defined as business unrelated to the practice of law. The second condition further demands that a legal practitioner should not act for an employee or client of his employer. This does not, by any means, prohibit a legal practitioner employed as in-house

counsel from engaging in private practice. The third condition is that a legal practitioner must have practiced as an advocate for a minimum of at least three years.

53. It is clear from the analysis we have made that indeed, the court below erred in the manner it interpreted **Rules 24(2) and Rule 27 of the Legal Practitioners' Practice Rules**. The advocates who are required to cease or refrain from practicing law in private practice are those appointed to hold public office, such as Ministers, Deputy Ministers, the Attorney General, the Director of Public Prosecutions, the Solicitor General or indeed any office in the Government. These restrictions are imposed by **Rule 40 of the Legal Practitioners' Practice Rules** which states as follows:

**"40. (1) Where a practitioner is appointed to the office of Minister, Deputy Minister, Attorney-General, Director of Public Prosecutions, Solicitor-General the practitioner shall -**

- (a) Upon appointment to the relevant position cease or refrain from practicing in private practice;**
- (b) Employ a practitioner of at least three years standing to manage and operate his or her practice.**

**(2)...**

**(3) Subrule (1) and (2) shall apply mutatis mutandis to a practitioner appointed to any office in the Government."**

54. We are therefore convinced that the only category of legal practitioners who are required to cease or refrain from engaging in private practice upon appointment are those who hold public office or other positions in government. If the intention was to prohibit all legal practitioners employed as in-house counsel from engaging in private legal practice, the framers of the rules would have expressly stated so. We find merit in ground one and it accordingly succeeds.

55. Coming to the second ground, the issue is whether the contract between the parties was illegal. The court below expressed the view that the contract was tainted with illegality and it would be contrary to the **Legal Practitioners' Practice Rules** to enforce it. As we have already indicated in ground one, the legal practitioners who are required to cease or refrain from engaging in private practice upon appointment are those who hold public office or other positions in government. We are of the considered view that the position of Corporate Secretary held by the appellant at the respondent is not a public office or position in government. We therefore the appellant was not required to cease or refrain from engaging in private practice upon his appointment.

56. It was therefore wrong for the court below to hold that the contract was tainted with illegality and that it would be contrary to the **Legal Practitioners' Practice Rules** to enforce it. The lower court misdirected itself when it relied on the case of **Jalpa Pradeepbhai Desai vs Bar Council of India and 2 Others (supra)**, where the Supreme Court of India interpreted the **Rule 49 of Chapter II, Part 6 Indian Bar Council Rules**. The principle in that case does not apply to this jurisdiction, because our own rules do not contain a provision similar or equivalent to **Rule 49 of the Indian Bar Council Rules**.

57. We must state that the legal profession has evolved over the years, in that the scope and number of supplementary occupations in which advocates are permitted to engage are now considerably wide. This has been clearly stated in **Paragraph 1127 of Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 3, at Page 611**, which states as follows:

**"...Practicing barristers were formerly under a general obligation not to engage in any other profession or business or be an active partner, salaried official or employee engaged in another profession or business. This rule has been reviewed by the Bar Council and replaced by new rules which together with the various ad hoc rulings of the Council, considerably widen the scope and number**

*of supplementary occupations in which practicing barristers are permitted to engage.*

*Nevertheless, a barrister in practice must make that his primary occupation and must refrain from engaging in any other occupation which may adversely affect the reputation of the Bar..."*

58. However, the rules require that an advocate in practice must refrain from engaging in any other occupation which may adversely affect his reputation or prejudice the ability of the advocate to attend properly to the interests of his client. This principle finds expression in **Rule 32(1)(b) of the Legal Practitioners' Practice Rules**, which provides that:

*"A practitioner shall not engage directly or indirectly in any occupation if the engagement of association with that occupation may adversely affect the reputation of a practitioner or prejudice the ability of a practitioner to attend properly to the interests of a client."*

59. In the present case, we have not seen any evidence to show that taking up the position of Corporate Secretary at the respondent had adversely affected the appellant's reputation or prejudiced his ability to attend properly to the interests of his clients. There is actually evidence that the respondent was satisfied with the performance of the appellant and extended his contract for a further term of three years. There being no illegality or other

vitiating factor in this, the duty of the court is to enforce contracts which the parties have freely and voluntarily entered into.

60. In the case of **Colgate Palmolive (Z) Inc vs. Abel Shemu Chika and 110 Others (supra)**, where the Supreme Court held that:

***“If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that their contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of justice.”***

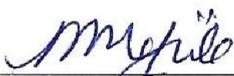
61. The contract between the parties shows that the appellant is entitled to gratuity, a motor vehicle and capital allowance as provided under the Self-Liquidating Motor Vehicle Loan Policy. These are the entitlements which the appellant is seeking and they have not been disputed by the respondent. We cannot accept the argument that the contract was varied by the Board Chairperson without regard to the laid down procedure. The variation was made before the appellant accepted the offer of employment and the respondent extended his contract for a further term of three years on the same terms and conditions.
62. We therefore enter judgment in favour of the appellant against the respondent. The gratuity and capital allowance shall carry interest at the short-term bank deposit rate from the date of the complaint

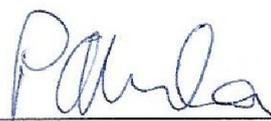
to the date of judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia until full settlement.

63. We, accordingly, find merit in ground two. We hereby allow it. It follows that ground three becomes otiose, as it was advanced in the alternative to grounds one and two which have both succeeded.

64. For the foregoing reasons, we find merit in this appeal. It is hereby allowed. We shall make no order as to costs since this appeal is from the Industrial Relations Division of the High Court.

  
M. M. KONDOLO SC  
COURT OF APPEAL JUDGE

  
B. M. MAJULA  
COURT OF APPEAL JUDGE

  
P. C. M. NGULUBE  
COURT OF APPEAL JUDGE