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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.159/2013**

HOLDEN AT NDOLA

(CIVIL JURISDICTION)

BETWEEN:

IMA ZAMBIA LIMITED **APPELLANT**

AND

JEAN MARC DARMON **RESPONDENT**

CORAM: Mambilima, CJ, Hamaundu and Wood, JJS.

On 1st December, 2015 and 16th February, 2016.

For the Appellant: *Mr. L. Zulu-Messrs Tembo Ngulube and Associates.*

For the Respondent: *Ms. E. Banda, Senior Legal Aid Counsel-Legal Aid Board.*

JUDGMENT

WOOD, JS delivered the judgment of the Court.

CASES REFERRED TO:

1. *Collier v Sunday Referee Publishing Company Limited [1940] 4ALL E.R. 234.*
2. *Kitwe City Council v William Ng'uni (2005) Z.R. 57.*

3. *Holmes Limited v Buildwell Construction Company Limited (1973) Z.R. Reprint, 129.*

4. *BOC Gases Plc v Phesto Musonda (2005) Z.R. 119.*

This is an appeal against a decision of the Industrial Relations Court on the narrow point of whether or not the respondent was entitled to a salary and allowances when he never worked at all.

The facts leading to this appeal are quite brief. The respondent was employed on an employment permit by Gomes Haulage Limited in January, 2009. The appellant offered the respondent employment as a Senior Pilot/Information Technician/Training Manager Engineer on 30th August, 2011. A Staff Employment Contract for two years was signed by both parties on 30th August, 2011. The respondent was expected to start work on 1st September, 2011.

Clause 1 of the contract of employment stipulated the basic salary and allowances in the total sum of K15, 000.00. In addition, the appellant agreed to provide a car and a postpaid cell phone sim card to the appellant. Clause 2 of the contract stipulated that the respondent was to be in the exclusive employment of the appellant

and would not engage himself, alone or in company with any other person, in any work or business conflicting with the interest of the appellant. The contract provided that either party could terminate the contract by giving one month's written notice or by payment in lieu thereof. The respondent was to be based at the proposed Ndola branch of the appellant.

According to the respondent's evidence in the court below, the appellant did not provide the respondent with work or pay him the agreed emoluments after executing the contract on 30th August, 2011. He stated that on the basis of his employment with the appellant, he had on the same day, 30th August, 2011, submitted his application for variation of his work permit with the Immigration Department. The respondent further stated that the appellant paid a K1, 000.00 for the permit and the Immigration Department approved the change of employer from Gomes Haulage Limited to the appellant. The respondent also stated that in the evening of the same day, he attended a dinner at the house of Mr. Olivier Ghemer, the respondent's country manager, which was also attended by Sandra Santisha Mukoma, an employee of the appellant. During

the dinner, he told Mr. Ghemer of the approval of his work permit and that Mr. Ghemer agreed that the appellant's office on the Copperbelt would be at the respondent's house in Ndola. It was also agreed that the appellant would be using the respondent's own motor vehicle for transport at an agreed rent of US$1,200.00. The parties also agreed to be using the respondent's communication equipment, but that no rent was agreed for the house and the equipment. Finally, it was agreed that Sandra Santisha Mukoma and another employee by the name of Agness would report to the appellant's house on 5th September, 2011, to begin work. The respondent then went to Ndola and began to wait.

He waited in vain. Agness and Sandra Santisha Mukoma did not report as agreed and his persistent enquiries did not yield any response as Mr. Ghemer could not talk to him. As at the date of filing the notice of complaint, he had not received any formal letter of notice of termination of his employment.

Mr. Ghemer's evidence on the other hand was that the respondent never informed the appellant that he had obtained the work permit and that in any case he did not report for work and

therefore, there was no basis for him to claim his salary when he never worked. It was the respondent who had in effect frustrated the contract by deserting and failing to show that he could be legally employed in Zambia. We must mention here that although there had been considerable debate over the work permit which was no doubt a vital document in the court below, none of the parties appears to have produced it. In his evidence, the respondent admitted that he did not file into court the email which attached the work permit. However, the appellant does not appear to have challenged the existence of the work permit. We say so because the respondent's testimony that he obtained the work permit was not challenged in cross examination and the record of appeal appears to end abruptly without the appellant's evidence in the court below. Further, the judgment of the court below shows that the appellant's first witness admitted that the appellant's consultant applied for the respondent's work permit, although she was not aware that it had been approved. She, nonetheless, admitted to having had sight of it.

The court below considered the evidence of the parties, and came to the conclusion that there was in existence a valid contract

of employment which had rights, obligations and liabilities. Most important of all is the conclusion it reached, after relying on the case of *Collier v Sunday Referee Publishing Company Ltd*[1]. After considering this decision, the court came to the conclusion that the appellant having entered into a valid contract of employment with the respondent, was not obliged to provide work to the respondent but was, nevertheless, obliged to pay him in accordance with the contract.

The appeal has been brought on two grounds. The first is that the court below erred when it held that the respondent was entitled to a salary and allowances when he never worked at all. The second ground is that the trial court erred in law and fact when it applied the principles set out in the case of *Collier v Sunday Referee Publishing Company Ltd*[1] wrongly.

Mr. Zulu submitted in respect of the first ground that a salary is an employer's consideration in return for the services agreed to be provided by the employee. He argued that the employment relationship is a contractual one and as such must have all the basic elements of an enforceable contract to make it legally binding.

It was submitted that one of the rules that a contract of employment ought to conform to in terms of its enforcement and performance is the principle against unjust enrichment. Mr. Zulu then cited the case of *Kitwe City Council v William Ng'uni*[2] to illustrate what amounts to unjust enrichment. In that case we held *inter alia,* that:

> *"It is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."*

Mr. Zulu submitted that from the respondent's own evidence, he did not at any point perform the work for which he was employed. He stayed at his place and sent emails and texts to the appellant. At no point did he make mention of the fact that he did some work for the appellant. He was, therefore, not entitled to be paid any salary for the period when he did not work for the appellant. It was argued that the claim by the respondent amounted to unjust enrichment.

With regard to the second ground of appeal, Mr. Zulu submitted that the court below applied the principle in *Collier v*

Sunday Referee Publishing Company Ltd[1] wrongly and further, that the facts in this case are totally different from the Collier case. His contention was based on the fact that the Collier case relates to a valid master and servant relationship. In the present case, the contract had not been concluded because the respondent needed to obtain a work permit for him to be legally employed by the appellant. The respondent was aware of this, but did not notify the appellant that he had obtained the work permit nor did he present himself to the appellant that he was ready, able and willing to work after obtaining his work permit. The failure to report for work and to communicate that he had obtained a work permit negated the existence of an employer/employee relationship. In the circumstances, the court below wrongly applied the principle in the Collier case.

Ms. Banda combined her response to grounds one and two of the appeal on the basis that the two grounds are interrelated. She argued that the court below was on firm ground when it awarded the respondent his salary and allowances because there was a contract of employment executed by the parties on 30th August,

2011. She submitted that the court below did not misapply the case of *Collier v Sunday Referee Publishing Company Ltd*[1] because of the existence of the valid contract of employment and the fact that there was nothing in the contract to suggest that it was subject to the respondent obtaining a work permit.

Ms. Banda also submitted that the court below was on firm ground when it relied on the case of *Holmes Limited v Buildwell Construction Company Limited*[3] and the case of *BOC Gases Plc v Phesto Musonda*[4], on when extrinsic evidence may be accepted by a court, because at the time of signing the contract, the parties where fully aware of the import of the document to which they were appending their signatures. Ms. Banda contended that the appellant, as the originator of the document was aware of its contents and this Court should not imply terms which contradict the express terms of the contract of employment. She argued that any suggestion that the contract was subject to the respondent obtaining necessary documentation in order for him to be employed by the appellant, would amount to bringing extrinsic evidence to vary the contract to the detriment of the respondent. She observed

that in any event, the court below found that the respondent had in fact obtained a change in his work permit on 30th August, 2011.

Ms. Banda also contended that the appellant's argument that the respondent did not report for work lacked merit, because the contract was supposed to be performed from the respondent's house in Ndola. The respondent waited for work to be assigned to him which was not done and efforts by the respondent to communicate to the appellant also proved futile as his calls went unanswered.

We are grateful to counsel for their submissions. We take the view that although there are two grounds of appeal, the issues are interrelated. We shall, therefore, deal with them simultaneously. The facts leading to this appeal are quite unusual. It is not in dispute that the appellant and the respondent executed a contract of employment which provided for the payment of certain emoluments and provided for other terms and conditions of service. The appellant does not appear to have seriously challenged the respondent's version of events leading to the signing of the contract, the dinner, the lack of communication between the parties shortly

after signing the contract and the fact that the respondent did not do any work after the signing of the contract as no work was provided.

Contrary to Ms. Banda's submission that the work permit was not significant to the performance of the contract of employment, our view is that the respondent required a valid work permit to enable him perform the contract. That is why the appellant facilitated the process of change of employer with the Immigration Department, from Gomes Haulage to IMA Zambia Limited. However, the appellant seems to have accepted that the respondent had obtained a new work permit as this was not challenged in cross examination. Even in the heads of argument, there is an acceptance by the appellant that the respondent had a work permit. The only contention raised was that the respondent did not inform the appellant that he had obtained the work permit or that he was ready, willing and able to work. However, in the affidavit in support of the answer filed in the court below, Mr. Olivier Ghemar admitted that he facilitated the processing of the work permit. The judgment of the court below also shows that RW1, whose name was not

stated, admitted that the appellant processed the respondent's work permit. Further in cross examination, the respondent stated that he had attached a copy of the work permit to the email he had sent to the appellant. We can, therefore, safely state that the work permit was in no way an impediment to the performance of this contract.

This brings us to what is at the core of this appeal. Was the appellant obliged to provide work to the respondent? In order to answer this question, the court below relied on the case of *Collier v Sunday Referee Publishing Company Limited*[1] in which Asquith J, put it as follows:

> *"It is true that a contract of employment does not necessarily or perhaps normally oblige the master to provide the servant with work. Provided that I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out."*

The learned Judge, however, made some exception when there is an obligation to provide work and made a distinction as follows:

> *"...where for instance, the servant is remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things for publicity, and the master, by withholding work, also withholds the stipulated publicity... such cases are however, anomalous, and the normal rule is illustrated by such cases as Lagerwall v. Wilkinson,*

> *Henderson & Clerk Ltd and Turner v. Sawdon & Co. where the plaintiff – a commercial traveler and a salesman respectively, retained for a fixed period and remunerated by salary were held to have no legal complaint so long as the salary continued to be paid, notwithstanding that, owing to the action of their respective employers, they were left with nothing to do. The employer was not bound to provide work to enable the employee 'to keep his hand in', to avoid the reproach of idleness, or even make a profit out of travelling allowances. In such a case, there is no breach of contract, but the result is much the same as if there had been, since in either event the plaintiff is entitled to a sum or sums of money which are measured, prima facie, by the amount in respect of the unexpired period of service."*

In this appeal, it is not in dispute that the parties entered into a contract of employment. The evidence shows that although the respondent was willing to start work, the appellant became difficult to communicate with and did not provide any work to the respondent. We do not accept the argument by the appellant that there was no contract between the parties as all the ingredients of a valid contract were in place. We have stated above that the evidence points to the fact that there was a work permit in existence. The argument that the respondent did not notify the appellant of the existence of the work permit is untenable because it was the appellant's agent that was processing the respondent's work permit. Further, the argument that the respondent did not report for work

lacks merit as the parties had agreed to use the respondent's house as the base for their business. There was, therefore, no need for him to report elsewhere for work when his house was the place of work. The court below, quite properly in our view, applied the principle in the Collier case correctly when it reached the conclusion that the appellant was not obliged to provide work for the respondent. The sudden loss of enthusiasm by the appellant shortly after signing the contract leads us to surmise that the appellant simply wanted to extricate itself from the contract.

For the foregoing reasons we find no merit in both grounds of appeal. This appeal is dismissed with costs to the respondent to be taxed in default of agreement.

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I.C. MAMBILIMA
CHIEF JUSTICE

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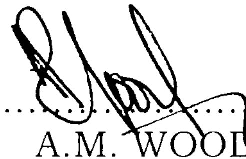
E.M. HAMAUNDU
SUPREME COURT JUDGE



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A.M. WOOD
SUPREME COURT JUDGE