IN THE SUPREME COURT OF ZAMBIA Appeal No.50/2003

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

METAL FABRICATORS OF ZAMBIA LIMITED **Appellant**

AND

WASHINGTON MWENYA ZIMBA **Respondent**

Coram: Sakala, CJ., Chibesakunda and Chitengi JJS

19th May and 29th June 2005

For the appellant: Mr. J.S. Cornhill of Wilson and Cornhill

For the respondent: Mr. P.K. Chibundi of Mulenga Mundashi and Company

JUDGMENT

Sakala, CJ., delivered the judgment of the Court

This is an appeal against a Ruling of the full Bench of the Industrial Relations Court dated 23rd July 2002, dismissing the appellant's appeal on the ground that the appellant's appeal to the full Bench was against an assessment of damages by the Deputy Registrar.

The facts relevant to the appeal before us are that on 29th March, 2000, the respondent, who had brought an action against the appellant to recover certain terminal benefits, obtained a Consent Order in which the appellant was,

among other orders, ordered to pay the balance of K55, 435,757. According to the Consent Order, this amount was to be paid on or before 31st (30th) April 2000; and thereafter to attract interest at 5% per day until full payment was made. This order was drawn by the appellant's advocates. From the record, it appears that at some date the appellant deposited the money with the Court in the Clients Account.

Subsequently, the respondent applied before the Deputy Registrar, for an order that the money deposited into the Client Account by the appellant be paid out to him. The Deputy Registrar ordered that the money involved, namely, K55, 433,757.00, be withdrawn from the Clients Account and be paid to the respondent. The appellant, at the time of hearing the application by the respondent, had also applied for an order for stay of execution of the Consent Order on the ground that the respondent was asking for interest on the amount of K55, 433,757 which amounted to K296, 570,299.95, worked out on the basis of the provisions of the Consent Order. The Deputy Registrar dismissed the respondent's claim for interest at 5% per day as contained in the Consent Order, thereby effectively altering the Consent Order of 29th March 2000.

The respondent appealed to the Deputy Chairperson of the Industrial Relations Court, sitting as a single Judge, against the Deputy Registrar's Order, altering the Consent Order of 29th March 2000. Among the grounds of appeal before the Deputy Chairperson of the Industrial Relations Court were: that the learned Deputy Registrar erred at law and fact to alter or amend his own order of 29th March 2000, when there was no application by either the applicant or the respondent to amend or to alter in any way, the order of 29th March 2000; and that the learned Deputy Registrar misdirected himself in both law and fact

to order that the applicant was not entitled to be paid interest pursuant to the Order of Court dated 29th March 2000.

In dealing with the appeal, the Deputy Chairperson observed that the record before the Deputy Registrar showed that his decision, dated 18th December 2000, was based on two applications heard simultaneously. One application related to payment out of Court, of certain monies; while the other application was seeking for an order to stay execution of the Consent Order in relation to the interest.

In concluding the matter, the Deputy Chairperson had this to say:

"I have considered this appeal carefully and in my view I have found it very difficult to support the findings of the Learned Deputy Registrar. In my considered view these orders made by the Deputy Registrar are not supported by any evidence that there were any applications made before him. Hence I find that these orders were unilaterally made by the Court and for the fore going I agree with the appellants learned Counsel Mr. Mandona that the Learned Deputy Registrar varied or amended the Order of 29th March 2000 without any applications to do so before him and I totally concur with Counsel for the appellant that such orders made are at variance with the Consent order of 29th March 2000 hence amount to reviewing the order of the Court of 29th March. This position does not prevail in this Court. Since there is no provision in the Industrial and Labour Relations Act for the Deputy Registrar to review his own orders I find it highly irregular for the Learned Deputy Registrar to do so and I accordingly allow this appeal. The ruling of

the Learned Deputy Registrar is set aside and the Consent Order of 29th March 2000 is restored accordingly."

The appellant, in these proceedings, appealed against the ruling of the Deputy Chairperson, sitting as a single Judge, to the full Court of the Industrial Relations Court.

The full Court took up the position that the appeal was against the assessment of damages by the learned Deputy Registrar and rejected attempts by Counsel for the appellant to impeach the Consent Order. The Court noted that the Consent Order that Counsel was impeaching was actually drawn by the appellant's Counsel. The appellant's Counsel before the full Court abandoned the argument attacking the Consent Order.

The full Court then considered the effect of a Consent Order and upheld the Consent Order of 29th March 2000 and ordered that interest, as per Consent Order, be paid. The appellant's appeal was dismissed, by the full Court, with costs. Hence the appeal to this Court.

The memorandum of appeal contains two grounds namely;

1. ***"That the Court below erred in law by failing to appreciate the issue of promissory estoppel created by the Respondent's refusal to accept payment pursuant to application to Set Aside the said consent Order, and***

2. ***That the Court below completely ignored the provisions of Section 6 of the Consent Order dated 29th March 2000 with***

respect to the Respondent's liability for failure to vacate the Company House he is currently in occupation, after the sum of K55, 443,757 was paid into Court,"

On behalf of the appellant, Mr. Cornhill filed written heads of argument augmented by brief submissions. The gist of the written and oral arguments on ground one centered, again, on attacking the Consent Order of 29th March, 2000, this time through arguments based on equitable principle of promissory estoppel. We do not propose to delve into the written heads of argument based on promissory estoppel because in the oral arguments, after hints from the Bench, Mr. Cornhill conceded that the best course Counsel should have taken when advocates of the respondent had rejected the amount of K55, 433,785, the amount should have been paid into the client's account with the Court. Mr. Cornhill, properly so in our view, abandoned the promissory estoppel arguments. Another reason for not delving into the arguments on promissory estoppel is the argument advanced by Mr. Chibundi that the issue was not raised in the lower Court. Suffice it to say that the appeal based on ground one fails.

On the second ground of appeal, Mr. Cornhill argued in the written heads of argument that the Court order of 29th March 2000 gave each party in the matter specific rights and obligations. These were for the appellant to pay K55, 433,757 by 31st April 2000, (This must have meant 30th April); and for the respondent to vacate the house after the 7th day of May 2000.

According to Counsel, the appellant paid the sum of K55, 433,757 into Court on the 15th August 2000; the respondent only vacated the house on 30th September 2002. Counsel submitted that since the principal sum of

K55,433,757 was fully paid as at 15th August 2000, the court erred in allowing the respondent to reside in the house until interest was paid. Counsel contended that the Court should have granted the appellant a set off for economic rentals from 15th August 2000 until the date the house was vacated. In the oral arguments, Mr. Cornhill argued that the awarding of interest at 5% per day was unlawful.

In the written arguments, Mr. Chibundi replied on ground two by arguing that the Consent Order was clear that the respondent should have vacated the house seven days after the 31st (30th) April 2000, upon full payment by the respondent; but since the full payment was not paid by 31st (30th) April, 2000, the amount started accruing interest and that the interest accrued as part of the full payment as a penalty for not paying on 31st (30th) April, 2000. In this connection, Counsel argued that the effective date for the respondent to have vacated the house was seven days after full payment of the principal sum plus the accrued interest.

We have considered the arguments on ground two. At the outset we must point out that the lower Court accepted that the order of 29th March, 2000 was a consent order. To complete the story, the order of 29th March, 2000 was couched as follows:

> ***UPON HEARING both counsel FOR the Complainant and the Respondent and UPON READING the affidavits filed herein***
> ***IT IS HEREBY ORDERED as follows:***
>
> 1. ***That the Order for Possession granted herein be and is hereby set aside and that the complainant's status quo be restored.***

2. *That the outstanding balance of K55, 433,757 be paid to the complainant less the following:*

   a) *the sum of K2,000,000 for water and electricity consumed on the premises as per outstanding bills.*

   b) *an amount that will be proved by the Respondent as a true and accurate value of any damage that the Complainant might have caused to the house.*

3. *That the outstanding balance of the sum of K55,433,757 shall be paid on or before the 31st day of April 2000 and thereafter attract interest at five per centum (5%) per day until full payment is made.*

4. *That the K7,063,149.55 rejected by the Complainant shall cease to be payable.*

5. *That costs are awarded to the Complainant.*

6. *That the Complainant vacates the said house seven days after the 31st day of April, 2000 upon full payment by the Respondent; that being the 7th day of May, 2000.*

DATED the ..... Day of March 2000.

.....

Hon. Deputy Registrar

In its judgment, the lower Court said:

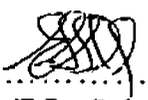
> ***"We cannot dwell so much, on the effect of consent order than Sir Jessel did. The consent order stands. The interest as agreed must be paid, that is when the complainant will vacate the house all outgoings like ZESCO AND water bills shall be paid by complainant. The Respondents cannot put premium on their default."***

On the facts on record, the Court was entitled to hold that the interest agreed must be paid. The question that the 5% interest awarded was unlawful did not, therefore, arise.

On the other hand, while we agree with the submission on behalf of the respondent that the consent judgment was clear on when the respondent was to vacate the house, namely seven days after 31st April (30thApril), 2000 upon full payment, it is not in dispute that full payment was not paid as envisaged. In the meantime, the respondent continued to occupy the house in issue without, according to the arguments, rentals being paid. The submission, as we understand it, was that the court should have granted the appellant a set off for economic rentals from 15th August, 2000 until the date the house was vacated. This submission anxiously exercised our minds. We consider that for whatever the reasons that caused the appellant to delay payment, there is merit in the argument and was well taken.

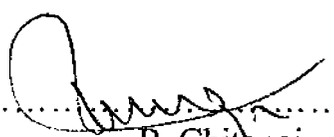
In our view, the appellant is entitled to a set off. But on the evidence before us, we cannot determine the amount of the set off. For that reason, we grant the parties liberty to apply before the Registrar of the Industrial Relations Court to determine the issue of the set off.

For avoidance of any doubt, ground one of appeal fails. On ground two, the appellant is partially successful in so far as it relates to a set off. In the result, the appeal is partially successful and partially unsuccessful. In the circumstances, we make no order as to costs.



E.L. Sakala
CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE



P. Chitengi
SUPREME COURT JUDGE