

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

SCZ No.8/14/2022

BETWEEN:

**OCCUPATIONAL HEALTH AND SAFETY
 INSTITUTE**

APPLICANT

AND

JAMES MATALIRO



RESPONDENT

CORAM: E. M. Hamaundu, JS

For the Applicant : Mr S.A.G. Twumasi, Messrs Kitwe Chambers

For the Respondent: Mr M. Mwachilenga, Messrs James & Doris
 Legal Practitioners

RULING

HAMAUNDU, JS delivered the Ruling of the court.

Cases referred to:

1. **Bidvest Foods Zambia Limited & Others v C.A.A. Import and Export Limited, Appeal No. 56 of 2017**
2. **Mususu Kalenga Building Limited v Richman Money Lenders Enterprises**
3. **Zinka v The Attorney General (1990-92) ZR 73**
4. **Zlatan Arnautovic v Stanbic Bank Zambia Limited, SCZ/08/14/2020**

Legislation referred to:

The Court of Appeal Act, No.7 of the Laws of Zambia, Section 13.

1.0 Introduction

- 1.1 The applicant, Occupational Health and Safety Institute, wishes to appeal against the judgment of the Court of Appeal. The applicant has come before a single judge of this Court after its application for leave to appeal was declined by the Court of Appeal.
- 1.2 The proposed appeal by the applicant is anchored on the following grounds of appeal:

- “1. The Court of Appeal of Zambia misdirected itself in law when it held that Rules 24(2) and 27 of the Legal Practitioners practice Rules, S.I. No. 51 of 2002 does not stop an advocate in private practice to also work for another institution or company either on full time or part time basis;**
- 2. The Court of Appeal of Zambia erred in law when it held that Rules 24(2) and 27 of the Legal Practitioners Practice Rules, S.I. No. 51 of 2002 does not prohibit a legal practitioner employed as in-house counsel from engaging in private practice;**
- 3. The Court of Appeal of Zambia erred in law and fact when it held that the Respondent was not required to cease or refrain from engaging in private practice upon his appointment;**
- 4. The Court of Appeal of Zambia misdirected itself in law and fact when it entered judgment in favour of the appellant against the Respondent without giving**

the Respondent sufficient opportunity of contesting the appeal on that ground”.

2.0 Background

2.1 I must at the outset lament the absence of the record of the originating documents in this action, including the judgment of the trial court. Hence, the only background that I can give is that which is given in the judgment of the Court of Appeal.

2.2 The background is this: At the material time, the respondent was in the employ of the applicant as its Board Secretary on a second fixed term contract of three years. The initial offer of employment on 23rd May, 2014 had stipulated that the respondent would be required to work for eight hours a day; from Monday to Friday between 08:00 hours and 17:00 hours, excluding holidays. The contract however was varied and signed by the respondent on 4th June, 2014. The varied contract did not require the respondent to be at the applicant's office for eight hours a day.

2.3 A dispute arose between the parties regarding payment of gratuity and a motor vehicle loan. It is not clear whether

this was with regard to the first contract or the second one. The respondent complained that he had been treated unfairly and differently from the way other fellow senior employees had been treated. It was his contention; that the applicant had failed to pay him the accrued gratuity; and that the applicant had also refused to buy him a motor vehicle and pay the corresponding allowances in accordance with the self-liquidating motor vehicle loan policy.

- 2.4 The respondent, accordingly, took out a complaint in the Industrial Relations Division of the High Court in 2019. His claims were: damages for breach of contract; payment of accrued gratuity; an order that the applicant buys a motor vehicle for him under the loan policy; an order that the applicant pays him the capital allowance under the loan policy in arrears from the time he was employed, or in the alternative, an order that the applicant pays him damages for loss of opportunity to earn allowances under the policy and to replace the personal motor vehicle that he had been using during the course of employment.

- 2.5 The applicant countered that the issue of the respondent's gratuity and motor vehicle had been referred to the office of the Attorney General. The applicant also took issue with the fact that the appellant had not been working for eight hours a day as was required by the original contract, and charged that the variation was done by the Board Chairperson without regard to laid down procedure. The applicant accused the respondent of some sort of complicity in the variation by not advising the Board Chairperson that the variation was contrary to procedure. The applicant, therefore, made a counter-claim for an order that the respondent's terms and conditions of employment be changed to that of a part-time employee as from the date the contract was varied; and also, that the gratuity be re-assessed on a part time employment basis.
- 2.6 The appellant replied that he had negotiated for the variation of the contract, and it was mutually agreed upon; and further that he could not have advised the applicant on the variation of the contract because, at that time, he was not an employee of the applicant.

3.0 The Trial Court's Decision

3.1 The learned trial judge, without making any findings of fact on the evidence that was adduced by the parties, and without addressing the issues that the parties had raised, focused his mind to the legality of the contract that the parties had entered into. The judge particularly looked at **Rules 24** and **27** of the **Legal Practitioners' Practice Rules** and held the view that, according to those provisions, a legal practitioner who is engaged in private practice cannot at the same time work as a full-time salaried employee of a company, or institution. The judge therefore held that the contract between the parties was illegal because it contravened the **Legal Practitioners' Practice Rules**. He accordingly, dismissed the claims and counter-claim.

4.0 Proceedings in the Court of Appeal

4.1 The respondent appealed to the Court of Appeal where the main issue was whether an interpretation of the two rules

in the **Legal Practitioners' Practice Rules** supported the view held by the trial judge.

- 4.2 The Court of Appeal disagreed with the trial judge, and held that the two rules did not prohibit a legal practitioner engaged in private practice from working for another institution, or company, on a full-time or part-time basis. Flowing from this view, the Court of Appeal found that the contract herein was not illegal, and allowed the appeal.
- 4.3 Having allowed the appeal, the appellate court proceeded, in rather summary fashion, to award the respondent the claims that he had made before the trial court.

5.0 The Arguments

- 5.1 Mr Twumasi, for the applicant has argued that this application meets the threshold set out in **Section 13** of the **Court of Appeal Act** in three respects: First, that the proposed appeal raises a point of law of public importance; secondly, that the proposed appeal will have a reasonable prospect of success; and, thirdly, that there is some other compelling reason for the appeal to be heard.

- 5.2 It is Mr Twumasi's submission that the case itself brought out the question whether an advocate who is engaged in private practice can at the same time be in full-time salaried employment in another organization, as a lawyer. According to counsel, this question affects all legal practitioners, as well as the Law Association of Zambia which oversees the conduct of Legal practice in this Country. Mr Twumasi argues that, although the case is of a private nature, the question itself has elevated the case into the public arena and has engaged broader public interest, as was said in the case of **Bidvest Foods Zambia Limited & Others v C.A.A. Import and Export Limited**⁽¹⁾. Counsel therefore submits that the proposed appeal raises a point of law of public importance.
- 5.3 Mr Twumasi has also argued that there is equally merit in the proposed appeal because; after deciding the question that was before it, the Court of Appeal went on to pronounce itself on the contractual obligations of the parties without affording the applicant a chance to argue on them. Counsel has pointed out that there was no

ground of appeal that was raised on the contractual obligations which would have enabled the applicant to argue them. It is Mr Twumasi's position that the approach by the Court of Appeal was wrong, and that for these reasons the proposed appeal has reasonable prospects of success; or there are compelling grounds for it to be heard. In support of these submissions, Mr Twumasi has referred to a number of authorities notably, among them, are the case of **Mususu Kalenga Building Limited v Richman Money Lenders Enterprises⁽²⁾** and also the case of **Zinka v The Attorney General⁽³⁾**.

- 5.4 The respondent's position is that the proposed grounds of appeal do not transcend the parties to the action because they merely deal with employment issues; and that, as far as the question that arose under the *Legal Practitioners Rules* is concerned, it does not need the intervention and interpretation of the Supreme Court because the provisions of the statute are already clear, and can adequately be dealt with by the Law Association of Zambia.

5.5 In support of this position, Mr Mwachilenga, counsel for the respondent has, in addition to the case of **Bidvest Foods Limited**, referred to other cases, which include the case of **Zlatan Arnautovic v Stanbic Bank Zambia Limited**⁽⁴⁾.

6.0 The Decision

6.1 **Section 13(3)** of the **Court of Appeal Act** provides:

“13 (3) The Court may grant leave to appeal where it considers that —

- (a) the appeal raises a point of law of public importance;
- (b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;
- (c) the appeal would have a reasonable prospect of success or;
- (d) there is some other compelling reason for the appeal to be heard”.

6.2 Now, the respondent, in opposing this application, contends that the question whether a legal practitioner can practice in private as well as be employed full-time by an organization as an advocate does not transcend the parties to this dispute. I do not think so. And the best demonstration of how the question is of wider application


is this case itself; This question was never raised by either party at the trial, it was introduced by the trial court in its judgment. Yet the question alone became the only issue on which the case was resolved, and on which the respondent lost its claim before the trial court. Until now, I have not heard of an advocate appearing before the courts of law wearing two hats; that is where in one instance an advocate appears before court to prosecute or defend a claim as in-house counsel for an organization; and the very next instant the same advocate appears before court to prosecute or defend a claim as counsel from a law firm in private practice. Of-course it was different where the full-time employment involved an occupation which is not regulated by the **Legal Practitioners Act**. I have in mind here the situation of lecturers at the University. So, the fact that there is a difference of opinion between the trial court and the Court of Appeal on this issue underscores the novelty of the question. It is my view, therefore, that the question is of public importance. I am sure that there are many legal practitioners out there who would like to

know the settled position on the question. On this ground alone I would say that the proposed appeal meets the threshold in **section 13(3)(a)**.

- 6.3 There is another point that the applicant has raised, namely that, by resolving the contractual obligations of the parties, the Court of Appeal denied the applicant the opportunity to be heard on them. I tend to agree with that argument because the trial court did not resolve them. In my view there were some issues which could only be resolved upon making findings of fact; and these findings of fact would only have been made by the trial court which had had the advantage of hearing the evidence and seeing the witnesses. Since the trial court did not do that, it would appear to me that once the Court of Appeal determined the question of the **Legal Practitioners Rules**, the better course of action would have been to refer it for re-trial. Therefore, I agree that the appeal also has a reasonable prospect of success, as set out in **Section 13(3)(c)**.

6.4 For the foregoing reasons, I find that the proposed appeal has met the threshold in **Section 13** of the **Court of Appeal Act**. Therefore, I grant the applicant leave to appeal. Costs shall be in the cause.

Dated the15th..... day ofJanuary.....2025



E. M. Hamaundu
SUPREME COURT JUDGE