IT

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 62/2014**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NDOLA ENERGY COMPANY LIMITED **APPELLANT**

AND

LAMAMUDA LIMITED **RESPONDENT**

Coram: Wood, Malila and Musonda, JJS.

On 5th October, 2016 and 25th January, 2017.

For the Appellant: *Mr. M. Sikaulu -Messrs SLM Legal Practitioners*

For the Respondent: *Mr. F. B. Muma - Messrs Chitabo Chiinga Associates*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases referred to:

1. *Mohamed S. Itowala v Variety Bureu De Change (2001) Z.R. 96*
2. *Robinson v Harman (1848) 1 Exch 850*
3. *Hadley v Baxendale (1854) 9 Exch 341*

Legislation referred to:

1. *Section 3 (2) of the Law Reform (Frustrated Contracts) Act Cap 73*
2. *Order 15 rule 2 of the High Court Rules Cap 27 of the Laws of Zambia*

Other works referred to:

1. *Halsbury's Laws of England 4th edition Volume 9 paragraphs 473,1174*
2. *Chitty on Contracts, General Principles 13th edition, paragraph 16-007*

This is an appeal against a decision of the High Court which awarded damages for breach of a labour supply contract.

The facts leading to this appeal are as follows. The appellant wanted to construct a power plant and site works at its project site in Ndola. It needed labour to undertake the project so it entered into a Memorandum of Agreement with the respondent which was in the business of providing suitably qualified labour. The Memorandum of Agreement was dated 31st August, 2011 but was with effect from 15th August, 2011 to 30th June, 2012. The respondent supplied labour to the appellant until 8th November, 2011 when the Zambia Environmental Management Agency ("ZEMA") halted the project due to the absence of an environmental

impact assessment report. On 28th March, 2012, the appellant entered into a contract with Yangts Jiang Limited to execute works at the site and to remedy any defects. Yangts Jiang Limited started construction in April, 2012. As a result, the respondent issued a writ on 12th July, 2012 claiming US$ 329,607.50 as representing the value of the remaining portion of the contract which had been discharged.

The appellant denied the claim and counterclaimed the sum of US$430,897.60 as the cost of doing the work again due to alleged poor workmanship by the labour supplied by the respondent. In its defence to the counterclaim, the respondent stated that the appellant's own engineers selected suitably qualified workers from the respondent and supervised them. The respondent could not as a result be held liable for the quality of workmanship of the labour it hired out to the appellant. The record shows that there was no dispute as to the report made by Mr. Anders Langhorn, a Marine and Power Plant Engineer who condemned the quality of the foundation works as being totally inadequate for the power plant that was designed for the project. He recommended that the

foundation works be razed down and a new contractor be awarded the tender to rebuild the whole project. The dispute according to Mr. Muma in the court below was whether the poor works were attributed to the workforce provided by the respondent.

After analyzing the evidence and submissions, the learned trial judge found that the only dispute before him was whether the Memorandum of Agreement contained provisions that made it ineffective and whether the sum claimed by the respondent had been proved. This finding was distilled from two contentious paragraphs contained in Clause 1 of the Memorandum of Agreement. The relevant parts of Clause 1 read as follows:

> 1. *Establishment of the Agreement*
>
> *"The Company agrees to hire certain specified labour of various skill classes and in various numbers from the Contractor on the further terms of this agreement.*
>
> *It is specifically agreed that this agreement shall in no way confer nor imply that an exclusive contract exists between The Parties."*

The learned trial judge held that the first paragraph merely expressed the appellant's right to hire labour from the respondent

and did not place an obligation on the appellant to hire only from the respondent. The agreement only became operational and binding once the appellant called upon the respondent to supply labour. While no labour from the respondent was in engagement, the appellant could hire labour from other providers. This did not nullify the agreement that the appellant had with the respondent. The second paragraph in Clause 1 just allowed the appellant to multi-source labour without excluding the respondent.

The learned trial judge also found that Clause 2 of the Memorandum of Agreement required the appellant to give notice of termination as completion or effluxion of time did not automatically bring the agreement to an end as it had to be terminated by the appellant. As a result, the appellant was still bound by the agreement even after the Zambia Environmental Management Agency had halted the works pending compliance with environmental impact assessments. The learned trial judge then found that the respondent had a legitimate expectation of continuing with the performance of the agreement. The fact that the labour force was not recalled was without a doubt a breach of the

agreement on the part of the appellant. The engagement of another contractor to do the works again did not terminate the agreement with respect to the labour hired from the respondent. This was because the condition precedent which was the period between March and 30th June, 2012 and the termination had not arisen. Further, the appellant's own witness admitted that the appellant did not terminate the agreement.

With regard to the second paragraph of Clause 1, the learned trial judge held that on a proper interpretation of the paragraph, it was clear that it unfettered the appellant from hiring any particular class or type of labour from the respondent. He therefore dismissed the appellant's defence that there was no agreement between the parties which had been breached by the appellant.

The learned trial judge found as a fact that in so far as the counterclaim was concerned, there was no dispute that the appellant incurred the amount it was claiming for the works that had earlier been done by the respondent's workers. What was in dispute was whether the respondent was responsible for the poor works before the Zambia Environmental Management Agency halted

the works. The court below found that the unskilled and technical labour provided by the respondent was to work under the direction of the appellant's engineers *"...who were the owners and interpreters of the project to ensure it was executed according to plan on the diagrams."* It was, therefore, wrong to attribute the substandard execution of the works to the labour hired from the respondent and ultimately any liability arising there from to the respondent. In addition, the hired labour was subject to directives from the appellant's agents which meant that the appellant reserved the power to send back any of the hired personnel to the respondent for unsatisfactory performance or failure to follow instructions. As a result, the learned trial judge dismissed the counterclaim with costs.

The appellant has now advanced four grounds of appeal against the judgment as follows:

"1. The Honourable court below erred in law and in fact when it held that the appellant breached the contract made with the respondent on 31st August, 2011 for the supply of labour.

2. *The learned trial judge erred in law and in fact when he awarded payment to the respondent for the period when the Zambia Environmental Management Agency (ZEMA) halted works on the construction site pending compliance by the appellant.*

3. *The learned trial judge misdirected himself in law and in fact when he awarded the plaintiff with payment of the equal sum of what the plaintiff would have received had the project not been halted by ZEMA being the period outstanding from the month of the contract to the estimated completion in 2012 when the plaintiff only pleaded for payment of the sum representing the value of the remaining portion of the contract which has been discharged.*

4. *The learned trial judge erred in law and in fact when he awarded payment to the plaintiff based on the period of the contract when the contract was for specific works and labour hired by the defendant."*

When this appeal was heard, Mr. Sikaulu relied on his heads of argument and stressed that in relation to the first ground the whole essence of this matter was that it was based on a labour contract. In terms of that contract, labour was to be provided as and when it was required for specific purposes such as the construction of a foundation or a roof. It was a need based contract. As such it could not be said to have been a breach if there

was no requirement for labour unless the specific job that was asked for was not complete. No evidence was produced in the court below to show specific jobs agreed and specific labour. What used to happen was that at the end of each month a detailed schedule laying out the hours worked was submitted to the appellant. The time period was merely the duration of the contract. Counsel then gave the example of how law firms are engaged for specific periods of time and for specific purposes. Counsel argued that this does not mean that a law firm can claim exclusive rights to all the work emanating from a particular client. When the project was suspended by ZEMA, no work was done for the duration of the suspension. It was therefore unjust and unconscionable for the court below to order payment during the period when no work was done when payment was based on work done and hours worked. The suspension by ZEMA in effect made it impossible to perform the contract during the period of the suspension. He further argued that the parties did not engage beyond March 2012. After the contract ended, the new company came on the scene. Reasonable expectation of the contract being performed was therefore only in

respect of uncompleted works the respondent was engaged in and not completion of the contract.

Mr. Muma on the other hand submitted that this was a contract for a specific period which was eight months of which three months had been paid for. The contract was up to 30th June, 2012. The respondents were not recalled after the contract was suspended by ZEMA and the respondent was therefore entitled to be paid damages during the period of the suspension.

It seems to us that the learned trial judge took the view that the agreement had been breached because another company had been engaged to carry on with the construction of the project. A closer reading of the Memorandum of Agreement reveals that although the parties had agreed generally that the respondent would supply labour, it was subject to a few terms and conditions. The first term was that the appellant would hire certain specified labour of various skill classes and in various numbers. The second term and condition was that it was not an exclusive contract between the parties as the appellant was at liberty to engage other parties although this was subject to the condition that after a two

months probationary period, specific works agreed to in writing could not be terminated. They had to be completed and paid for. The appellant could also terminate the agreement summarily if the works were substandard. The third term and condition was that the appellant was under no obligation *"...to hire certain specified labour."* The terms and conditions do not imply that the respondent was engaged to construct the whole power plant. The agreement was that the respondent would participate by providing labour as and when agreed by the appellant and the appellant would only be bound in a limited way once works had been agreed to in writing. The record of appeal does not show which particular works had been agreed to in writing and were later breached.

It is also evident from the judgment that the learned trial judge construed the Memorandum of Agreement in very broad terms. He held that the fact that the labour force was not recalled was without a doubt, a breach of the agreement on the part of the appellant. We do not agree with the trial court's conclusion in this regard. This was a non-exclusive contract and the appellant was at liberty to hire labour from other sources subject to agreed works.

The clause relating to the probationary period of two months in effect supports Mr. Sikaulu's argument that it was not a blanket agreement for labour but that labour was to be provided when it was needed for specific purposes. If the contract was that open for labour as was being suggested by Mr. Muma, then there would have been no need to make provision for the completion of a particular task prior to termination. We accordingly find merit in the first ground of appeal that the court below erred in law and in fact when it held that the appellant had breached the contract as the appellant was under no obligation to hire any particular type of labour from the respondent. The choice was absolutely within the discretion of the appellant as to what labour to hire, when or whether to hire or not. However, once labour was hired, the appellant was bound in terms of clause 2 and could not terminate the contract until the works indicated in writing were completed. There was no evidence before the court below of these works being undertaken during the existence of the contract which would have entitled the respondent to be in a position to claim that there was a breach of contract. The learned trial judge therefore fell into error when he held that *"...the labour force as well as the plaintiff had a*

legitimate expectation with the agreement performance ...." as the contract cannot be said to have been an indivisible whole. The learned authors of *Halsbury's Laws of England, Volume 9, 4th Edition*[1] state as follows in paragraph 473 on entire and divisible contracts:

"473. Entire and divisible contracts. ... Contracts are indivisible or entire when the consideration is one and entire; that is where, on the proper construction of the contract, no consideration is to pass from one party unless and until the whole of the obligations of the other party have been performed. Thus a party who has not completely performed cannot demand performance by the other party. If no such intention is to be gathered and the contract resolves itself into a number of considerations for a number of acts (as, for example, in the case of a contract to deliver goods by instalments, the price being fixed per item or per instalment) the contract may be divisible (or alternatively it may constitute a series of separate contracts). If the contract is divisible the right to demand performance of the other party's obligations (for example, payment) arises as each part of the contract is performed and where there has been partial performance a proportionate part of the other party's performance may be demanded."

The respondent in this matter was being paid for specific works agreed upon and performed and as such the learned trial judge fell into error when he held that there was a legitimate expectation of continuing with the agreement. The contract might as well have continued and the expectation kept alive but this expectation only lay in the labour supplier's hope that its labour would be required and called upon. We must also state here that the doctrine of legitimate expectation is associated with a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. It should not be extended to private individuals to a contract as a basis for awarding damages for breach as was the case in the court below. The first ground accordingly succeeds.

The second ground of appeal is against the award of the payment to the respondent during the period when ZEMA halted works on the construction site pending compliance by the appellant. We have no difficulty with agreeing with Mr. Sikaulu that such payment amounts to enforcing an illegality as the contract could not be performed without obtaining prior approval to

do so. The learned authors of *Chitty on Contracts, General Principles 13th edition, paragraph 16-007*[2] have explained as follows:

"...where a contract is illegal as formed,... the courts will not enforce the contract, or provide any other remedies arising out of the contract... No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa... there the court says he has no right to be assisted..." This principle was endorsed by this court in the case of *Mohamed S. Itowala v Variety Bureau De Change*[1] in which we held that:

> *"A party cannot sue upon a contract if both 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."*

The parties had also agreed in clause 11 of the Memorandum of Agreement to sever from the agreement any portion which contravened the Laws of Zambia. Quite clearly the learned trial judge fell into error when he awarded the respondent damages for breach of contract during the period when the suspension was in effect. We therefore allow this ground of appeal.

The record of appeal shows that the parties agreed in the Memorandum of Agreement that the respondent would charge *"... a rate per class of technical personnel deployed by it, at the company's specific, written request"* in accordance with a schedule attached to the Memorandum of Agreement. The schedule shows the personnel to be hired, their basic rates, housing, transport, mark up, NAPSA, Medical, Workmens Compensation, leave pay and gratuity. The summary for the payments in the record of appeal simply shows ball park figures opposite the various groups of personnel. There is no indication of the total number of personnel or a breakdown of how the various figures were arrived at to make up the totals for the months of April, May and June 2012. These summaries are not sufficient in our view for meeting the threshold of proving the respondent's claim because they are devoid of any supporting documents such as NAPSA or Workmens Compensation schedules of employees or the number of leave days. The Memorandum of Agreement stipulates in clause 5 the need for a schedule *"...detailing the cost of each of the type of personnel, the hours worked and allowances extended..."* The summaries in the record of appeal do not comply with what the parties had agreed upon. We

have consistently stated that a party needs to prove its claim before it can become entitled to judgment. In their present form, the figures do not prove the claim of US$329,607.50.

We note from the record of appeal that according to the Memorandum of Agreement, the contract was to run from 15th August, 2011 up until 30th June, 2012. We also note that ZEMA suspended works from 8th November, 2011 to about April, 2012. The record also shows that the appellant entered into a contract with Yangts Jiang Limited on 28th March, 2012 to execute works and remedy defects relating to the project. At the time of the signing of the contract with Yangts Jiang Limited, the labour contract with the respondent had three months remaining. Langson Mulenga told the court below in his evidence- in- chief that the sum of US$329,607.50 the respondent was claiming was for the period December, 2011 to January, 2012. This was the period when the ZEMA had suspended operations. The learned trial judge agreed with the respondent and held as follows:

> *"With respect to the plaintiff's claim, I uphold it and order that a sum equivalent to what the plaintiff would have received had the project not been halted by the Zambia Environmental Management Agency*

be paid from the date works resumed for a period of five months, which is the period outstanding from the month of the contract to the estimated completion in March, 2012."

It is quite clear from the above holding that the learned trial judge had awarded the respondent what it had not claimed in its pleadings. Paragraphs 15 and 16 of the statement of claim state as follows:

"15. Contrary to the foregoing express stipulations in the contract, the defendant has not after resumption of works at the site called upon the plaintiff to supply it labour for the works on site.

16. By reason of the said breach the plaintiff has suffered loss amounting to US$329,607.50 representing the value of the remaining portion of the contract which has been discharged.

AND THE PLAINTIFF CLAIMS

(i) The sum of US$ 329,607.50..."

It is implicit in paragraph 15 that the respondent did not wish to claim for the period during which the project was suspended by ZEMA. The respondent is instead claiming from the date the works were resumed. Paragraph 16 is quite specific as it states that the sum of US$329,607.50 represented the remaining portion of the

contract which had been discharged. When a contract is discharged on grounds of frustration (which is essentially what transpired in this matter, but was not argued or pleaded in the court below), section 3 (2) of the Law Reform (Frustrated Contracts) Act, Cap 73[1] stipulates that a party should not be paid beyond the date of the discharge. Judgment was therefore not only obtained in excess of the amount pleaded which is contrary to Order 15 rule 2 of the High Court Rules, Cap. 27[2] which states that judgment cannot be obtained for any sum exceeding that stated in the particulars, except for subsequent interest and the costs of suit, but was also contrary to section 3(2) of the Law Reform (Frustrated Contracts) Act.

We do not agree with Mr. Muma's interpretation of clause 2 of the Memorandum of Agreement that the contract bound the appellant wholly for a period of eight months because the contract alludes to the parties agreeing to various works to being carried out subject to the parties agreeing in writing. We also do not agree with Mr. Muma's argument in connection with the illegality of the contract. He took the view that the intervention by the ZEMA had nothing to do with the contract for the supply of labour by the

respondent to the appellant. He argued that the illegality that must affect a contract must be within the contract itself and in this case there was no illegality whatsoever in the contract between the parties for the supply of labour. What Mr. Muma does not seem to address is the frustrating event caused by the statutory requirement to obtain requisite approval from ZEMA. The parties could not contract outside the statute which they were subject to. We find merit in this ground of appeal and allow it as well.

The fourth ground of appeal attacks the payment to the respondent which was based on the period of the contract when the contract was for specific works and labour hired by the appellant. Mr. Sikaulu argued that the learned trial judge departed from the general legal principles of awarding payment where it is alleged that there was breach of contract resulting in loss by the respondent. He contended that having held that there was breach of contract, the learned trial judge should have awarded payment with due regard to the specific work contracted to be done by the labour supplied by the respondent. He relied on paragraph 3 of clause 2 of the Memorandum of Agreement and argued that the respondent

should have adduced evidence to show that there were works outstanding to be performed by the labour it supplied since it was not contracted to construct the entire power plant. In this way, the appellant would have been liable only to the extent of the unfinished works specified to be performed by the workers. Mr. Sikaulu cited a number of useful authorities in support of his argument. The first one is paragraph 1174 of Volume 9 of Halsbury's Laws of England, 4th edition[1]. The relevant part states that *"... in cases of breach of contract, the contract breaker is responsible and responsible only for resultant damage which he ought to have forseen or contemplated when the contract was made as being unlikely."* The injured party under the contract should only financially recover that which ought to have been due to him had the breach occurred. In *Robinson v Harman*[2] it was held that *"... the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."* In *Hadley v Baxendale*[3] , the Court of Exchequer held that *"... Where two parties have made a contract which one of them has broken, the damages which the other party*

ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally."

We agree with the argument by Mr. Sikaulu that the learned trial judge awarded damages under circumstances which did not warrant such redress because no specific work which had been agreed to in writing was performed by the respondent.

The net result is that the appeal is allowed and the judgment of the court below is set aside with costs to the appellant both here and in the court below. The costs are to be agreed or taxed in default of agreement.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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M.C. MUSONDA, SC
SUPREME COURT JUDGE