IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 154/2022**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JONATHAN BANDA & 102 OTHERS **APPELLANTS**

AND

RAINBOW INVESTMENTS LIMITED **1ST RESPONDENT**
ZALAWI HAULAGE LIMITED **2ND RESPONDENT**

CORAM: ***NGULUBE, MUZENGA AND CHEMBE, JJA.***

On 27th March, 2024 and 9th April, 2024.

For the Appellants: *No appearance*

For the Respondent: *Ms. M. Mutambo – Mesdames Theotis Mutemi Legal Practitioners*

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Stevenson, Jordan Harrison Limited vs MacDonald and Evans [1952] 1 TLR 101*
2. *Market Investigations Limited vs Minister of Social Security [1969] 2 QB 173*
3. *Collins vs Hertfordshire [1947] KB 598*

4. *Holmes Limited vs Buildwell Construction Company Limited (1973) Z.R. 97*
5. *National Drug Company Limited & Zambia Privatisation Company vs Mary Katongo SCZ Appeal No. 79 of 2001*
6. *Ringford Habwanda vs Zambian Breweries Plc (2012) Vo. 3 Z.R. 75*
7. *Friday Mwamba vs Sylvester Ntenge & Others SCZ Appeal No. 174 of 2010*
8. *Riverbed Limited vs Wycliffe Kasuni - Appeal No. 210/2019.*
9. *Vitol SA vs Norelf Limited (The Santa Clare) [1996] A.C. 800*
10. *Pickard vs Sears (1842) 2 Ex. 654*
11. *Re C.W. & A.L. Hughes Limited [1966] 2 All ER 702*
12. *Melise Lubanda & 72 Others vs Pierson Mwale, Zambia Consolidated Copper Mines & Others - SCZ Appeal No. 84 of 2011*
13. *Nsama & Others vs Zambia Telecommunications Company Limited - SCZ Appeal No. 21/2012*
14. *The Attorney General vs David Lubuwa & 49 Others - Appeal No. 06/2014*
15. *Ford vs Beach [1848] 11 BC, 852*
16. *Premish Bhai Megan Patel vs Rephidim Institute (2011) Vol. 1 Z.R. 134 (S.C.)*

Other works referred to:

1. *Halsbury's Laws of England, Volume 16, 4th Edition.*
2. *Chitty on Contracts, Vol. 2, 29th Edition, Sweet & Maxwell*
3. *P. Matibini, Zambian Civil procedure: Commentary and Cases, Lexis Nexis Vol. 2, 2017*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of the Honourable Justice M. M. Kondolo, High Court Judge (as he then was), delivered on 13th December 2021, in which the Court found that the appellants were not employees of the respondents but independent contractors subcontracted for a specific service.

2.0 BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 The background to the matter is that the appellants (the plaintiffs in the Court below) commenced the matter in the High Court by way of Writ of Summons and Statement of Claim, seeking the following reliefs-

i. ***A declaration that the appellants were employees of the respondents from the time that they signed the said contracts with the respondents, which were synonymous to employment contracts, and as such entitled to all rights and benefits of employment, as pensionable employees;***

ii. ***Amounts owed to the appellants in terms of gratuity and leave that the plaintiffs worked for the defendant and the officer contrast;***

iii. ***Amounts owed to the appellants in terms of pension benefits for contributions made to NAPSA by the***

appellants during the periods of employment with the respondents;

iv. ***Amounts owed to the appellants in terms of toll gate fees which amounts were never paid back to the appellants but to which VAT refunds the respondents enjoyed in South Africa;***

v. ***Amounts owed to the appellants in terms of risk allowance paid to the respondents by mining companies on the Copperbelt, which amounts were received by the respondents but never paid to the appellants;***

vi. ***Any relief the Court may deem fit;***

vii. ***Interests on all amounts; and***

viii. ***Costs.***

2.2 The appellants contended that the respondents employed them as subcontractors on diverse dates from 1993 to 2006, to transport goods to various destinations between Zambia and South Africa. That the contract between the parties covered various issues which were synonymous to employment contracts such as remuneration, which depended on the destinations travelled by the appellants. The contracts were negotiated between the respondents and the appellants in their own individual rights.

2.3 It was contended further that the appellants were not treated as employees, despite the fact that the respondents paid taxes and

made pension contributions to the National Pension Scheme Authority (NAPSA). The appellants contended that there were under the control of the respondents and their terms and conditions of service were in line with any contract of employment.

2.4 The appellants contended that on 24th January 2007, the Labour Commissioner declared that the appellants were in fact employees of the respondents and were therefore entitled to other perks of an employee on pensionable terms. That this resulted in the appellants entering into contracts of employment with the respondent companies in July 2007. The contracts now provided for among other things standard remuneration, leave entitlement, gratuity and medical schemes. That prior to July 2007, the appellants were never given any benefits or entitlements such as salary and gratuity by the respondents.

2.5 The respondents on the other hand contended that the appellants were subcontractors and not employees until the appellants' union negotiated for employment contracts and the collective agreement was signed. It was contended that the subcontracts were open-ended, had no duration, and the terms provided for were not exclusive to employment contracts.

2.6 The respondents contended further that they never paid taxes or made pension contributions for the appellants until they were directed to do so by the Zambia Revenue Authority (ZRA) and National Pension Scheme Authority (NAPSA) respectively. That the appellants were not under the respondents' control as the respondents had no control over the duration of the trips. That there was no basis for the Labour Commissioner finding that the appellants were employees of the respondents. The appellants were not entitled to any benefits, gratuity or salary as they were engaged as independent contractors.

2.7 The appellants' evidence at the trial was that the respondents would give each appellant a worksheet which would show how much each of them would be paid after a trip. That the appellants would pay the toll fees with their own money and would submit the receipts for refund in South Africa. There was a protest by the appellants as to the status of the employment since their first engagement with the respondents. That the Ministry of labour got involved in the dispute and the Labour Commissioner determined that the appellants were not independent contractors of the respondents but employees.

2.8 The appellants contended that they were not paid any salary from 1999 when they were engaged by the respondents until June 2007. They were paid trip allowances for each trip, but payments was erratic. The appellants undertook three to four trips per month and were required to report for work each day in between the trips where they were given different tasks.

2.9 The appellants contended that the conditions of service enjoyed from 2007 should be applied to all their years of service with the respondents before the collective agreement was signed.

2.10 The respondents' evidence at trial was that prior to 2007, the appellants were not employees of the respondents but were independent contractors to transport goods on their behalf. That however, the respondents subsequently entered into employment contracts with the appellants. That previously, each appellant was remunerated after making four trips and withholding tax was paid to ZRA on the payments.

2.11 The respondents contended that in the year 2000, ZRA approached the respondents and instructed them to deduct a fixed rate of tax that would be paid through the Pay As You Earn (PAYE) system effective March 2000. However, the PAYE system had a number of tax bands which did not apply to the appellants. That NAPSA also

asked the respondents to make pension contributions for all subcontractors.

2.12 The respondents' further evidence was that when they received the letter from the Labour Commissioner, they entered into a collective agreement and into contracts of employment with the appellants. That there were no dues owed to the appellants because they were remunerated in full in accordance with the contracts entered into as subcontractors.

3.0 DECISION OF THE LOWER COURT

3.1 The lower Court considered the evidence before it and came to the conclusion that it was clear that the appellants were engaged by the respondents as subcontractors and voluntarily entered into the contracts prior to 2007. The lower Court noted that the appellants worked for a long time without protest until 2007 when the Labour Commissioner was involved in the dispute. The lower Court found that the appellants did not dispute the contents of their earlier contracts but contended that the contents misrepresented what they understood it to mean.

3.2 The lower Court concluded that there was nothing on the record that suggested that the appellants misunderstood the nature of the

initial contracts they entered into. That despite the appellants alleging that they were promised a salary, they did not produce any evidence of how much the purported salary would be or on what date it was expected to be paid. The Court below also found that it was never intended that the respondents would pay the appellants a monthly salary and the appellants did not expect it.

3.3 The Court further noted that the earlier contracts entered into by the appellants, did to a large extent resemble an employer-employee relationship but the clear intention of the parties must override all considerations. The contracts were therefore binding on all the parties and no extrinsic evidence could be admitted to challenge the validity and purpose of the contract. The Court went on to dismiss the appellants' claims with costs.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment of the lower Court, the appellants launched this appeal, advancing the following four grounds-

1. ***The learned trial Judge erred in law and fact when he failed and/or neglected to find that the appellants and the respondents were indeed and in fact in an employer-employee relationship after finding as a matter of fact that the respondents owned the tools of work (trucks), provided instructions and directed the work of the appellants in***

form of worksheets , paid the appellants remuneration per trip, and required the appellants to report for work even when they had no trips as shown by the respondents' own evidence at page J18, paragraph 2 of the Judgment of the Court below;

2. ***The trial Judge erred in law when he held that the true intentions of the parties, signing contractors as independent contractors should override all other considerations when the learned trial Judge found as a matter of fact that the situation on the ground to a large extent resembled an employer-employee relationship as per page J49 paragraph 1 of the Judgment;***
3. ***The learned trial Judge erred in law and in fact when he failed and/or neglected to admit extrinsic evidence to show the true nature of the relationship between the appellants and the respondents even in the presence of evidence of the respondents withholding the signed contracts from the appellants and failing to explain the contracts to the appellants who were not given a chance to read the contracts; and findings of ZRA, NAPSA and the Department of Labour; and***
4. ***The learned trial Judge erred in law and in fact when he held that the appellants were disentitled of the rights under the existing employer-employee relationship on account only of their want of protest after having worked for what the learned trial Judge deemed to be a long time, and on account of the appellants not having taken action***

to terminate or otherwise rescind or repudiate the contracts.

5.0 THE ARGUMENTS

5.1 Both parties filed heads of argument which they relied on at the hearing. In support of ground one, Counsel for the appellants posited that in determining whether there was an employer-employee relationship, a lot of factors need to be taken into account, such as who owns the tools of work, the employer's degree of control, integration of the employee in operations, payment of fixed remuneration, arrangements for payment of statutory obligations and consistency and terms of the relationship. In support of this argument, we were referred to the ***Halsbury's Laws of England, Volume 16, paragraph 3.***

5.2 Counsel submitted that these factors are visible from the facts of this case and therefore the Court should have found that there was an employer-employee relationship between the parties. To buttress this argument further, we were referred to the case of ***Stevenson, Jordan Harrison Limited vs MacDonald and Evans,[1] Market Investigations Limited vs Minister of Social Security[2]*** and ***Collins vs Hertfordshire County Council[3]*** where a contract of

service was distinguished with a contract for services and/or a contract for independent contractors.

5.3 It was argued further that there was no evidence to suggest that the appellants were engaged in a business of their own but that they worked according to the terms of the worksheet provided by the respondents. We were urged to find that the mere fact of construction of the purported contracts is not decisive of the relationship that existed between the parties.

5.4 In support of grounds two and three, Counsel argued that there were enough grounds upon which the trial Judge could have found that the contract signed between the parties did not bring to the fore, the true nature of the agreement.

5.5 That some of these factors included the fact that the nature of the agreement was substantially and materially different from the apparent intentions of the parties, and the findings of ZRA and NAPSA. Reference was made to the case of ***Holmes Limited vs Buildwell Construction Company Limited***[4] where it was held that it is a general principle of law that extrinsic evidence is not admissible to vary, add or subtract the terms of a written contract. Reference was also made to the case ***National Drug Company Limited & Zambia Privatisation Company vs Mary Katongo***[5]

where it was held that parties are bound by the terms of a contract which they enter into freely and voluntarily. Reference was further made to various other cases which discuss the principle of extrinsic evidence in relation to written contracts, such as ***Ringford Habwanda vs Zambian Breweries Plc,***[6] ***Friday Mwamba vs Sylvester Ntenge & Others,***[7] and ***Riverbed Limited vs Wycliffe Kasuni.***[8]

5.6 It was submitted in support of ground four that the lower Court erred when it held that the appellants were not entitled to rights under an employer-employee relationship because they did not take action to terminate, rescind otherwise terminate their contracts. It was argued that silence or inaction with regard to legal rights cannot constitute acceptance. To support this argument, Counsel referred to the cases of ***Vitol SA vs Norelf Limited (The Santa Clare)***[9] and ***Pickard vs Sears.***[10]

5.7 It was argued that by their own conduct, the respondents treated the appellants synonymously to employees under a contract of employment by remunerating them per trip, requiring them to report for work and performed an integral part of the business.

5.8 We were urged to find that the appellants cannot lose their rights by mere fact that they did not protest against the perceived relationship with the respondents.

5.9 In response to ground one of the appeal, Counsel for the respondents submitted that the appellants' appeal seems to be anchored on three (3) issues, namely: the tools of work; provision of instructions and direction of work; and remuneration.

5.10 With regard to the issue of tools of work, it was submitted that it is one of the several factors to be considered in determining an employment relationship. That however, identification of the tools alone is not conclusive determination of the existence of the employment relationship. By way of an example, reference was made to ***Re C.W. & A.L. Hughes Limited***[11] to argue that there can be labour only subcontractors.

5.11 The lower Court noted that the appellants were engaged for a specific purpose of driving the respondents' trucks. That even though the trucks were owned by the respondents, this was not indicative of an employment relationship.

5.12 With regard to provision of instructions for work, the case of ***Collins vs Hertfordshire County Council*** (supra) was relied on where it was held that the distinguishing feature of a contract of service is

that the master cannot only order or require what is to be done but also how it shall be done. It was accordingly argued that as per the testimony of DW2, the appellants were not under the full control of the respondents but would come and go as they pleased. That further, the contracts did not specify the number of hours to be worked per day or the time of reporting for work.

5.13 With regard to remuneration, it was argued that this is an important element of a contract of service as stated that the learned authors of ***Chitty on Contracts, Vol. 2, 29th Edition*** at page 949. We were referred to the case of ***Melise Lubanda & 72 Others vs Pierson Mwale, Zambia Consolidated Copper Mines & Others***[12] where the Supreme Court of Zambia held that a relationship of employment must have been created formally or informally which obliges the employer to pay wages and meet all other conditions attendant to that relationship.

5.14 It was submitted that the lower Court's finding that the appellants did not produce any evidence that they were promised a monthly salary was supported by PW1's evidence who admitted that remuneration was paid after completion of each journey.

5.15 In response to grounds two and three, it was submitted that the expressly agreed terms must override all other considerations

because the Court is charged with the responsibility of upholding sanctity of contract. We were referred to the learned author of ***Zambian Civil procedure: Commentary and Cases, Vo. 2 at page 1067*** where it is stated that-

> ***"When a transaction has been reduced to or recorded in writing, either by requirement of law or agreement of the parties, the writing becomes, in general, the exclusive record thereof, and no evidence may be given to prove the terms of the transaction."***

5.16 We were also referred to the case of ***Friday Mwamba vs Sylvester Ntenge (supra)*** where the Supreme Court quoted a text from ***McKendricks Contract Law, 3rd Edition, page 3*** where it is stated that freedom of contract and sanctity of contract are the dominant ideologies and parties should be as free as possible to make agreements on their own terms without interference of the Courts or Parliament.

5.17 Further, reference was made to the case of ***Nsama & Others vs Zambia Telecommunications Company Limited[12]*** where the Supreme Court of Zambia held that-

> ***"...the Court does not make contracts for the parties. The Court will not even improve the contract which the parties have made for themselves, however desirable the***

improvement might be. The Court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the Court thinks some other terms would have been more suitable."

5.18 In response to ground four, Counsel relied on the case of ***The Attorney General vs David Lubuwa & 49 Others***[14] to argue that the appellants acquiesced to their wages since they continued working for a long time without taking action to terminate or repudiate their contracts.

6.0 THIS COURT'S DECISION

6.1 We have carefully considered the record of appeal, the grounds of appeal and the Judgment appealed against. The core of this appeal is centred on the lower Court's finding that there was no employment relationship between the parties.

6.2 However, we have sifted through the issues raised before us and we are of the considered view that the real issue which this Court needs to determine is whether, following the Labour Commissioner's finding and the subsequent re-engagement of the appellants as employees of the respondent in 2007, they should

also be considered as employees of the respondent from the dates of their initial engagement so as to entitle them to all the benefits of employees.

6.3 To resolve this dispute, we need to consider what was agreed between the parties, because whatever relationship subsisted between the parties, is not exempt from the general principles of contract. Therefore, the contract between the parties must be interpreted as any other contract.

6.4 We are persuaded in this regard by the case of ***Ford vs Beach***[15] where it was held that-

> ***"The common and universal principles ought to be applied; namely that (an agreement) ought to receive the construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent."***

6.5 As stated in the above authority, greater regard should be had to the clear intention of the parties than to particular words used.

6.6 There was no dispute that in their initial contracts of engagement prior to 2007, the appellants were engaged as independent

subcontractors for the respondents. Further the evidence on record suggests that the appellants entered into these contracts freely and voluntarily. There is no evidence on record to suggest that the intention of the parties was to engage the appellants as employees. This is because, as correctly pointed out by the lower Court, the appellants accepted their contracts and continued to work for the respondents for many years before the Labour Commissioner resolved the dispute and contracts of employment were signed.

6.7 It is clear from the record that the terms of engagement of the appellants as truck drivers were provided for in writing. The trial Court accepted the evidence of the appellants that their contracts of employment were similar to that of Edward Musonda shown on page 93 of the record of appeal. Clause 11 of the said contract provided that ***"This agreement shall not be construed as an employment contract and the Sub-Contractor accepts that he is not an employee of the Contractor."***

6.8 This clause in our view, expressed the intentions of the parties and there was no evidence to the contrary to show that the appellants did not understand the terms of the above clause in their initial contracts.

6.9 In the case of ***National Drug Company Limited & Zambia Privatisation Agency vs Mary Katongo (supra),*** the Supreme Court of Zambia guided that-

> ***"It is trite law that once parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it, by respecting, upholding and enforcing the contract."***

6.10 Accordingly, we are of the firm view that the appellants are bound by the terms they agreed to in their initial contracts.

6.11 The appellants contended that the lower Court erred by not admitting forensic evidence to show the true nature of the relationship between the parties. It is trite that extrinsic evidence is generally not admissible unless it is shown that the agreement did not incorporate all the terms of the contract. We are fortified by the case of ***Premish Bhai Megan Patel vs Rephidim Institute***[16] where the Supreme Court stated that-

> ***"Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties before or after execution of the contract, where it is shown that the agreement was not intended to incorporate all the terms and conditions of the contract."***

6.12 From the foregoing authority, extrinsic evidence can only be admitted when it is shown that the written agreement did not intend to incorporate all the terms and conditions of the contract. In this regard, the lower Court found that there was insufficient reason to allow the Court to admit extrinsic evidence to challenge the validity or purpose of the contract. We do not find fault with the finding of the lower Court. This is because, we find no evidence on the record to suggest that the agreement entered into did not intend to incorporate all the terms and conditions.

7.0 CONCLUSION

7.1 In view of the foregoing, this appeal lacks merit and it is accordingly dismissed. Costs shall be for the respondents, to be taxed in default of agreement.

P. C. M. NGULUBE
COURT OF APPEAL JUDGE

K. MUZENGA
COURT OF APPEAL JUDGE

Y. CHEMBE
COURT OF APPEAL JUDGE