SAM AMOS MUMBA v ZAMBIA FISHERIES AND FISH MARKETING CORPORATION LIMITED (1980) Z.R. 135 (H.C.)

HIGH COURT
SAKALA, J.

4TH MAY, 1979
1978/HP/502

Flynote

Contract - Written contract - Extrinsic evidence - Whether admissible in evidence.
Employment - Contract of service - Directives from Government altering terms of existing contract - Whether frustration of contract.
Contract - Frustration - Government directives - Whether frustrates and terminates contracts of employment.

Headnote

The plaintiff's claim is for damages for breach of contract of employment entered into between him and the defendant company. The plaintiff was a company secretary. At the trial he produced a written contract and in addition a letter written by him which he claimed to be part of the contract. This letter was contested by the defendant company. The plaintiff claimed that the conditions of employment he had been offered were altered and some of them not fulfilled at all. The defendant company pleaded frustration, contending that the plaintiff's conditions of service

were altered as a result of the Mwanakatwe Salaries Commission followed by a Government white paper which directed that all salaries of permanent employees were to be within the Government's recommendations. The plaintiff challenged the implementation of these recommendations as unlawful and a breach of his contract of employment.

Held:

(i) Where the parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions.

(ii) A subsequent change in the law or in the legal position affecting a contract is a well recognised head of frustration. At common law, the occurrence of a frustrating event terminates the contract forthwith.

(iii) The Government directives to the defendant company were a frustrating event and put an end to the contract between the parties.

Cases referred to :

(1) Mercantile Bank of Sydney v The Taylor [1893] A.C. 317.
(2) Davis Contractors Ltd v Fareham Urban District Council [1956] A.C. 696.
(3) British Movietonews Ltd v London and District Cinemas [1952] A.C. 166.
(4) Hirji Mulji v Cheong Yue Steamship Co., [1926] A.C. 497.
(5) Fribrosa Spolka Akcyjna v Hairbairn Lawson Combe Barbour Ltd.[1943] A.C. 32.

For the plaintiff: S. A. Mumba, Mumba and Company.

For the defendant: H. H. Ndhlovu, Jacques and Partners.

Judgment

SAKALA, J.:

The plaintiff's claim is for damages for breach of contract of employment entered into between him and the defendant in August, 1975.

In the amended statement of claim the plaintiff pleaded that he is and was at all material times the company secretary of the defendant company. On the 1st September, 1974, the defendant offered him a post of a company secretary which he accepted and a binding contract of employment was entered into. Paragraphs (4) and (5) of the statement of claim read as follows:

"4. The salary, conditions of service and fringe benefits accruing from the Defendant to the Plaintiff under the contract of employment were as follows:

(a) Salary: K8,500.00 per annum;
(b) Entertainment allowance: K1,200.00 per annum;
(c) Transport: Free Fiat 132s for official and personal use;

(d) Housing: Free and furnished;
(e) Leave: 6 working weeks per annum;
(f) Housing allowance: 20 per cent of basic salary;
(g) Medical Aid Scheme: Membership of Lusaka Nursing Home.

5. The Defendant has, unlawfully and in breach of the contract of employment made the following changes to the salary, conditions of service and fringe benefits enjoyed by the plaintiff:

(a) Salary: Reduced to K8,230.00 per annum;
(b) Entertainment Allowance: Completely withdrawn;
(c) Transport: Completely withdrawn;
(d) Housing: Rent at 10 per cent of salary but furniture completely withdrawn;
(e) Housing allowance: Completely withdrawn;
(f) Leave: Reduced to 36 days annually;
(g) Medical Aid Scheme: Completely withdrawn."

The plaintiff contends that by these matters, he has suffered loss and damages. The statement of defence does not dispute that the plaintiff is and was at the material time the company secretary of the defendant company. The contract of employment is admitted but that the plaintiff was employed at a salary of K7,200 per annum from 1st September, 1974, to March, 1975. Paragraphs (3):and (4) of the defence read as follows:

"3. The defendant admits paragraph 4 of the plaintiff's statement of claim save as follows:

(a) The salary was K7,200 per annum and not K8,500 as stated in the plaintiff's statement of claim;
(b) There was no Medical Aid Scheme;

(c) Housing though furnished was not free;

(d) Housing allowance was only given to officers not occupying company houses and not to plaintiff who occupied company house;

(e) The plaintiff was not entitled to free transport as shown in paragraph 4 (c) or at all;

(f) The plaintiff was, not entitled to an entertainment allowance under contract of employment.

4. The defendant denies paragraph 5 of the plaintiff's statement of claim and will further state that in effecting changes to the plaintiff's conditions of service it was not in breach of contract but was merely implementing a public or government policy pronouncement regarding the rationalisation of salary structures in the Civil Service and Parastatal Organisations as recommended by Mwanakatwe Commission."

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In the alternative, the defendant company pleads that the contract of employment was frustrated by the Government's action or decision to rationalise salaries.

The plaintiff gave evidence in support of his claim. Mr Jonas Bernard Mubanga testified on behalf of the defendant. The plaintiffs oral evidence was in substance a repetition of what he pleaded in his statement of claim. But testified further that he entered into a contract of employment with the defendant company on the 1st September, 1974. A ZIMCO contract for permanent and pensionable employment was signed. He outlined the conditions of service set out in para. (4) of his statement of claim. He said he enjoyed all these facilities from the 1st September, 1974, to 31st December, 1975, but from 1st January, 1976, new conditions of employment known as "Mwanakatwe conditions" were imposed on him. The new conditions changed the original conditions as per para. (5) of the statement of claim. The plaintiff testified that by these changes he has suffered loss and damages. He claims damages for breach of contract of employment. In cross-examination, he said he was employed as company secretary. He originally requested for a salary of K7,200 per annum temporarily. He denied that this salary was reassessed in April 1975. He told the court that he disagreed with the letter that stated that his salary had been reassessed. According to the plan, the contract of employment signed in August, 1975, was with effect from the 1st September' 1974. He said the ZIMCO contract entered into with the defendant should be read together with his letter dated 26th August, 1974, document number (2). He testified that housing allowance was paid under cl. 6 (2) of the agreement. The Fiat car and the furniture were not fringe benefits but conditions of service and part of the contract. Entertainment allowance was also a condition of service forming part of the contract. This included the Zambia Medical Aid Scheme. He explained in cross-examination that the new conditions of service were as a result of a meeting at Cabinet Office chaired by the Secretary to the Cabinet which he also attended. He said at the meeting he pointed out that the new proposals would contradict the existing contracts. He said he suggested that it was necessary to serve notices to all employees ending existing contracts thereby making new offers which would include the new conditions. He said he was overruled. The plaintiff further told the court that even when the circular containing the new conditions was received by the defendant company, he again drew the attention of the managing director to the difficulty of implementing the new salaries and conditions. He said he was again overruled. He said the directives to implement the new conditions came from the Government. He continued working despite the new conditions infringing the existing contracts. In answer to a question by court, he appreciated that the original conditions of service had been breached. But he hoped that the new conditions would be revoked.

DW1 who testified on behalf of the defendant was the managing director during the material time. He knew the plaintiff. He said the plaintiff was employed at the request of the chairman who was then the Minister of Commerce. He said although there was nothing irregular in

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the way the plaintiff got the job, he would have liked to advertise the job. He further told the court that with the exception of the managing director, permanent staff like the plaintiff were not entitled to free housing. He said if the plaintiff had a house, he had to pay rent. He conceded that prior to the Mwanakatwe Salaries Commission, the plaintiff was prodded with a car but contributed K20.00 per month. He disagreed with the salary of the plaintiff as shown in document number (3) the ZIMCO contract of employment. He also disputed the date of the contract. He said during the plaintiff's service with the company, his conditions of service changed as a result of the Mwanakatwe Salaries Commission followed by a Government white paper which directed that all salaries of permanent employees were to be within the Government's recommendations with the exception of contract staff who were to be affected after their existing contracts expired. According to the witness, the circular from the Government containing the recommendations was a directive to be obeyed. He told the court that there was an outcry about the new conditions of service but the plaintiff continued to work. The witness supported the plaintiff's evidence in respect of the withdrawal of the car; the reduction of the salary and the withdrawal of furniture.

A consideration of the evidence by both parties as well as of the pleadings discloses very little conflict. The statement of defence as well as the evidence of both parties introduce into the proceedings the Mwanakatwe Salaries Commission recommendations which brought about the changes to the plaintiff's conditions of service. The plaintiff challenges the implementation of these recommendations as unlawful and a breach of his contract of employment with the defendant. On the other hand, the defendant relies on the implementation of these recommendations as part of its defence. Surprisingly neither of the parties has bothered to exhibit these Mwanakatwe recommendations. In my view, this was certainly bad pleading where things were taken for granted. Be that as it may, the existence of the Mwanakatwe recommendations appears to be common cause. On the evidence which appears not to be in dispute, I accept that the defendant implemented the recommendations by the Mwanakatwe Salaries Commission as a Government directive to rationalise the salary structure in the civil service and parastatal organisations. I also accept that as a consequence of the implementation of these recommendations, the plaintiff's salary, conditions of service and fringe benefits accruing from the defendant to the plaintiff were affected resulting in reduction in certain instances and complete withdrawal in others.

A lot of questions were asked by either side as to the plaintiff's starting salary and the date the contract was signed. According to the plaintiff, the salary of K7,200 as per document number (2) was to be temporary. He said after some disputes and discussions, the salary was agreed at K8,500 with effect from 1st September, 1974, although the contract was only signed on 15th August, 1975. Mr Mubanga's evidence on behalf of the defendant was not clear on the point. The plaintiff was adamant that after several discussions it was finally agreed that the salary

of K8,500 per annum was to be with effect from the 1st September, 1974, and that the agreement although signed on the 15th August, 1975, had to be back-dated to the 1st September, 1974. The plaintiff said that as a result of back-dating the contract he was paid arrears. This evidence was not challenged. I accept the plaintiffs evidence on this point and hold that it was agreed that his salary would be K8,500 per annum and that the contract dated 15th August, 1975, was to be with effect from 1st September, 1974. I agree with the plaintiff that the issue is not one of the initial salary but of what salary he was receiving when the Mwanakatwe recommendations were implemented. The defendant does not dispute that at the time of the implementation of the recommendation the plaintiff was in receipt of K8,500 per annum. This I accept as a fact.

The action is for damages as a result of an alleged breach of a written contract. The contract is contained in document number (3) headed "ZIMCO contract and conditions of employment, permanent and pensionable staff end married women." The document should be read together with document number (2) a letter from him to the general manager of the defendant company regarding his appointment as company secretary. In that letter he set out various conditions under which he was prepared to accept the post of a company secretary. The letter is dated 21st August, 1974. In the letter, the plaintiff requested for a salary of K7,200 per annum. He requested housing allowance at 20 per cent of his salary. He also requested for a furnished house at a normal rental. He further requested for a standard company car and other fringe benefits enjoyed by company secretaries in ZIMCO companies. The contention of the plaintiff is that the ZIMCO contract was not intended to express the whole contract of employment. At this juncture, I must resolve the question of whether the plaintiff's requests as per his letter of 21st August, 1974, were made or understood and intended to be part of the ZIMCO contract signed by both parties. The general principle of law is that where parties have embodied the terms of their contract into a written document extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document subject of course to certain exceptions. In the case of *Mercantile Bank of Sydney v The Taylor* (1) at p. 321 their Lordships had this to say:

"It had been proved that the whole terms of the agreement under which Griffin became entitled to his release were embodied in the bank's letter of the 5th April, 1889, which he accepted without reservation or qualification. On that assumption, it is plain that the previous verbal communications which had passed between him and the bank were completely superseded, and could not be legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its legal ordinary construction."

In the present case, it is the case for the plaintiff that the conditions he requested by his letter were discussed and agreed. The defendant denies that the salary was agreed at K8,500. The defendant denies that Medical Aid Scheme was part of the conditions of service. The defendant also

denies that the plaintiff was entitled to a free furnished house and housing allowance. The defendant further denies that the plaintiff was entitled to a free car or entertainment allowance.

I have critically and carefully perused the ZIMCO contract in issue. It consists of twenty-one clauses within which are sub-clauses.
A perusal of the same discloses that the plaintiff who was employed as a company secretary was entitled to a salary of K8,500 per annum, 20 per cent housing if not occupying a company house and medical aid scheme if he joined a Medical Aid Society. He was also entitled to leave but I am not clear on the evidence as to number of days as this depended on the grade of the position. There was no evidence as to the grade of a company secretary. I have found no provisions in the ZIMCO contract relating to entertainment allowance, free car and free and furnished house. It may well be that the plaintiff might have been in receipt of K1,200 as entertainment allowance and perhaps had free transport and a free and furnished house. I do not know under what arrangement these might have been provided. But certainly not under the ZIMCO contract subject of this case. I have already observed that the action here is based on the breach of contract. I am satisfied that the defendant's withdrawal of entertainment allowance; transport and a free furnished house could not be said to have been a breach of the terms of the ZIMCO contract because those items were not part of terms of the contract. If they were they should have been mentioned in the contract. This is not an action for unlawful or wrongful dismissal or termination of employment which perhaps would have entitled the plaintiff depending on the arrangements to

claim entertainment allowance as well as for loss of free transport and free furnished house.

I have already indicated that the implementation of the Mwanakatwe recommendations did affect the plaintiff's conditions of service as embodied in the ZIMCO contract. This position is admitted. I am satisfied despite the defendant's denial that at the time of the implementation of the Mwanakatwe recommendations the plaintiff's salary was reduced as pleaded; that medical aid scheme was withdrawn and leave days reduced. The plaintiff's evidence is that he protested at the defendant's action but continued working. The plaintiff contends that, these reductions and withdrawals were unlawful and a breach of his contract of employment. On the other hand, the defendant contends that in effecting the changes to the plaintiff's conditions of service, it was not in breach of the contract. But the changed circumstances in implementing a public or Government policy pronouncement regarding the rationalisation of the salary structure in the civil service and parastatal organisation as recommended by the Mwanakatwe Salaries Commission made it impossible to fulfil the original terms of the contract. The defendant's main defence is one of frustration. The plaintiff has argued that the doctrine of frustration in the circumstances of this case has no application because it only applies in cases where by no fault of either party performance is made impossible or illegal or where the contract is rendered something radically different front what was

originally undertaken. He contended that the contract can only be impossible of performance if the subject matter is destroyed. In the instant case, he submitted that there was nothing impossible about the defendant performing the terms of the contract. The Mwanakatwe Salaries Commission was as a result of Statutory Instrument No. 134 of 1974 made pursuant to s. 2 of the Inquiries Act. Paragraph 2 (a) (b) and (f) of the schedule to the Instrument reads as follows:

"Investigate and report on the salaries, salary structures and conditions of service of personnel employed by statutory boards and corporations and by companies in which the State has a majority or controlling interest and to make recommendations for whatever changes may be necessary, having particular regard to -

(a) the need to establish a closer relationship between salaries, salary structure and conditions of service in the public services and those applicable to the staff of parastatal organisations;
(b) the need to achieve consistent policies of remuneration and advancement throughout the public sector;
(c) the method of implementation of the recommendations of the Commission."

On the evidence, I have no doubt that the defendant company was at the material time a parastatal organisation. There is however no evidence of the actual Mwanakatwe recommendations. Both parties however appear agreed on the existence and implementation of the recommendations. For my part, I will assume that position and the consequence on the plaintiff's conditions of service.

It is a recognised principle in the law of contract that performance of contract may be discharged among others by way of frustration. It is not my intention to write a treatise of the law pertaining to frustration.

The question I have to resolve is whether the contract between the plaintiff and the defendant was frustrated by the defendant's implementation of the Government directives. The question is one of

construction of the terms of the contract. In the case of *Davis Contractors Ltd v Fareham Urban District Council* (2) at pp. 720-721 Lord Reid put the matter as follows:

"It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. "

At the time of the contract, I have no doubt that the parties did not anticipate the Mwanakatwe recommendations. Viscount Simon in *British Movietonews Ltd and District Cinemas Ltd* (3) at p. 185 had this to say:

"If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different

situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because of its true construction it does not apply in that situation." The original obligations in the instant case under the ZIMCO contract were that the defendant had to pay the plaintiff a salary of K8,500. The plaintiff was entitled to six working leave days per annum and was also entitled to medical aid scheme. They did not, in my view, at the time of the contract, agree to bind themselves in a situation of the Mwanakatwe Salaries Recommendations which unexpectedly then emerged. The fact that the parties might have actually foreseen the possibility of the Mwanakatwe recommendations but made no provision for them does not in my opinion necessarily prevent the doctrines of frustration from applying when the event took place (*see* para. 1417 of *Chitty on Contracts*, 24th edn.). Paragraph 1418 of the same edition of *Chitty on Contracts* states that "a subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration ". The other examples given are the intervention by Parliament or any other authority by legislative action or Government exercising administrative powers affecting the legal situation of the contracting parties. I have had no benefit of decided cases where Government administrative powers or directives have been held to frustrate a contract. The principle is however well recognised.

In the instant case, I have a situation where there has been intervention by delegated legislative action (statutory instrument that set up the Commission). There is also intervention by administrate Government directives. All these combined together undoubtedly affect the legal standing of the parties. The evidence of DW1 is that with regards to permanent and pensionable staff like the plaintiff the directives had to be implemented without any alternative apart from contract staff. The principle of frustration assumes that the frustrating event was not caused by the fault of either party to the contract. In my opinion, the issue is not one of alternatives, but of whether there was a radical change in the " obligations " affecting the promises of the parties construed in the light of the new circumstances, namely, the implementation of the Mwanakatwe Salaries' Commission Recommendations irrespective of the option by either party to give notice to terminate the contract. The pleadings, in particular the statement of claim, clearly shows the changes that resulted from the implementation of the recommendations. On the evidence, I hold that the Government directives to the defendant to implement the Mwanakatwe recommendations were a frustrating event with the effect of putting to an end the contract between the parties. At common law, the occurrence of a frustrating event "brings the contract to an end forthwith, without more and automatically" (per Lord Summer at p. 505 in *Hirji Mulji v Cheong Yue*

Steamship CO., (4). In *Fribrosa Spolka Akoyjina v Fairbairm Lawson Combe Barbour ltd* (5) at p. 70 Lord Wright put the position as follows:

"In my opinion the contract is automatically terminated as to the future because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party."

Applying these principles to the instant case, I hold that the defendant did not breach the terms of the contract but that the contract was frustrated by Government directives. The contract therefore ceased to be binding on the implementation of the Government directives. The defendant company in the circumstances cannot be held liable. Accordingly, I dismiss the claim. As to costs, I consider that the nature of this action demands that in the interest of justice each party pays its own costs. Consequently I order that each party pays its own costs.

Claim dismissed
