J. K. RAMBAI PATEL v MUKESH KUMAR PATEL (1985) Z.R. 220 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S
15TH MAY, 1985 AND 15TH NOVEMBER ,1985)
(S.C.Z. JUDGMENT NO. 26 OF 1985)

Flynote
Employment - Restraint of trade - Master and servant - Agreement not, within two years, to take up employment within Zambia - Validity of.

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Employment - Restraint of trade - Master and servant - Agreement not, within two years, to take up employment within Zambia -Private engineer taking employment with public undertaking.
Employment - Restraint of trade - Master and servant - Payment of servant's air fare - Whether reasonable ground for restraint.
Damages - Master and servant - Inconvenience to employer- Breach of contract by employee - Damages for.

Headnote
The defendant was employed by the plaintiff under a written contract which included the following clause - "upon the determination of the employee's employment whether by effluxion of time or pursuant to clause 7, 8, or 11, hereto the employee shall not for a period of two years ensuing take up employment within Zambia and has to immediately leave the country". The defendant was employed as an engineer end after leaving the plaintiff obtained employment with Lusaka City Council. The plaintiff claimed, inter alia, damages for breach of the clause and gave evidence that one of the reasons for the restriction was that the plaintiff did not wish other people to take advantage of the fact that he had paid the defendant's air fare.

Held:

(i) The plaintiff's trades secret and trades connection were in no way threatened by the defendant's taking employment in the public sector. To read the binding out clause as preventing the defendant talking such employment would make it far too wide and therefore unreasonable and unenforceable;

(ii) The reason for imposing the restriction, that is that the plaintiff did not wish other people to take advantage of the fact that he had paid the defendant's air fare could never be held to be reasonable.

Per Curiam:

(iii) A binding out clause debarring servant who is an engineer from taking employment in the whole of Zambia is too wide to be considered reasonable;

(iv) An employer is entitled to damages for the inconveniences caused by employee's breach of contract.

Cases referred to:
(1) Attorney-General v Mpundu (1984) Z.R. 6.

For the appellant: A. M. Hamir, of Solly Patel, Hamir and Lawrence.
For the respondent: J. B. Sakala, of J.B. Sakala and Company.

Judgment

GARDNER, J.S.: delivered the judgment of the court and in addition to Matters which are not the subject of this report said:

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We turn now to the plaintiff's claim for damages for breach of Clause 18 of the Agreement. This Clause reads as follows: "Upon the determination of the employee's employment whether by effusion time or pursuant to Clause 7, 8 or Clause 11 hereto the employee shall not for a period of (two) 2 years next ensuing, take up employment within Zambia and has to immediately leave the country."

All covenants in restraint of trade are prima facie unenforceable unless they are reasonable with reference to the interests of the parties concerned and of the public. It is usual to find as reasonable covenants by employees leaving their master's employment not to practice or take employment in the same capacity within a reasonable period and within reasonable geographical limitation. The purpose of this is to protect the employers' trade secrets and trade connections. (Chitty on Contracts 25th Edition para. 1092 and 2111). In this particular case we have no hesitation in finding that the period of two years restraint imposed upon the defendant was not unreasonable and we have noted Mr Hair's argument that because the defendant is an expatriate it is reasonable to debar him from practising or taking employment in any part of Zambia. We are inclined to the opinion that, despite Mr Hamir's argument, the geographical limitation is too wide, but, in the event, this part of the question does not call for our determination. The evidence was that the defendant after leaving the plaintiff obtained employment with Lusaka City Council. In our view the plaintiff's trade secrets and trade connections were in no way threatened by the defendant's taking of employment in the public sector and to read the binding out clause as preventing the defendant taking such employment would make it far too wide and therefore unreasonable and unenforceable. The plaintiff's reason for imposing the restriction, that is that he did not wish other people to take advantage of the fact that he had paid the defendant's air fare could, in our view, never be held to be reasonable within the terms of the doctrine. This ground of appeal must therefore fail.

So far as the counter-claim is concerned, in his reply the plaintiff admitted that leave pay of K315.62n was due, together with November salary of K307.20n. The learned trial judge awarded the defendant K215.00 salary for the month of December when in fact the defendant was on leave. This was not claimed by the defendant in his counter-claim and we disallow this amount.

This appeal is allowed to the extent that we have indicated and we set aside the judgment of the High Court on the claim and the counter-claim. In its place we give judgment to the plaintiff on the

claim for damages for breach of contract in the sum of Kl,000 general damages, and K163.13n being one-third of the air fare. We give judgment to the defendant on the counter-claim for K315.62 leave pay and K307.20n November, 1980 salary.

Mr Adam on behalf of the plaintiff has asked for costs in this court and in the court below on the grounds that it is cardinal principle that costs normally follow the event and in this particular case the plaintiff

had no alternative but to come to this court to upset the judgment in the court below. Mr Sakala has asked for an order that each party should pay his own costs having regard to the fact that the plaintiff originally claimed damages for breach of the covenant in restraint of trade on which he was unsuccessful in this appeal and the plaintiff claimed over K15,000 damages for replacing the defendant when the defendant left his employment. He argued that the claim for such high figure had to be resisted by the defendant and the amount awarded as general damages was far less that claimed. He also asked this court when exercising its discretion to take into account the relative financial circumstances of the parties. He pointed out that whilst the plaintiff is a director of a substantional company, the defendant is a poor man. We agree with Mr Sakala that the costs are in the discretion of the court but there are certain guidelines which we must follow in exercising that discretion. A successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs. So for as the argument concerns the suggestion that the amount of damages was so inflated that the defendant had to defend himself, we must indicate that there are provisions for steps to be taken for the avoidance of costs in an action. Such steps were taken, for example, by the plaintiff himself, and consist of payment into court of sum which in the payer's opinion is sufficient to satisfy a claim. In those circumstances a successful claimant would not be entitled to costs unless he obtained judgment for a sum in excess of the paid in court. No such steps were taken by the defendant. In our view the financial circumstances of the parties should not effect the issue and there was nothing in the conduct of the parties or any other reason for us to exercise our discretion by depriving the successful party of his costs. The costs on the claim in this court and the court below will be the plaintiff's and, having regard to the fact that the amount paid into court on the counter-claim was the same as the amount awarded by this court, the plaintiff will also be awarded costs on the counter-claim in this court and in the court below.

Appeal allowed is part