NATIONAL AIRPORTS CORPORATION LIMITED v REGGIE EPHRAIM ZIMBA AND SAVIOR KONIE

Supreme Court
Ngulube, CJ, Sakala AG. DCJ, and Lewanika, JS
1st August, 2000 and 18th October, 2000
(SCZ Judgment No. 34 OF 2000)

Flynote

Company Law – Third party – Whether affected by want of authority of a representative of a company.
Employment Law – non-consensual substitution of the contract – Effect.
Contract – Breach – Damages – measure of damages.

Headnote

The appellant company was desirous of employing a Managing Director. The short listed candidates were interviewed and it appears that during such exercise the sort of remuneration package expected and that to be offered were discussed.

The position was offered to the first respondent in a letter dated 6th August 1996, written on behalf of the appellant by the second respondent who was at the time the Chairman of the Board of Directors of the appellant company. Consequently, the first appellant was offered a two year contract to run from 1st September 1996, to 30th August 1998. The first respondent worked for four months and a few days until 14th January 1997, when his contract was terminated quite summarily. The learned trial Judge found for the first respondent in respect of the claim for breach of contract and awarded him damages. The appellant appealed.

Held:

(i) An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction.

(ii) The employer did repudiate the contract and it was not wrong for the Managing Director to reject a non-consensual substitution of the contract for the worse.

(iii) Where a contract breaker has a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option to terminate.

Cases referred to:

1. *Zambia Bata Shoe Company Limited* v. *Vinmas Limited* (1993-1994) Z.R 136.
2. *Royal British Bank* v. *Turquand* [1856] 5 E and B 248.
3. *Kabwe* v. *BP Zambia Limited* (1995-1997) Z.R 218.
4. *Shindler* v. *Northern Raincoat Company Limited* [1960] 2 ALL ER 239.
5. *Yetton* v. *Eastwoods Froy Limited* [1966] 3 ALL ER 353.

6. *Abrahams* v*. Performing Rights Society* [1995] 1 CR 1028.
7. *Mobil Oil Zambia Limited* v *Patel* (1988-1989) Z.R 12.
8. *Dunlop Pneumatic Tyre Company Limited* v*. New Garage and Motor Company Limited* [1915] AC 79.

C. L. Mundia of C. L. Mundia and Company for the appellant.
L. P. Mwanawasa, SC, of Levy Mwanawasa and Company for the respondent.

Judgment

NGULUBE, CJ, delivered the judgment of the court.

The facts of the case may be briefly stated: The appellant company was desirous of employing a Managing Director. The short listed candidates were interviewed and it appears that during such exercise the sort of remuneration package expected and that to be offered were discussed. The position was offered to the first respondent in a letter dated 6th August 1996, written on behalf of the appellant by the second respondent who was at the time the Chairman of the Board of Directors of the appellant company. The first respondent was offered a two year contract to run from 1st September 1996, to 30th August 1998. The letter set out a number of terms and conditions including a salary of four thousand US dollars per month. The contract as set out in that letter – which the first respondent accepted – provided for termination by three months' notice on either side and then went on to provide:-

"If the employer terminates the contract prematurely for reasons other than incompetence or wilful neglect of duty, all the benefits under the contract shall be paid as if the contract had run the full term."

The first respondent commenced work on 1st September 1996, and, on the authority of the Chairman, he was reimbursed or paid various other expenses and allowances not set out in his letter of appointment. He worked for four months and a few days until 14th January 1997, when his contract was terminated quite summarily by the appellant through a letter dated 8th January 1997, written by the Corporation Secretary on the instructions of the Board of Directors exclusive of the second respondent who resigned at about that same time. The letter of 8th January 1997, was entitled "Nullification of Contract" and went on to declare the contract contained in the letter of 6th August 1996, a nullity. It also asked the first respondent to stop working with immediate effect "until further notice." The evidence on record showed that this turn of events coincided with a change that had occurred at the supervising government ministry and that it was the new Minister who directed that changes be made. As a result, the Chairman – the second respondent – resigned in protest and the reconstituted Board caused the letter of nullification to be sent in which it was alleged that the former Chairman had offered the Managing Director a package of terms and conditions which was fundamentally different from the package approved by the Board of which the candidates had allegedly been apprised and which would not exceed a gross of seventy-two thousand dollars per annum.

One argument against the finding of liability for breach of contract alleged that the court below was wrong to find that there was any breach at all by any alleged counter offer of terms after a binding contract had already been accepted. The upshot of the argument was that the first respondent must have been aware from the interview what package the appellant company was prepared to offer and that

accordingly the former Chairman had no authority to offer the different package which he did allegedly after further representations by the Managing Director. There were many submissions about the Chairman's alleged want of authority and attempts were made to distinguish the case from the principle and the position discussed in cases like *Zambia Bata Shoe Company* v *Vinmas Limited* (1) and the famous *Royal British Bank* v *Turquand (2).* The principle in those cases is now confirmed by our Companies Act so that an outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction. Mr Mwanawasa was on firm ground when he resisted Mr Mundia's arguments on these grounds. The Managing Director was still an outsider at the time of the job interview and when he made further representations (if any at all) to the former Chairman who was undoubtedly a person of the right standing to write a letter of employment of a Managing Director on behalf of the company.

Having examined all the written submissions and also taking into account the oral submissions, we come to the inescapable conclusion that the learned trial Judge was not in error when he found for the Managing Director on the issue of liability. There was quite clearly the plainest breach of contract after the new Minister's intervention which resulted in an attempt to *"nullify"* the contract already being performed and already just over four months old. The employer did repudiate the contract and it was not wrong for the Managing Director to reject a non-consensual substitution of the contract for the worse. We are fortified in holding this view by the similar approach taken by the courts in such cases as our own *Kabwe* v *BP (Zambia) Limited (3)* (where the salary of a senior employee was reduced unilaterally); and the English cases of *Shindler* v *Northern Raincoat Company Limited (4) And Yetton* v *Eastwoods Frog Limited (5)* (where Managing Directors were offered lower status alternative employment by the employers in breach.)

What has truly exercised our minds was the quantum and measure of damages, one of the issues raised in this appeal. This is in view of the provision for termination by three months' notice which was coupled in the same breath with an apparently contradictory limitation of the grounds for termination and the stipulation in default that all the benefits had to be paid as if the contract had run its full term. Did the provision mean notice could only be given on one of the stated grounds? Did the provision amount to liquidation damages being prescribed? We have considered the arguments and submissions. We have also considered the authorities, including the *Shindler* case where there was an implied engagement on the part of the company not to terminate the Managing Director's ten–year contract other than on a few limited grounds, as in this case. The requirements of mitigation were applied there in computing the damages after the contract had been technically wrongfully terminated in some other way available under the Articles of Association. We have borne in mind that the action here was for damages for wrongful termination which were ordered below to be computed "as if the contract had run the full term." We are aware that damages on such a footing can be defended if the sum thereby stipulated can be held to be liquidated damages, a genuine pre-estimate of damages the parties themselves intended should govern the contract in the case of termination in breach. We are equally aware that, on the other hand, the courts refuse to implement the intention of the parties if the sum is held to be a penalty. Of course, we have not forgotten that Mr Mwanawasa argued very warmly that parties to a contract should be free to oust a requirement for the mitigating of damages just as they should be free to oust the law of penalties. He submitted that since parties enter into contracts with their eyes wide open, none of them should be heard to

complain that the bargain is or has become onerous or unconscionable. He urges that the courts should not intervene, whatever their views. Needless to say, Mr Mwanawasa's plea flies in the teeth of equitable intervention by the courts which is now too entrenched to require or to permit fresh debate. However, there are rules or guidelines which have been evolved over time and which can still be further developed for distinguishing liquidated damages from penalties. The facts here which are to be borne in mind were that the Managing Director only worked for four months under a contract which could have been terminated by three months' notice; the contract floundered because the employer tried to substitute it with one involving less money; the complainant who was highly qualified found alternative employment within months; and, finally, the award as framed would give the Managing Director the rest of the money he would have earned under the remainder of the two year contract. In our research, we came across the case of *Abrahams* v *Performing Rights Society (6)* mentioned in paragraph 485 of the McGregor On Damages, 16th edition, which supports the payment of liquidated damages equal to the stipulated notice period's payment in lieu irrespective of amount and without requiring proof of actual damage or any mitigation. There, the contract provided for the giving of two years' notice or the payment of salary in lieu of notice and the plaintiff was held to be entitled to the full amount as a contractual debt. In the case at hand, there was provision for the giving of three months' notice coupled with a curious fetter on the employer's ability to terminate by specifying incompetence and wilful neglect only, grounds which were not applicable when there was termination by repudiation in the attempt to substitute an unacceptable contract. We have no doubt that on an ordinary reading of the provisions concerned, it was not suggested that the employer could only give three months' notice to terminate if there was incompetence or wilful neglect. Terminating for cause stipulated is one thing and terminating by notice quite another. Admittedly, the notice clause was not invoked but, as we reaffirmed in *Mobil Oil Zambia Limited* v *Patel (7),* where the contract-breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option. In this case, the damages should relate to the period of three months of salary and perquisites and any other accrued benefits such as gratuity over that period. We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited* v *New Garage And Motor Company Limited (8),* especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below.

Before we conclude, we should mention that there was an unsuccessful counter claim below over which Mr Mundia sought to make submissions in his heads of arguments. This was not covered by the memorandum of appeal and we cannot now entertain it. In sum, the appeal succeeds to the extent only that we have varied the quantum to be assessed below as damages for breach of the contract. Because of the way the issues were presented and the outcome, it is only fair that each side bear its own costs.

Appeal on quantum of damages allowed.