IN THE COURT OF APPEAL OF ZAMBIA HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 210/2019

BETWEEN:

RIVERBED LIMITED **APPELLANT**

AND

WYCLIFFE KASUNI **RESPONDENT**

CORAM : Mchenga, DJP, Chishimba and Sichinga JJA
On the 24th March, 2021 and 23rd April, 2021

For the Appellant : Capt. C. Chisau of Messrs KCK and Associates

For the Respondents : Mr. S.C Mwananshiku of Messrs M & M Advocates

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J U D G M E N T

CHISHIMBA, JA, delivered the judgment of the Court.

CASE REFERRED TO:

1. Trywell v The People (2015) ZR 69
2. Kitwe City Council v William Ng'uni (2005) ZR 57

3. J. Evans and Son Portsmouth Limited v. Andrea Merzario Limited (1976) 1 W.LR 107.
4. Indo Zambia Bank Limited vs Mushaukwa Muhanga (2009) Z.R. 266
5. Ponde and Others v Zambia State Insurance Corporation Limited (2004) Z.R. 151.
6. Zambia Oxygen Limited and Zambia Privatization Agency v. Paul Chisakula and Others (2000) ZR 271.
7. Armstrong and Whitworth Rolls Limited vs. Mustard (1971) 1 ALL ER 598.
8. Engen Petroleum Zambia Limited v. Willis Muhanga and Another SCZ Appeal No. 117 of 2016.

LEGISLATION CITED:

1. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia

OTHER WORKS REFERRED TO:

1. Halsbury's Laws of England, Vol. 16
2. H. G. Beale; Chitty on Contracts, Volume 1, General Principles, 30th Edition (London), Thomson Reuters (Legal) Limited, 2008

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of the Industrial Relations Division of the High Court delivered by Justice W. S.

Mweemba dated 28th August, 2019 in which he held that the operative document of employment between the Appellant and the Respondent, was the offer letter and not the contract of employment. On this basis, the court below awarded the Respondent salary arrears, accrued leave days, unpaid fuel allowances and gratuity for four years of completed service.

2.0 **BACKGROUND**

2.1 The facts not in dispute are that by letter dated 26th July, 2013, the Appellant offered the Respondent employment for the position of Technical Manager. The offer included remuneration of a basic gross salary of K24,750.00; gratuity of 15% of the annual salary for every completed year; fuel allowance of K2000.00 per month and motor vehicle allowance of K4,999.00 per month; 2 days leave per month; and airtime allowance of K1,000.00 per month.

2.2 On 31st July, 2013, the Respondent executed a contract of employment with the Appellant for the position of Technical Manager. According to the schedule to the said contract of employment, the Respondent would be entitled to the following remuneration:

Monthly gross salary	-	K18, 900.00
Vehicle allowance	-	K4, 860.00
Phone allowance	-	K1, 080.00
Fuel allowance	-	K2, 000.00
Total	=	K26, 840.00

2.3 Being dissatisfied with some of the conditions in the contract of employment, the Respondent immediately engaged the Appellant with a view to obtaining a better package. Subsequently, the Respondent accepted the offer of employment by executing the letter of offer on 1st August, 2013 and was paid a better remuneration package stated in after letter as opposed to the one in the contract of employment.

2.4 By email dated 10th May, 2017, the Respondent resigned from employment without giving the requisite notice. The Appellant accepted the resignation immediately. The Respondent then wrote to the Appellant demanding payment of his March 2017 salary excluding 8 working days he had not worked; the April 2017 salary; May 2017 salary for 10 days; accumulated leave days; and less one months in lieu of notice of resignation. The Respondent did not hand back company property being a

windows phone that was allegedly stolen, a Mifi, and a laptop that was in bad condition following a road traffic accident.

2.5 The Respondent lodged a complaint in the Industrial Relations Division claiming the following reliefs:

(1) K41, 240.00 being two months' salary arrears for March and April 2017;

(2) K8, 248.00 being accrued leave days for the year of 2017;

(3) K88, 000.00 being fuel allowances for 44 months;

(4) K148, 464.00 being the total gratuity for the four years of completed service; and

2.6 At the trial, the Respondent, PW1's evidence was that the document governing his employment relationship and upon which his claims were based, was the letter of offer and not the contract of employment. The basis for this position was threefold: first, that he signed the letter of offer after executing the contract of employment; second, that the letter of offer varied his conditions of service contained in his favour as opposed to the inferior package in the contract of employment; and thirdly, that the salary appearing in the letter of offer is

what he was actually being paid as it was also appearing on the payslip.

2.7 On the other hand, the Appellant, through its Managing Director, RW1 led evidence that the governing document for the employment relationship was in fact the contract of employment. This view was informed by the universal practice of giving a prospective employee a letter of offer followed by a contract; that the letter of offer was a provisional agreement generated on 26th July, 2013 but only executed on 1st August, 2013; that the acceptance of an offer subject to contract did not constitute a binding contract because it is unconditional; and that the contract being a written document, could not be varied or supplemented by another document.

3.0 **DECISION OF THE HIGH COURT**

3.1 Judge Mweemba considered the evidence and submissions before him. He noted that Clause 21 of the contract of employment provided that:

> ***"... No conditions or representations, whether oral or in writing, prior to this agreement shall bind the Employer and/or the Employee. All previous verbal or***

written agreements between the Employer and the Employee are hereby cancelled and the Employee, hereby acknowledges that he has no right under such agreement."

3.2 On this basis, the learned Judge took the view that any conditions, terms or representations made or offered by the Appellant to the Respondent prior to 31st July, 2013 are not binding on the parties. As the letter of offer was executed on 1st August, 2013 after the Respondent had discussions with the Managing Director, it followed that the letter of offer varied the terms and conditions contained in the contract of employment.

3.3 Further, the learned Judge noted that the conditions of service appearing in the letter of offer were the ones appearing on the payslip. The Appellant, having prepared both documents with the Respondent being only a recipient, it followed that any terms that were unclear have to be construed in favour of the Respondent as per the doctrine of contra proferentum.

3.4 Having found that the doctrine of contra proferentum applied to the matter with the letter of offer being the document governing the relationship between the Appellant and the Respondent, the court below came to the conclusion that the Respondent was

entitled to receive all the reliefs he sought, save for the claim relating to the eight days that he was absent from work. These were to be deducted from the two months' salary arrears he was claiming.

3.5 In this regard, the learned Judge awarded the Respondent K15,121.36 as salary arrears for the March and April 2017 less the 8 days he was absent and one less months' salary in lieu of notice; K8,248.00 being accrued leave days for 2017; K88,000.00 being fuel allowances for 44 months; and K148,464.00 being the total gratuity for four years of completed service.

3.6 With respect to the company assets held by the Respondent, the court directed that their total value be deducted from the total amount payable by the Respondent to the Appellant. Costs were awarded to the Respondent.

4.0 **GROUNDS OF APPEAL**

4.1 The Appellant now appeals against the decision of the High Court and has raised the following grounds of appeal:

1) The honourable court grossly erred in law and in fact when it held that the operative document between the

two parties was the letter of offer and not the contract of employment;

2) ***The honourable court erred in law and in fact when it held that since the remuneration during the subsistence of his employment was as set out in the letter of offer and reflected in the payslip then the governing document between the two parties was (the) letter of offer;***
3) ***The honourable court grossly erred in fact and law when it held that the Complainant has been able to substantiate his assertion that the document that governed his relationship with the Respondent was the letter of offer which the Complainant signed on 1st July, 2013;***
4) ***The honourable court grossly erred in law and fact when it held that extrinsic evidence may be admitted to show that the contract of employment was not intended to express the whole agreement between the parties;***
5) ***The honourable court grossly erred in law and fact when it held it accepts the argument of the Complainant that since he signed the letter of offer the day after he signed the contract of employment it means that the terms of his employment were varied in his favour;***
6) ***The honourable court grossly erred in law and in fact when it held that the fuel allowance which was tabulated in the letter of offer in the sum of K2000.00***

was not being paid to the Complainant during the time he worked for the Respondent; and

7) ***The honourable court grossly erred in law and fact when it held that gratuity is due and payable as claimed.***

5.0 APPELLANT'S ARGUMENTS

5.1 The Appellant filed heads of argument dated 28th November, 2019. In arguing grounds one to five, the Appellant submitted that the letter of offer was a provisional agreement pending a final contract of employment as it is trite law that a letter of offer cannot supersede a contract of employment. This is also the procedure in employment that a prospective employee is made an offer, and upon acceptance, a binding contract is executed. It was further argued that this is what transpired in this case.

5.2 It was contended that the court below failed to properly address and evaluate the application of the law in regard to the contract of employment. That it is settled law that where there is an informal agreement which expressly requires or envisages the subsequent execution of a formal contract, the legal effect of that prior agreement is that it is null and void as provided by Clause 21 of the contract of employment. Consequently, the

learned trial Judge made a finding that is perverse and is not supported by the evidence. Reliance was placed on the case of **Trywell v The People** [1].

5.3 It was further argued that an acceptance of an offer subject to contract does not constitute a binding contract and that evidence of pre-contractual negotiations of conduct subsequent to the making of the contract and of parties' subjective intention is inadmissible.

5.4 The Appellant submitted that **paragraph 536 of Halsbury's Laws of England, Vol. 16,** states that:

> ***"Where the terms of a written contract of employment are precise, oral evidence is not admissible to show that such terms were varied by oral stipulations at the time of the contract."***

Therefore, it was surprising that the court below found that extrinsic evidence may be admitted to show that the contract of employment was not intended to express the whole agreement between the parties.

5.5 In arguing ground six, the Appellant submitted that having demonstrated that the operative document governing the relationship between the parties was the contract of

employment, it follows that the Respondent was being paid his fuel allowance as it was embedded in his salary as per the addendum in the contract of employment. Therefore, the K24,750.00 comprised the fuel allowance of K2000.00 which the Respondent was receiving up to the time he resigned.

5.6 With respect to ground seven, the Appellant submits that the contract of employment did not provide for the payment of gratuity at the rate claimed by the Respondent. Therefore, the award of gratuity by the court below was misconceived at law and has no basis whatsoever if it is not provided for under the terms and conditions of service stipulated in the contract of employment.

5.7 It was further argued that contrary to Clause 17.1.2 of the contract of employment, the Respondent resigned without giving the requisite notice of three months. The court below also failed to address the fact that the Respondent decided to resign abruptly in the face of disciplinary charges for absenteeism in order to be paid terminal benefits which he would not have been entitled to had he been dismissed. As authority, reference was made to the case of **Kitwe City Council v William Ng'uni** [2].

5.8 The Appellant urged the Court to uphold the appeal in its totality with costs.

6.0 **RESPONDENT'S ARGUMENTS**

6.1 The Respondent relied on the heads of argument dated 20th February, 2020 in which it was contended that the Respondent has been hard pressed to find the "evidence" alluded to by the Appellant as the evidence on record actually showed that the operative document was the letter of offer. It was submitted that the Appellant did not follow the procedure it highlighted of first issuing an offer followed by a contract upon agreement as it did not obtain the Respondent's acceptance to the letter of offer before the contract was signed on 31st July, 2013. The undisputed evidence showed that the letter of offer was signed on 1 August, 2013 after the contract had been signed.

6.2 Contrary to the Appellant's contention, there is no evidence on record to support the position that the letter of offer was 'a provisional' agreement pending a final contract of employment in view of Clause 12 of the letter of offer which provides that:

> ***"Please note that this letter, read in conjunction with the conditions of service, consists of the full offer***

made to you by Riverbed Limited and supersedes any other offers, verbal or otherwise relating to your remuneration or other conditions of service."

Therefore, the Respondent contended that there is nothing in the letter of offer which remotely indicates that it was designed to be a provisional document pending a final contract.

6.3 It was submitted on behalf of the Respondent that he indicated in his testimony that he was aware that the contract that he executed on 31st July, 2013 had a provision for variation, and so he proceeded to negotiate for better terms contained in the letter of offer than the contract off employment.

6.4 On the reference to the parole evidence rule by the Appellant, the Respondent was of the view that the court below correctly noted that there are exceptions to the parol evidence rule. One such exception is where the written agreement was not intended to be the whole contract on which the parties actually agreed. The learned authors of **H. G. Beale; Chitty on Contracts, Volume 1, General Principles, 30th Edition (London), Thomson Reuters (Legal) Limited, 2008 para. 12-097 page 866,** were cited where they expressed the same sentiments that:

"... it cannot be asserted that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms, not included expressly or by reference in the documents."

6.5 Further, the case of **J. Evans and Son Portsmouth Limited v. Andrea Merzario Limited** [3], was called in aid where it was stated at page 1083 as follows:

"The Court is entitled to look at and should look at all evidence from start to finish in order to see what the bargain that was struck between the parties."

6.6 The Respondent argued that one of the reasons the court below accepted the Respondent's assertion that the letter of offer was the operative document was because that was the document that the Appellant implemented when it came to salary payments. The Respondent exhibited his payslips which show that his remuneration matched the letter of offer and not the contract of employment and that the Appellant's witness admitted in his testimony that the Respondent's pay slips matched the letter of offer and not the contract.

6.7 The contra proferentum rule was also called in aid and said to operate adversely against the Appellant. It was the Appellant that prepared both the letter of offer and the contract of employment, and as such, was in a dominant position as compared to the Respondent. As authority, the case of **Indo Zambia Bank Limited vs Mushaukwa Muhanga** [4] was cited where the Supreme Court stated as follows:

> ***If the insertion of the words 'permanent and pensionable' was as a result of careless drafting, then under the doctrine of contra proferentum the document has to be construed against them in favour of the Respondent.***

6.8 With respect to ground six, the Respondent submitted that having established that the operative document was the letter of offer, the Appellant's arguments do not apply.

6.9 Lastly, as regards ground seven, the Respondent contends that contrary to the Appellant's assertion that the Respondent resigned abruptly in the face of possible disciplinary charges, there was no evidence adduced in the Court below by the Appellant that suggested that there was any imminent

disciplinary process that was about to be embarked on by the said Appellant. The Appellant's sole witness never alluded to any impending disciplinary proceedings that were in contemplation against the Respondent. Further, the Respondent stated in his evidence-in-chief and re-examination that he was not aware of any disciplinary action that was ever taken or threatened against him.

7.0 **DECISION OF THE COURT**

7.1 We have considered the appeal, the arguments advanced and the authorities cited by learned counsel for both parties.

7.2 Grounds one to five are hinged on the question whether the letter of offer or the contract of employment was the operative or governing document between the parties. The position of the Respondent is that the letter of offer, having been executed after the contract of employment following further discussions, was the operative document governing the relationship of the parties. This view was premised on the fact that the salary appearing in the letter of offer is what was actually paid as opposed to the remuneration in the contract of employment.

7.3 The Appellant maintained that the contract of employment was the operative and governing document. This view is informed by the fact that the letter of offer was issued first, followed by the contract of employment: and that the standard practice in employment is that a letter of offer is issued first before a contract of employment is executed.

7.4 As argued by the Appellant, it is trite law that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract. By way of exception to the above rule, extrinsic evidence may be admitted to show that the written instrument was not intended to express the whole agreement. See the case of **Ponde and Others v Zambia State Insurance Corporation Limited** [5].

7.5 However, in matters of employment, conditions of service already being enjoyed by employees cannot be altered to their disadvantage without their consent as was held in **Zambia Oxygen Limited and Zambia Privatization Agency v. Paul Chisakula and Others** [6].

7.6 In the present case, a letter of offer was issued on 26th July, 2013 outlining conditions that the Appellant was offering to the Respondent. Without doubt, the conditions outlined therein were favourable to the Respondent who, for some reason, did not immediately sign the offer to signify his acceptance. Nonetheless, the Appellant proceeded to avail the Respondent a contract of employment with a less favourable remuneration package which the Respondent proceeded to sign on 31st July, 2013. There was evidence that the Respondent immediately engaged the Appellant over the remuneration package, and upon agreement, he executed the letter of offer containing a superior package on 1st August, 2013.

7.7 Thereafter, as the payslip clearly shows, the Appellant proceeded to pay the Respondent a superior package as expressed in the letter of offer. What then is the effect of this conduct by the Appellant with respect to the contract of employment?

7.8 Where parties have entered into a contract of employment, their conduct may be taken to infer implied variation of the terms of

the contract. In the case of **Armstrong and Whitworth Rolls Limited v. Mustard** [7], the English Court of Appeal held that:

> ***The respondent was entitled to a redundancy payment calculated on the basis of normal working hours of 60 per week because the natural inference to be drawn from the fact that he was put on a 12 hours shift basis as opposed to an eight hour shift basis was that the 12 hour shift was something which the respondent was bound to work after his colleague left in 1963. Although there was no express mutual agreement to vary the terms of the respondent's contract of employment, it was impliedly varied by the conduct of the parties. (underlining for emphasis)***

7.9 Flowing from this persuasive authority, it can be concluded that the conduct of the Appellant in paying the remuneration package contained in the letter of offer as opposed to that in the contract of employment, goes to demonstrate that there was a mutually agreed variation of the remuneration package contained in the addendum to the contract of employment.

7.10 Having held that the terms of employment were varied mutually, as reflected on the payslip, it follows that the notice period for termination is as per letter of offer. The letter of offer stipulated

a month's notice of termination. This is more favorable term than three months' notice. The other terms of contract of employment remained unchanged. Clause 22.1 on variation stipulated that the employer reserves the right to make any reasonable changes to the employee's terms and conditions of employment from time to time. Any changes or amendments would be deemed to be accepted unless the employee notifies the employer of any objection. The employer varied terms as to remuneration which was effected on payroll. It is trite that an employee's conditions of terms cannot be adversely changed.

7.11 Therefore we find no merit in the connected grounds one, two, three and four of the appeal.

7.12 Having found that the letter of offer varied the terms of the contract of employment with respect to remuneration, it follows that ground six must fail. There being no evidence adduced to the effect that the appellant was paying the respondent fuel allowance in the sum of K2,000, the court below was on firm ground to hold that the respondent was entitled to the claim for the period he worked for the appellant.

7.13 With respect to ground seven, the letter of offer provided for gratuity which is not mentioned in the contract of employment. Therefore, it must follow that the Respondent is entitled to gratuity. The Appellant cannot be heard to argue that the Respondent resigned to avoid dismissal and is thereby not entitled to gratuity for the reason that there was no evidence of disciplinary action being taken against the Respondent. Consequently, ground seven must fail. The undisputed fact being that the Respondent tendered in his resignation notice and the Appellant accepted it.

7.14 **COSTS**

The court below awarded costs to be borne by the Appellant. No reasons were given for this. In this appeal, the Appellant has also prayed for costs. **Rule 44(1) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia**, as explained by the Supreme Court in **Engen Petroleum Zambia Limited v. Willis Muhanga and Another** [8], restricts the award of costs to cases where there has been unreasonable delay, or a party has taken improper or vexatious and unnecessary steps

in the proceedings or is guilty of other unreasonable conduct which have neither been raised or proved.

7.15 Therefore, the award of costs against the Appellant by the court below was wrong in the absence of any misconduct. In the same vein, the Appellant cannot be heard to pray for costs. Consequently, the award of costs must be reversed and each party must bear its own costs.

8.0 **CONCLUSION**

8.1 Having held that the operative document governing the relationship between the parties is the letter of offer which was in conformity with the renumeration received, we find no merit in the appeal. We accordingly dismiss the appeal.

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C. F. R. Mchenga

DEPUTY JUDGE PRESIDENT

COURT OF APPEAL

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F. M. Chishimba

COURT OF APPEAL JUDGE

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D. L. Y. Sichinga

COURT OF APPEAL JUDGE