

GEORGE LEWIS v ZIMCO LIMITED (1992) S.J. (S.C.)

HIGH COURT
BWEUPE B.K., J
4TH SEPTEMBER, 1992
1992/HP/725

Flynote

Contract - Offer and Acceptance - Specific Performance - Damages in lieu - ZIMCO conditions of service - Plaintiff's eligibility thereunder

Headnote

The plaintiff entered into a contract of employment with the defendants who were the holding company for National Airports Limited where the plaintiff was managing director. It was a three year contract and when it was coming to an end, the plaintiff wrote the defendants asking them whether they intended to renew his contract by giving him a second term. He started looking for alternative employment elsewhere since there were some delays in case the response was negative. He got the offer for the second term but at that time he had already been offered another job elsewhere which he had accepted. A little later, he wrote a letter to the defendant requesting to purchase the company Motor vehicle that was allocated to him by the defendant under the three year contract. He requested to buy it in terms of the ZIMCO conditions of service. The response was in a letter addressed to the Financial Director of national Airports Corporation authorizing the sale of that vehicle which letter was copied to him. Later on, the plaintiff received another letter rescinding the earlier one authorizing sale of the car. The plaintiff took the matter to court seeking specific performance or damages in lieu.

Held:

- (i) The correspondence between the plaintiff and defendant regarding the purchase of the vehicle did not constitute an "offer" and "Acceptance" capable of an order for specific performance in that the offeree failed to prove all the elements of a valid contract, including assent and consideration;
- (ii) The Plaintiff did not fall under ZIMCO conditions of service Clause 22.1 to 22.2

Cases referred to:

- (1) Harvey v Facey (1893) A.C .552
- (2) Clifton v Palumbo (1944) 2 ALL E.R.. 497

Legislation referred to:

- (1) ZIMCO Conditions of Service.

For the Plaintiff: Mr. George Chilupe of Chilupe & Co.

For the Defendant: Mr. Mukelabai, Legal Officer, ZIMCO Ltd.

Judgment

The plaintiff, by his Writ of Summons, Claims (a) Specific Performance of an agreement evidenced in writing for the sale by the Defendant to the Plaintiff of Motor Vehicle Registration

Number AAJ 4402 at a price of K348,450.00; (b) an injunction. The plaintiff gave evidence on his own behalf and called no other witness. He deposed that on 26th October, 1990 he entered into a contract of employment with ZIMCO Ltd. of which the effective date of the contract was 16th January 1989. He was working for National Airports Corporation under a contract with ZIMCO Ltd. as Managing Director. He said that the Defendant ZIMCO Ltd. is a holding company that controls a lot of other corporations. He had a three year contract and when it was coming to an end he wrote ZIMCO asking them whether they intended to renew his contract by giving him a second term. He started looking for alternative employment elsewhere since there were some delays in case the response was negative. He got the offer for the second term but at that time he had an offer for the present job, he is now employed as Chief Executive of African Joint Air Services. He took a decision not to accept the new contract from ZIMCO but to accept the new job offered with African Joint Air Services. On 13th January, 1992 he wrote a letter to ZIMCO requesting to purchase the company Motor vehicle AAJ 4402 that was presently allocated to him. He requested to buy it under ZIMCO conditions of service. The response was in a letter addressed to the Financial Director of National Airports Corporation authorizing the sale of that vehicle. The letter was written on 20th January, 1992 and was copied to him. The Financial Director determined the value but the Plaintiff was not sure if its value was communicated to him. However, on 29th January, 1992 the Financial Director in reply to ZIMCO's letter wrote to the Manager, Administration informing him the Net Book value as at 20/01/92 as K348,450.00. He said his request to purchase the vehicle was thus accepted without any conditions except to determine the value. Soon after that letter was copied to him he received another letter rescinding the decision by ZIMCO to purchase on ground that there was no other Nissan patrol for the new Managing Director to use. He said his request was accepted as appropriate in the light of his condition of service. He has come to court in an effort to enforce the agreement that he reached to purchase the vehicle from the Defendant. He is seeking for Specific Performance and in the alternative for damages in lieu.

Under cross-examination the plaintiff said he was employed on contract as Managing Director seconded to the National Airport which is subsidiary company of ZIMCO. He agreed that his contract of employment came to an end in a normal way when he offered not to renew his contract. He admitted that as Chief Executive he fell under Appendix A3 i.e. between Z9 and Z12 of ZIMCO conditions of Service. He said he did not qualify under clause 22.2 (c) of the Conditions of Service as the vehicle was assigned to him just over a period of two years instead of five years. The Defendant called one witness Morris Oyata Bulaya.

He testified that he was the Manager, Administration in ZIMCO Ltd. He said according to the Blue Book the vehicle Nissan patrol Reg. AAJ 4402 the subject matter of these proceedings has never been the property of ZIMCO but that of the National Airports Corporation Ltd., for which the plaintiff was the Managing Director until January, 1992 when his contract of employment terminated by effluxion of time. Consequently ZIMCO as third party has no capacity to be compelled to comply with the order of specific performance. On the 13th January, 1992 the plaintiff offered to ZIMCO to buy vehicle REG. AAJ 4402 in accordance with the prevailing ZIMCO conditions of service. He said he referred the matter to National Service Corporation to deal with it. It subsequently transpired that the Plaintiff did not qualify to purchase the Motor Vehicle in question. He said he wrote to National Airport Corporation under Clause 22(ii) (d) because the Plaintiff had indicated he was retiring. On receipt of the letter from Finance Manager he sat down to look at the matter critically. He called from the Plaintiff's personal file in which there were the ZIMCO conditions of service. He noticed that the plaintiff was not retiring but merely came to the end of his contract. He said ZIMCO conditions of service as amended which became effective on 1st July, 1990 does not provide to sell motor vehicles, to officers on contract. The plaintiff was not retiring but had just come to the end of this contract. So retiring and end of contract are two different things. Retiring applies after serving the 55 years prescribed in the condition of service, particularly to persons on pension Board. He admitted that when he wrote to Finance Director he made an honest mistake when he referred to the plaintiff as "Retiring".

"Under cross-examination he said that when he received a letter from the Plaintiff he wrote approving his request subject to the ZIMCO conditions. He asked for the price to be determined. The conditions were those in clause 22 (ii) (d). He did not tell the plaintiff that he had qualified under that clause. He said if the vehicle was going to be sold the national Airport Corporation were going to make the decision. He was going to make an offer to the Plaintiff after the price has been determined and a decision made by the Corporation to sell.

The critical examination of the evidence adduced on each side boils down to two questions to be answered, (a) was there a concluded contract of sale entered between the parties capable of being enforced by this Court? and/or (b) Does the Plaintiff fall within the category of those entitled or qualified under ZIMCO scheme?

In order to determine, whether in any given case, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm "Offer" and if the other party may likewise be taken to have "accepted" that offer. I propose to answer question (a) by referring to the letters written by the parties to each other.

By a letter dated 13th January, 1992 the Plaintiff writes:

"Mr. B. Bwalya
Acting Director-General
ZIMCO Ltd.
P.O. Box 30090
LUSAKA

Dear Sir,

RE-CONTRACT OF EMPLOYMENT

I wish to formally advise you that my contract of employment with ZIMCO expires on the 15th January, 1992 and I will not be renewing it. I have enjoyed serving ZIMCO for many years now and feel that the time is now opportune for me to further my career elsewhere.

While I am required by my new employers to start work on 20th of January, 1992, I will be available to ensure a smooth hand-over is effected.

In retiring from ZIMCO I wish to request as per conditions of service to purchase the company vehicle AAJ 4402 presently allocated to me. If this is agreed I would be grateful if I could pay over a six month period"

And on 20th January, 1992 ZIMCO manager, Administration writes to Finance Manager, National Airport Corporation as follows:-

"Mr. G.A. Lewis

This is to inform you that ZIMCO management has approved Mr. G.A. Lewis's request to purchase his personal-to-holder car Reg. AAJ 4402 in accordance with ZIMCO Terms and

Conditions of Service Clause 22(ii)(d).

I should be grateful if you could furnish me with the book value as well as original cost of the vehicle....."

One may now ask: Did the Plaintiff's letter herein before cited constitute a firm "offer" and the Defendant's letter above quoted be taken to be "Acceptance" of the plaintiff's offer? It has been said that an offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option for acceptance or refusal. It must not merely be feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not result.

In *Harvey v. Facey* (1893) AC 552 the plaintiff telegraphed to the Defendants "Will you sell us Bumper Hall Pen? Telegraph lowest cash price"

The Defendants telegraphed in reply

"Lowest price Bumper Hall Pen GBP900."

The plaintiff then telegraphed

"We agree to buy Bumper Hall Pen for GBP900 asked by you. Please send us your title deeds."

It was held that there was no contract. The second telegraph was not an offer but only an indication of the minimum price if the Defendants ultimately resolved to sell, and the third telegraph was there not an acceptance.

And in another case *Clifton v. Palumbo* (1944) 2 All ER. 497, the plaintiff wrote to the Defendants

"I..... prepared to offer you or your nominee my Lythan estate for P600,000..... I also agree that a reasonable and sufficient time shall be granted to you for the examination of all the data and details necessary for the preparation of the schedule of Completion."

The Court of Appeal held that this letter was not a definite offer to sell but a preliminary statement as to price, which -especially in a transaction of such magnitude was one of the many questions to be considered.

I have considered the above two cases quoted and agree in total the reasoning therein. I have no reason not to adopt their Lordships reasoning. In my humble view the letter written by the Plaintiff in the instant case was merely an inquiry initiating negotiations from which an agreement might or might not in time result. Equally the letter written by the Defendant to the National Airport Corporation Finance Manager, though copied to the plaintiff, was also a preliminary statement to find out what would be the book value of the car should the Defendants ultimately resolve to sell.

It may be argued that the letter by the Financial Director to the Manager Administration dated 29th January, 1992 copied to the Plaintiff constituted an acceptance. Last paragraph of the said letter reads:-

"..... We hope the information will be of use in determining at what price to charge Mr.

Lewis in accordance with the ZIMCO terms and conditions of service clause 22(ii)(d)...."

It is again my opinion that a letter couched in such language presupposes a further step to be taken namely determination of the price to be charged and an offer made by the Defendant to the Plaintiff of the price and the plaintiff's actual acceptance of the definite price offered. The Plaintiff has failed to prove the presence of a definite offer and acceptance. The agreement was not yet concluded. There was not yet an external manifestation of assent, some word spoken, or act done by the offeree or by his agent.

I now turn to the question (b) Does the Plaintiff fall within the category of those entitled under ZIMCO conditions?

Both parties have referred the Court to Clause 22. The Clause reads:-
22. SALE OF PERSONAL TO HOLDER VEHICLE TO EMPLOYEES.

22.1 ELEGIBILITY

(i) For employees continuing in service

- (a) The employee to whom the vehicle is being sold should have completed a minimum of 10 years of continuous service in ZIMCO Group. In arriving at the service period, the service under other Public/Parastatal institutions (Civil Service, UNZA and Statutory Boards) will be included.
- (b) The staff member should be in Grade Z8 and above.
- (c) The employee should have been using the vehicle as a personal to holder vehicle for a minimum period of three years.
- (d) The employer has already secured a replacement vehicle for the employee.
- (e) There should be at least an interval of ten (10) years, before an employee avails himself, similar facility from the employer.
- (f) The selling price for the vehicle will be 15% of the original cost of 25% of the market value, whichever is higher.

(ii) For Employees Retiring from Employment:

- (a) The employee should have completed a minimum of five years of service in ZIMCO Group.
 - (b) The employee should have been using the vehicle as a personal-to-holder vehicle for a minimum period to two years.
 - (c) The staff member should be in Grade Z7 and above.
- (d) The selling price for the vehicle will be the net book value of 15% of the original cost whichever is higher.

(iii) CNZ staffs are not eligible to buy personal-to-holder vehicles under this clause.

22.2 Further the Management has an option (solely at its direction) to offer vehicles which are outside the category of personal-to-holder vehicles to retiring employees only on the following basis:-

- (a) The employee should have completed a minimum of ten years of service in ZIMCO Group.
- (b) The vehicle should be at least five years old.
- (c) The employee has not availed the facility of purchasing the personal-to-holder car during the preceding five years.
- (d) Management confirms that the vehicle to be sold is surplus to its immediate requirements.
 - (e) Any such sale is to be with the approval of its Board.
 - (f) The sale value shall be 15% of the original cost or 25% of the market price whichever is higher.

It is an undisputed fact that the Plaintiff, after being transferred from Zambia Airways, was employed on contract as Managing Director for Zambia National Airport Corporation Ltd., a subsidiary of ZIMCO. It is common Cause that this contract came to an end on 15th January, 1992. It is common factor also that the Plaintiff was allocated the personal-to-holder vehicle AAJ 4402 on 10th November, 1989 which he now wishes to purchase under ZIMCO Conditions of Service which he has not specified under paragraph 3 of his letter Exh. GL1 dated 13th January, 1992. He has, however agreed with Mr. Bulaya, DW1 that his request was made under ZIMCO conditions of service clause 22(ii) (d) and not under 22.2 (d) as portrayed by Mr. Matibula, Financial Director, National Airports Corporation Ltd.

The plaintiff, in his letter which I have earlier on herein quoted dated 13th January, 1992 admitted that he was a contract officer when he wrote: "I wish to formally advise you that my contract of employment with ZIMCO expires on 15th January, 1992....." He confirmed this also in his viva voce evidence. He also admitted that his actual transfer was from Zambia Airways before he took up his appointment on contract with National airports Corporation. It is beyond dispute that the plaintiff was employed on contract with National Airports Corporation and not on permanent and pensionable conditions of service. So when he said in paragraph 3 of his letter "In retiring from ZIMCO I wish to request" " he did not intend to mean "Retiring" in its literal sense but in the sense of leaving the contract service which came to an end on 15th January, 1992 by effluxion of time.

The Plaintiff was not a retiring officer as stipulated by the ZIMCO conditions of Service herein before quoted. He was neither a continuing officer under clause 22.1 (i) nor an officer under clause, 22.2 under which an option can be exercised to officers outside the category of officers to holder vehicles.

I would, therefore, make the following findings:

Firstly, the plaintiff's letter dated 13th January, 1992 and the Defendant's letter of 20th January, 1992 did not constitute an "offer" and "Acceptance" respectively capable of an order for specific performance in that the offeree has failed to prove all the elements of a valid contract, including assent and consideration; secondly the Plaintiff did not fall under ZIMCO conditions of service Clause 22.1 to 22.2.

For reasons foregoing I would be slow to find for the Plaintiff. This claim must be dismissed with costs of and incidental to these proceedings to the Defendants to be taxed in event of disagreement.

Claim dismissed

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