

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HP/2123



BETWEEN:

EDIFY HAMUKALE

PLAINTIFF

AND

DANA HOLDING LIMITED
DANATRAC LIMITED

1ST DEFENDANT
2ND DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 5TH DAY OF
AUGUST 2016**

APPEARANCES

FOR THE PLAINTIFF : S. MULENGESHI AND G. CHILEKWA FROM A.B AND
DAVID
FOR THE 1ST & 2ND DEFENDANT : C. TRESFORD FROM H.H. NDHLOVU AND
COMPANY

J U D G M E N T

AUTHORITIES REFERRED TO:

1. JOSEPHINE MWAKA MWAMBAZI V FOOD RESERVE AGENCY,
APPEAL NO. 128 OF 2007
2. CHITTY ON CONTRACT VOL.1 GENERAL PRINCIPLES
3. SAM AMOS MUMBA V ZAMBIA FISHERIES (1980),REPRINT,ZR 170
4. BOC GASES PLC V PHESTO MUSONDA (2005) ZR 119
5. MERCANTILE BANK OF SYDNEY V THE TAYLOR (1893) AC 317

On 6th November, 2015, **Edify Hamukale**, the plaintiff herein, commenced this action by writ of summons against **Dana Holdings Limited and Danatrac Limited**, the 1st and 2nd defendant respectively. He alleged that he was employed by the 1st defendant under a written contract as a business manager for the 2nd defendant but that he was not paid gratuity in line with the oral negotiations they had prior to signing the contract.

The reliefs sought by the plaintiff were as follows:

- 1. Payment of the sum of K132,000.00 being the total amount of gratuity owed to him by the Defendant;***
- 2. Damages for breach of contract;***
- 3. Interest at the current bank lending rate on sums payable;***
- 4. Any other relief as the court may deem fit;***
- 5. Costs.***

The defence was filed on 23rd November, 2015 and both defendants stated that all payments due to the plaintiff were written in the contract to which the plaintiff agreed and signed. The defendants stated that the plaintiff was not entitled to any payment of gratuity and that no funds amounting to K132, 000 were reserved for that purpose.

The matter was heard on 16th March, 2016 and all the parties were before court. The plaintiff called one witness to support his claim while the defendants called two witnesses.

The plaintiff's testimony was that he was employed by the 1st defendant as a Business Manager for the 2nd defendant by a letter dated 24th August, 2013 as shown on page 1 of the defendant's bundle of documents. He stated that when he realised that there was no provision of gratuity in the contract of employment he was given, he brought it to the attention of Mr. David Nama, the proprietor of the defendant company and the Human Resource Director. The plaintiff testified that he was assured that the issue would be attended to. It was the plaintiff's testimony that he later realised that the 2nd defendant started setting aside some money towards the payment of his gratuity as per the leave schedules produced on pages 3 and 7 of the plaintiff's bundle of documents. He stated that when his contract was terminated, he reminded the 1st defendant to award him what was due as his gratuity. The 1st defendant's reply was that the witness was not entitled to gratuity.

In cross-examination, the witness was referred to his contract and agreed that there was no provision for gratuity. He stated that when the 1st defendant started allocating gratuity to him as was shown on the leave schedules, by implication they had acquiesced to his request for gratuity. When asked who the author of the said schedule was, the plaintiff's response was that it was obtained from

the 2nd defendant's accountant. The plaintiff also conceded that the stamp on the said documents was for his office but it was accessed by the accountant and therefore made the documents authentic. He agreed that at that time he wrote the letter reminding the 1st defendant on gratuity, he had already received the letter notifying him of non-renewal of his contract.

In re-examination, the plaintiff insisted that by allocating funds for his gratuity, the 1st defendant had responded to his query and that was the reason he did not continue raising the issue.

The defendants called two witnesses in aid of their defence hereinafter referred to as **DW1** and **DW2**.

DW1 was **Mutale Zombe**, the 1st defendant's Human Resource Manager who confirmed that the plaintiff was in the employ of the 2nd defendant as business manager on a two year written contract. He informed the Court that the plaintiff was given three months' notice of termination of contract before the expiration of his contract on 31st August, 2014. DW1 testified that the plaintiff was not paid gratuity because his contract of employment did not provide for it. He further testified that at no time did the plaintiff approach him over the payment of gratuity and that no assurances were ever made to that effect. DW1 stated that there was no money set aside by the defendants for the payment of the plaintiff's gratuity because it was not part of his entitlements.

In cross-examination, DW1 stated that he was not aware of any monthly allocation that was set aside for the payment of the plaintiff's gratuity. When referred to the leave schedule in the Plaintiff's bundle of documents, DW1 stated that though the document reflected the names of the employees of the 2nd defendant, he did not know the author of the document. He also testified that the stamp affixed on the leave schedules was from the plaintiff's office. He stated that he had access to the defendant's financial reports. When asked whether the plaintiff's name was reflected on the financial report in relation to the payment of gratuity, he answered in the negative. He also clarified that he was not part of the negotiating team for the plaintiff's contract. DW1 reiterated that there was no gratuity clause in the plaintiff's contract.

In re-examination, DW1 informed the Court that during negotiations for terms and conditions of a contract of employment a lot of issues would be discussed but only those terms reduced in writing would form part of the contract. He stated that the plaintiff confirmed the terms of his employment by signing the contract.

DW2 was **Stanley Mbewe**, the Group Finance Manager for the 1st defendant. He stated that he was the overseer of the accounting process for all subsidiary companies under the 1st defendant. He also confirmed that the plaintiff's contract of employment had no

gratuity clause. DW1 stated that the purported leave schedules in the plaintiff's bundle of documents were not generated from the 1st defendant's accounts department. DW2 testified that the stamp affixed on the said documents was not from the accounts department but belonged to the plaintiff when he occupied the office of manager. He stated that the plaintiff's contract was forwarded to the account's office to guide them on the entitlements available to the plaintiff.

In cross-examination the witness stated that the plaintiff was not entitled to gratuity as it was not included in his contract. He stated that he was not aware that the plaintiff's contract was to have an addendum for gratuity. DW2 informed the court that the payroll for the managers was managed at Head office under his office while the payroll for junior staff was separately generated at subsidiary company level. He stated that it was strange for the plaintiff to be included on the same payroll with the junior staff as shown in the plaintiff's bundle of documents.

At the close of the case only counsel for the plaintiff filed written submissions. I am indebted to counsel for his submissions. I shall not restate the same but will only refer to them as may be necessary.

From the evidence laid before this Court, it is common cause that the plaintiff was employed by the 2nd defendant on a two year fixed written contract with effect from 3rd September, 2012 to 31st August, 2014.

It is also common cause that the contract of employment executed between the plaintiff and the 2nd defendant did not provide for the payment of gratuity upon expiry of contract.

I am satisfied that the payroll for the managers, which included the plaintiff, from all the 1st defendant's subsidiary companies was generated from head office.

Having carefully considered the evidence on record and taking into account the submissions from counsel for the plaintiff, it is clear that the issue to be resolved herein is whether or not the plaintiff is entitled to the payment of gratuity.

It is a well settled principle of law that parties to any contractual relationship are free to negotiate such terms and conditions as they wish and having done so, these will bind them until there is a mutually agreed variation. It is the terms of that contractual relationship which ultimately guide Courts in an event of a dispute such as the one in casu. The case of **Josephine Mwaka Mwambazi v Food Reserve Agency**¹ is instructive on the law that parties are bound by the terms and conditions they set out for themselves. It

is also worth of note that the learned authors of **Chitty on Contract Vol.1 General Principles**² rightly observe on proof of terms at page 493 paragraph 772 that:

“Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect.”

Another general principle of law applicable to a case of this kind is that where the parties have embodied the terms of contract into a written document extrinsic evidence is not admissible to add to, vary, subtract or contradict the terms of the written document subject of course to certain exceptions (**see the case of Sam Amos Mumba v Zambia Fisheries³ and BOC Gases PLC v Phesto Musonda⁴**). In the case of **Mercantile Bank of Sydney v The Taylor at P321⁵** 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 6th 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 matter before me, it is the plaintiff's contention that he had engaged the 1st defendant on several occasions on the missing gratuity provision in the written contract and he was assured that the same would be rectified. To buttress his assertions, the plaintiff produced before Court leave schedules showing the monthly allocations set aside for his gratuity. The defendants denied having ever discussed or assured the plaintiff concerning the provision of gratuity. The defendants denied having generated the documents produced by the plaintiff. The defendant further asserted that the payroll for all senior management which included the plaintiff was printed from the Head office on a separate sheet and was never combined with that of junior staff as shown in the plaintiff's documents.

I have critically analysed the evidence relating to the leave schedules produced by the plaintiff and I am persuaded by the evidence of both DW1 and DW2 that the documents are not authentic. This is so because apart from the plaintiff merely stating that the said documents were authored by an accountant who was his subordinate, no further tangible evidence was adduced to substantiate their authenticity. On this basis I hold that the leave schedules produced in the plaintiffs bundles of documents cannot be relied on to form part of the executed contract in relation to the payment of gratuity.

Further I must mention here that if at all there were any verbal communication which had passed between the plaintiff and the proprietor of the defendant companies pertaining to the provision of gratuity, it is clear that the same were superseded by the signed contract of employment. It is my affirmation that the verbal discussion concerning the provision of gratuity cannot be legitimately referred to, either for the purpose of adding a term to their written contract, or altering its legal ordinary construction. I therefore reject the plaintiff's claim for gratuity as it is evident to me that the plaintiff freely signed the contract of employment whose clear and unequivocal terms did not contain any provision for the payment of gratuity.

Having established that the payment of gratuity was not part of the parties agreed terms, it follows that the plaintiff's claim for damages for breach of contract cannot be sustained. For the foregoing reasons the plaintiff's claims are accordingly dismissed with costs to the defendants.

Leave to appeal is granted

Dated the^{5TH}..... day ofAUGUST..... 2016

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HON. JUDGE M.CHANDA